QUICK REFERENCE CHART AND ANNOTATIONS FOR DETERMINING IMMIGRATION CONSEQUENCES OF SELECTED ARIZONA OFFENSES

Immigrant Legal Resource Center
Florence Immigrant and Refugee Rights Project
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Introduction

Note to Immigration Attorneys: Using the Chart. This chart was written for criminal defense counsel, not immigration counsel. It represents a fairly conservative view of the law, meant to guide criminal defense counsel away from potentially dangerous options and toward safer ones. Thus immigration counsel should not rely on the chart in deciding whether to pursue defense against removal. An offense may be listed as an aggravated felony or other adverse category here even if there are strong arguments to the contrary that might prevail in immigration proceedings. For a more detailed analysis of Ninth Circuit law, see cited sections of California Criminal Law and Immigration and other works in Note “Resources.” The Chart can provide guidance as to the risk of filing an affirmative application for a non-citizen with a criminal record. The Notes are concise and basic summaries of several key topics.

1. Using the Chart and Notes. The Chart analyzes adverse immigration consequences that flow from conviction of selected Arizona offenses, and suggests how to avoid the consequences. Endnote annotations discuss each offense in greater detail. The Chart appears organized numerically by code section.

Several short articles or “Notes” provide more explanation of selected topics. These include Notes that explain the Chart’s immigration categories, such as aggravated felonies and crimes involving moral turpitude, as well as those that discuss certain kinds of offenses, such as domestic violence or controlled substances.

2. Sending comments about the Chart. Contact us if you disagree with an analysis, see a relevant new case, want to suggest other offenses to be analyzed or to propose other alternate “safer” pleas, or want to say how the chart works for you or how it could be improved. Send email to AZchart@ilrc.org. This address will not answer legal questions. For consultations contact Kara Hartzler, Arizona Defending Immigrants Partnership, at the Florence Immigrant and Refugee Rights Project (khartzler@firrp.org) or see information about obtaining legal consults on cases “contract services” at www.ilrc.org.

3. Need for Individual Analysis. This Chart and Notes are a summary of a complex body of law, to be consulted on-line or printed out and carried to courtrooms and client meetings for quick reference. However, more thorough individual analysis of a defendant’s immigration situation is needed to give competent defense advice. For example, the defense goals for representing a permanent resident are different from those for an undocumented person, and analysis also changes depending upon past convictions and what type of immigration relief is potentially available. See Note “Establishing Defense Goals.” The Chart and Notes are best used in conjunction with resource works such as Brady, Defending Immigrants in the Ninth Circuit (citations to specific sections are included throughout these materials) or Tooby, Criminal Defense of Immigrants, and/or along with consultation with an immigration expert. See Note “Resources.”
Ideally each noncitizen defendant should complete a form such as the one found at Note “Immigrant Client Questionnaire,” which captures the information needed to make an immigration analysis and is a diagnostic aid. Some offices print these forms on colored paper, so that defenders can immediately identify the file as involving a noncitizen client and have the client data needed to begin the immigration analysis.

4. Disclaimer, Additional Resources. While federal courts have specifically affirmed the immigration consequences listed for some of these offenses, in other cases the chart represents only the authors’ opinion as to how courts are likely to rule. In addition there is the constant threat that Congress will amend the immigration laws and apply the change retroactively to past convictions. Defenders and noncitizen defendants need to be aware that the immigration consequences of crimes is a complex, unpredictable and constantly changing area of law where there are few guarantees. Defender offices should check accuracy of pleas and obtain up-to-date information. See books, websites, and services discussed in Note “Resources.” But using this guide and other works cited in the “Resources” Note will help defenders to give noncitizen defendants a greater chance to preserve or obtain lawful status in the United States – for many defendants, a goal as or more important than avoiding criminal penalties.

Acknowledgements

The Chart began with the impressive efforts of Ryan Moore, now with the Federal Defender’s Office of Arizona, when he was a law student at the University of Arizona. Since that time Katherine Brady and Angie Junck of the Immigrant Legal Resource Center (San Francisco); Holly Cooper of the Florence Immigrant and Refugee Rights Project (Florence), now teaching at the University of California Davis School of Law (Davis, CA); and Beth Houck of Maricopa County Office of the Public Defender (Phoenix) have been the primary authors. In 2008, Kara Hartzler of the newly-created Arizona Defending Immigrants Partnership revised and expanded the Chart. The ILRC is grateful to our colleagues in the national Defending Immigrants Partnership and to the Gideon Project of the Open Society Institute for funding the national project.

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<table>
<thead>
<tr>
<th><strong>Aggravated Felony</strong></th>
<th><strong>Aggravated Felony</strong>, defined at 8 U.S.C. § 1101(a)(43)(A)-(U). The aggravated felony definition includes twenty-one provisions that describe hundreds of offenses, which need not be aggravated or felonious. Aggravated felons under immigration law are ineligible to apply for most forms of discretionary relief from deportation including asylum, voluntary departure, and cancellation of removal. Conviction of an aggravated felony triggers mandatory detention without bond pending deportation. A conviction for illegal reentry after deportation or removal, in violation of 8 U.S.C. § 1326, will carry a significantly higher federal prison term if the defendant was previously convicted of an aggravated felony. See 8 U.S.C. § 1326(b)(2). See Note: Aggravated Felony</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CMT</strong></td>
<td><strong>Crime Involving Moral Turpitude (CMT)</strong>. A crime involves moral turpitude if it involves fraud, or it comes within a vague definition of involving evil intent or deviating from accepted rules of contemporary morality. Here, moral turpitude is defined according to federal immigration case law, and not, e.g., state cases on witness credibility or disbarment. For CMT determinations, see comments on individual offenses in this chart. A noncitizen is deportable who (a) is convicted of two CMT’s, which are not part of a “single scheme of criminal misconduct,” at any time after being admitted to the U.S. or (b) is convicted of one CMT, committed within five years of admission to the U.S., that carries a potential sentence of at least one year. 8 USC § 1227(a)(2)(A)(ii) and (i). A noncitizen is inadmissible if convicted of one CMT, unless he or she qualifies for the petty theft or youthful offender exception. To qualify for the petty theft exception, the person must have committed only one CMT, which has a potential sentence of not more than a year, and a sentence of not more than six months must have been imposed. To qualify for the youthful offender exception, the person must have committed only one CMT. 8 USC § 1182(a)(2)(A)(ii)(II) and (I). See Note: CMT.</td>
</tr>
<tr>
<td><strong>DRUG</strong></td>
<td><strong>Controlled Substance offenses</strong>. A noncitizen is deportable and inadmissible if convicted of an offense “relating to a controlled substance (as defined in section 802 of Title 21).” There is an exception to the deportation ground, and a waiver of inadmissibility, for conviction of a single offense of possession or being under the influence of marijuana or hashish. To be deportable, the person must have been convicted after admission to the United States. 8 USC § 1227(a)(2)(B)(i) (deportability), 8 USC § 1182(a)(2)(A)(i)(II), (h) (inadmissibility, waiver). In many cases, the record of conviction must identify the specific controlled substance involved in order for the crime to have immigration consequences. See Note: Controlled Substances and comments on individual offenses in this chart.</td>
</tr>
<tr>
<td><strong>DV CHILDREN</strong></td>
<td><strong>Crimes of Domestic Violence, Stalking, Violation of Protection Order, Crime of Child Abuse, Neglect or Abandonment</strong>. A noncitizen convicted of one of these offenses, or who is the subject of a court order finding certain types of violations of a domestic violence protective order, is deportable under 8 USC § 1227(a)(2)(E). A crime of domestic violence is defined as a “crime of violence” against a current or former spouse, cohabitant, person sharing a common child, or any other a person who is protected from the defendant’s acts under the domestic or family violence law.. See Note: Domestic Violence and individual offenses in this chart.</td>
</tr>
<tr>
<td><strong>FIREARMS</strong></td>
<td><strong>Firearms offenses</strong>, A noncitizen is deportable under 8 U.S.C. § 1227(a)(2)(C) who at any time after admission is convicted “under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device ....”. See Note: Firearms.</td>
</tr>
<tr>
<td><strong>DIVISIBLE STATUTES, RECORD OF CONVICTION</strong></td>
<td>One of the most important defense strategies comes from understanding and controlling the official “record of conviction” that will be considered by immigration authorities. A statute is “divisible” if it criminalizes offenses that do and do not bring immigration consequences. For example, ARS § 13-3102 is divisible for purposes of the firearms deportation ground because it prohibits offenses relating to firearms as well as those relating to non-firearms weapons, such as knives. As discussed in annotations to this chart, many statutes are divisible in this way. A reviewing court or immigration judge can examine only a strictly limited set of documents, often referred to as the “record of conviction” or “judicially noticeable documents,” to determine whether the offense of conviction causes immigration consequences. These documents include the charging document, but only where there is proof that the defendant pled to the count as charged; a written plea agreement; transcript of a plea colloquy; judgment; and any explicit factual finding by the trial judge to which the defendant assented. Thus, in the above example, if these documents did not conclusively establish that the weapon was a firearm, the noncitizen will not be deportable under the firearm ground. Presentence and police reports are not part of the reviewable record of conviction, except in some cases where counsel stipulated that they provide a factual basis for the offense. For this reason, counsel must be very careful in providing a factual basis. See Note: Divisible Statutes and Record of Conviction.</td>
</tr>
<tr>
<td>OFFENSE</td>
<td>AGG. FELONY</td>
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<tr>
<td>1. § 1001 Attempt</td>
<td>Yes if underlying crime is AF</td>
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<tr>
<td>2. § 1002 Solicitation</td>
<td>No if drug offense; probably not for any AF (this rule may only apply in 9th Cir).</td>
</tr>
<tr>
<td>3. § 1003 Conspiracy</td>
<td>Yes if underlying crime is AF</td>
</tr>
<tr>
<td>4. §1004 Facilitation</td>
<td>Assume yes conservatively if underlying crime is AF, but imm attys have an argument</td>
</tr>
<tr>
<td>5. § 1102 Negligent homicide</td>
<td>Not AF under current law because not crime of violence</td>
</tr>
<tr>
<td>6. § 1103 Manslaughter</td>
<td>Divisible. A1, A4, and arguably A5 are not</td>
</tr>
<tr>
<td>7. § 1104 Murder 2nd Degree</td>
<td>Yes, although A3 leaves imm atty an argument</td>
</tr>
<tr>
<td>8. § 1005 Murder 1st Degree</td>
<td>Yes</td>
</tr>
<tr>
<td>9. § 1201 Endangerment</td>
<td>No.</td>
</tr>
<tr>
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<td>AGG. FELONY</td>
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</tr>
<tr>
<td>10. § 1202 Threatening /Intimidating</td>
<td>Maybe if 1-yr sentence; no if property damage not caused by force; except not categorically for A2</td>
</tr>
<tr>
<td>11. § 1203 (A)(1) Simple Assault</td>
<td>Only if a sentence of a year (see 13-1204). Plus under current law, recklessly causing injury is not a COV.</td>
</tr>
<tr>
<td>1203(A)(2)</td>
<td>Probably if 1-yr sentence is imposed.</td>
</tr>
<tr>
<td>1203(A)(3)</td>
<td>An insulting touching only an AF as COV if offense is a felony, a 1-yr sentence imposed, and situation likely to result in use of force. See 13-1204.</td>
</tr>
<tr>
<td>12. § 1204 Aggravated Assault</td>
<td>Divisible: if 1-yr or more imposed, and if record shows substantial risk force may be used, may be AF as COV.</td>
</tr>
<tr>
<td>13. § 1205 Unlawful administer drug/ alcohol</td>
<td>Not as drug. Because possibly DHS would charge as a COV, obtain 364 or less.</td>
</tr>
<tr>
<td>OFFENSE</td>
<td>AGG. FELONY</td>
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<tr>
<td>14. § 1206 Assault by prisoner/juvenile</td>
<td>Yes, if sentence of 365 and record shows intent</td>
</tr>
<tr>
<td>15. § 1209 Drive-by shooting</td>
<td>Yes as COV if 1-yr or more sentence imposed.</td>
</tr>
<tr>
<td>16. § 1211 Discharging firearm at a structure</td>
<td>Yes as COV if 1-yr or more sentence imposed. May not be COV if record leaves open possibility that structure is owned by defendant and is unoccupied.</td>
</tr>
<tr>
<td>17. § 1302 Custodial Interference</td>
<td>Maybe as obstruction of justice if violation of court order and sentence of 365</td>
</tr>
<tr>
<td>18. § 1303 Unlawful Imprisonment</td>
<td>Maybe COV if felony and 1-yr or more sentence. <strong>May not be COV if restraint by deception or intimidation.</strong> But leave record clear of details. E.g., storeowner or officer making an improper detention might use legal “intimidation” but not force.</td>
</tr>
<tr>
<td>19. § 1304 Kidnapping</td>
<td>Yes as COV if 1-yr or more sentence imposed; or if ransom involved, regardless of sentence.</td>
</tr>
<tr>
<td>20. § 1305 Access Interference</td>
<td>Yes with 365 as obstruction of justice</td>
</tr>
<tr>
<td>21. § 1402 Indecent Exposure</td>
<td>No</td>
</tr>
<tr>
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<td>AGG. FELONY</td>
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<tr>
<td>22. § 1403 Public Sexual Indecency</td>
<td>Probably not (lewd intent toward minor victim not required)</td>
</tr>
<tr>
<td>23. § 1404 Sexual Abuse</td>
<td>Yes, if 1-yr or more imposed; Yes regardless of sentence if record shows V was under 18 or that intercourse occurred</td>
</tr>
<tr>
<td>24. § 1405 Sexual Conduct with a Minor</td>
<td>Yes, as AF sex abuse of minor including if V is over 15. Do not plead.</td>
</tr>
<tr>
<td>25. § 1406 Sexual Assault</td>
<td>Yes, in almost all circumstances.</td>
</tr>
<tr>
<td>26. §1406.01 Sexual Assault Spouse (Repealed)</td>
<td>Yes, unless counsel obtains 364 days or less and record does not foreclose possibility that offense was oral sex rather than intercourse</td>
</tr>
<tr>
<td>27. § 1410, 1417 Child Molestation, Continuous abuse</td>
<td>Yes as SAM regardless of sentence imposed</td>
</tr>
<tr>
<td>28. § 1424 Voyeurism</td>
<td>Possibly if victim was a minor.</td>
</tr>
<tr>
<td>29. § 1502, 1503 Criminal Trespass 2nd and 3rd degree</td>
<td>No, punishable as a misdo</td>
</tr>
<tr>
<td>28A. § 1504 Criminal Trespass 1st degree</td>
<td>Possibly, obtain 364 or less on felony convictions.</td>
</tr>
<tr>
<td>OFFENSE</td>
<td>AGG. FELONY</td>
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<tr>
<td>30. § 1505 Possession of Burglary Tools</td>
<td>No</td>
</tr>
<tr>
<td>31. § 1506 Burglary 3rd degree</td>
<td>Only if 365 days. If 365 unavoidable, see Advice.</td>
</tr>
<tr>
<td>30A. §1507 Burglary 2nd (click on 3rd degree)</td>
<td>Yes if 365.</td>
</tr>
<tr>
<td>30B. § 1508 Burglary 1st (click on 3rd degree)</td>
<td>Yes if 365 days and linked to 13-1507. If 365 days and possibly linked to 13-1506 (see Advice), it might be that the mere presence of weapon does not make it COV.</td>
</tr>
<tr>
<td>32. § 1602 Criminal Damage</td>
<td>No.</td>
</tr>
<tr>
<td>33. § 1603 Criminal Littering or Polluting</td>
<td>No.</td>
</tr>
<tr>
<td>34. § 1604 Agg. Criminal Damage</td>
<td>Possibly, with 365 days.</td>
</tr>
<tr>
<td>35. § 1702 Reckless burning</td>
<td>No because 365 not possible</td>
</tr>
<tr>
<td>36. § 1703 Arson of Structure or Property</td>
<td>Yes with 365 days and property is that of another.</td>
</tr>
<tr>
<td>OFFENSE</td>
<td>AGG. FELONY</td>
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<tr>
<td>37. § 1704 Arson of Occupied Structure</td>
<td>Yes with 365 days.</td>
</tr>
<tr>
<td>38. § 1705 Arson of jail or prison</td>
<td>Yes, if 365 days.</td>
</tr>
<tr>
<td>39. § 1706 Burning of wildlands</td>
<td>Yes, if 365 days and pleads to “intentionally”</td>
</tr>
<tr>
<td>40. § 1802 Theft</td>
<td>Try to avoid 365 days, but If that is not possible, see Advice. Avoid conviction of A3 if $10k loss to victim.</td>
</tr>
<tr>
<td>41. § 1803 Joyriding</td>
<td>Avoid 365 days where possible, but not AF “theft” as long as record does not show intent to deprive temporarily or permanently.</td>
</tr>
<tr>
<td>42. § 1804 Theft by Extortion</td>
<td>Probably if sentence of 365 days but imm. counsel have arguments to contrary.</td>
</tr>
<tr>
<td>43. § 1805 Shoplifting</td>
<td>Yes if 365 days.</td>
</tr>
<tr>
<td>44. § 1807 Issuing Bad Checks</td>
<td>Possibly if more than $10,000 loss to victim</td>
</tr>
<tr>
<td>OFFENSE</td>
<td>AGG. FELONY</td>
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<tr>
<td>45. § 1814 Theft of Transport</td>
<td>Try to avoid 365 days, but if that is not possible, see Advice.</td>
</tr>
<tr>
<td>46. §§ 1902 - 1904 Robbery; Agg and Armed Robbery</td>
<td>Yes if 365 days or more imposed.</td>
</tr>
<tr>
<td>47. § 2002 Forgery</td>
<td>Probably, if 365 days or record shows $10k or more loss to victim/s.</td>
</tr>
<tr>
<td>48. § 2003 Possession of Forgery Device</td>
<td>See forgery</td>
</tr>
<tr>
<td>49. § 2004 Criminal simulation</td>
<td>Yes if record shows loss of $10k or more to victim/s.</td>
</tr>
<tr>
<td>50. § 2006 Criminal Impersonation</td>
<td>Yes if record shows loss of $10k or more to victim/s.</td>
</tr>
<tr>
<td>51. § 2008 Taking identity of another person</td>
<td>365 days may be OK with vague record. Danger that $10k loss to victim is AF deceit</td>
</tr>
<tr>
<td>52. § 2319 Smuggling</td>
<td>Yes, unless person smuggled is spouse, child, or parent</td>
</tr>
<tr>
<td>53. § 2405 Compounding</td>
<td>Possibly, with sentence of 365 days</td>
</tr>
<tr>
<td>54. § 2407 Tampering w/ a Public Record</td>
<td>Yes, if loss of $10k or 365 days</td>
</tr>
<tr>
<td>55. § 2408 Securing Proceeds</td>
<td>No.</td>
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<tr>
<td>OFFENSE</td>
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<tr>
<td>56. §2502-3    Escape in 2nd and 3rd</td>
<td>Maybe w/ 365, but imm counsel have strong arguments</td>
</tr>
<tr>
<td>55A. §2504    Escape in 1st</td>
<td>Yes w/ 365 days.</td>
</tr>
<tr>
<td>57. 2506-7 FTA, 1st and 2nd degree</td>
<td>§2506 no. Avoid §2507; see Advice re character of underlying offense. Sentence given for FTA itself is irrelevant.</td>
</tr>
<tr>
<td>58. §2508    Resisting Arrest</td>
<td>Yes if 365</td>
</tr>
<tr>
<td>59. §2510-12 Hindering</td>
<td>Yes if 365 days as obstruction of justice, but not a drug or sexual abuse of a minor AF</td>
</tr>
<tr>
<td>60. §2602    Bribery of official</td>
<td>No</td>
</tr>
<tr>
<td>61. §2605    Commercial Bribery</td>
<td>Yes if 365 days or more</td>
</tr>
<tr>
<td>62. §2702    Perjury</td>
<td>Yes if 365 days or more</td>
</tr>
<tr>
<td>63. §2703    False Swearing</td>
<td>Try to avoid 365, but shd not be AF as perjury absent showing of materiality</td>
</tr>
<tr>
<td>64. §2809    Tampering</td>
<td>See hindering, ARS 13-2510</td>
</tr>
<tr>
<td>65. §2904    Disorderly Conduct</td>
<td>No.</td>
</tr>
<tr>
<td>66. §2907.01 False Statement to a Police Officer</td>
<td>Not an agg felony</td>
</tr>
<tr>
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<tr>
<td>67. § 2908 Criminal Nuisance</td>
<td>No.</td>
</tr>
<tr>
<td>68. § 2916 Use of Telephone to Annoy</td>
<td>No.</td>
</tr>
<tr>
<td>69. § 2921A Harassment</td>
<td>No.</td>
</tr>
<tr>
<td>70. §2921.01 Agg. Harrass</td>
<td>Maybe, avoid 365 or more. If not possible, leave open possibility plead to A2.</td>
</tr>
<tr>
<td>71. § 2923 Stalking</td>
<td>Yes with 365 days or more</td>
</tr>
<tr>
<td>72. § 3102 Weapons Misconduct</td>
<td>Divisible. Crimes of Violence with a 1-year sentence; felon in poss firearm; undocumented immigrant in poss firearm are agg felonies.</td>
</tr>
<tr>
<td>73. § 3107 Unlawful Discharge of a Firearm</td>
<td>No</td>
</tr>
<tr>
<td>74. § 3405 Marijuana Offenses</td>
<td>Divisible.</td>
</tr>
<tr>
<td>75. §§ 3407, 3408 Dangerous &amp; Narcotic Drug Offenses</td>
<td>Divisible</td>
</tr>
<tr>
<td>76. Drug Paraphernalia</td>
<td>No</td>
</tr>
</tbody>
</table>
1. **Attempt, A.R.S. §13-1001.**

**Summary:** Generally defense counsel should assume that a conviction for attempt carries the same immigration consequences as the principal offense. There are two instances where conviction of attempt potentially brings an immigration advantage, however. See discussion of the effect of its lesser potential sentence (at CMT) and the domestic violence ground of deportability (at Otherwise Removable). Note that a plea to attempt will undermine the immigration benefit of a plea to assault by recklessness under §§ 13-1203 or 13-1204. While reckless assault has been held not to be a crime of violence, immigration courts will not recognize “attempted reckless” assault.

A plea to A.R.S § 13-1001 at least permits immigration counsel to argue that the conviction does not trigger removability as an aggravated felony or controlled substance offense. In Rebilas v. Keisler, 506 F.3d 1161 (9th Cir. 2007), the Ninth Circuit noted that the federal definition of “attempt”, which requires a “substantial step” towards commission of a crime, is narrower than the Arizona definition, which is satisfied by “any step” towards the commission of an offense. *Rebilas* at 1164 (emphasis in original). However, the court subsequently depublished that part of the opinion, which was not necessary to the result. *Rebilas v. Mukasey*, 2008 U.S. App. LEXIS 10534 (9th Cir. May 16, 2008). While a plea to § 13-1001 is by no means a safe plea or guaranteed means of avoiding an aggravated felony or other deportation ground, in the absence of better options, defense counsel may want to consider seeking a conviction for Attempt as a means to provide immigration counsel with an argument that the offense is not removable. To maximize the argument, defense counsel should plead only to “attempt” plus the generic language of the statute. If possible, defense counsel should also avoid adopting any other documents, such as a police report or presentence report, into the factual basis.

**Crime Involving Moral Turpitude (CMT):** Attempt to commit a CMT will be held to be a CMT. The above-described argument based on *Rebilas* will not necessarily be helpful here. However, the fact that an attempt conviction carries a smaller maximum sentence than the principal offense may avoid immigration consequences based on a single CMT. The same is true for conviction of solicitation...
and facilitation. A single CMT conviction may not have immigration consequences if the potential sentence is sufficiently low and the person has no prior CMT’s.

- A single CMT conviction causes deportability under the CMT ground only if the offense was committed within five years after admission and carries a potential sentence of a year or more. 8 USC 1227(a)(2)(A)(i). Thus a potential sentence of under a year prevents deportability for a single CMT.

- A single CMT conviction will not cause inadmissibility if it carries a potential sentence of a year or less, with an actual sentence imposed of six months or less. 8 USC 1182(a)(2)(A)(ii). Thus a potential sentence of a year or less can prevent inadmissibility for a single CMT.

See further discussion at “Note: Crimes Involving Moral Turpitude.” The authors conservatively assume that immigration authorities will hold a class 6 felony to have a potential sentence of more than a year due to Guidelines, so the goal is to get to a misdemeanor. A conviction for attempt will cause a class 6 felony to become a class 1 misdemeanor. A conviction for solicitation will cause a class 5 or 6 felony to become a class 1 or 2 misdemeanor. A conviction for facilitation will cause a class 4 or 5 felony to become a class 1 misdemeanor, and a class 6 felony to become a class 3 misdemeanor. (However, post-Blakely immigration counsel can argue that where no aggravating factors are present, a class 6 felony carries a top of one year, low enough to qualify for the petty offense exception – so that is worth obtaining if it is the best available.)

**Aggravated Felony:** An attempt to commit an aggravated felony is an aggravated felony, under 8 USC § 1101(a)(43)(U). Defense counsel should conservatively assume that a conviction under § 13-1001, where the offense attempted is an aggravated felony, will be held an aggravated felony. However, this plea does permit immigration counsel at least to argue that the Arizona definition of attempt is sufficiently broader than the federal such that the conviction is not an aggravated felony. See discussion of Rebilas v. Keisler in the Summary, supra. Thus, while it is by no means a safe plea and should not be relied on, it may provide an additional argument for immigration counsel.

**Otherwise Removable:** As discussed in the Summary above, while a conviction for §13-1001 is not a safe plea, immigration counsel can argue that a conviction will not come within a deportability ground that includes “attempt,” because the state definition of attempt is broader than the applicable federal one.

Beyond that, some deportation grounds do not include attempt to commit the offense at all; there, a plea to attempt provides immigration counsel with a relatively strong argument. Because part of the domestic violence deportation ground does not specifically include attempt or conspiracy, a plea to attempt might prevent deportability under the ground relating to a conviction for stalking, or a crime of child abuse, neglect or abandonment. See 8 USC §1227(a)(2)(E) and Note: Domestic Violence.

Attempt is included in the definition of a conviction of a crime of domestic violence, another basis for deportation under this section, because attempt is included in the definition of “crime of violence” at 18 USC § 16. However, a plea to attempt (or conspiracy or facilitation) still may help prevent the offense from becoming a crime of violence if the plea makes the offense a misdemeanor. Under 18 USC § 16(a), a misdemeanor is a crime of violence only if the offense has as an element the intent to threaten or commit to use violent force, while a felony that carries an inherent risk that force will be used is a crime of violence. By reducing an offense to a misdemeanor, attempt thus can disqualify some offenses from being crimes of violence, and therefore crimes of domestic violence.
2. **Solicitation, A.R.S. §13-1002**

A person “commands, encourages, requests or solicits” another to commit criminal behavior.

**Summary:** This offense is a valuable alternate plea to avoid conviction of an aggravated felony or under the substance abuse, firearms or domestic violence grounds. Solicitation to commit a drug sale is not a drug trafficking aggravated felony or a deportable controlled substance conviction. See also the comment at the end of this section regarding when solicitation appears in a substantive statute, such as “offering to sell marijuana.” While solicitation of a drug sale is a CMT (see below), there usually are more immigration remedies for conviction of a CMT than for a drug offense. See discussion below and Note: Safer Pleas (A), (B).

The downside of solicitation is that there are moves to legislatively eliminate the defense by adding “solicitation” to, e.g., the definition of aggravated felony. For that reason, while solicitation is useful, other strategies may be more secure.

**Crime Involving Moral Turpitude (CMT):** Criminal defense counsel should assume that solicitation to commit a CMT will itself be held a CMT. Immigration counsel at least can argue that this is not so, because under Arizona law solicitation is a preparatory offense and thus a separate and distinct offense from the underlying crime because it requires a different mental state and different acts. *Coronado-Durazo v. INS*, 123 F.3d 1322, 1326 (9th Cir. 1997). Unlike attempt, solicitation does not require acting with the same “kind of culpability.”) However, this is a difficult argument and criminal defenders should not rely on it.

In *Barragan-Lopez v. Mukasey*, 508 F.3d 899 (9th Cir. 2007), the Ninth Circuit held that Solicitation to Possess for Sale at least four pounds of marijuana under A.R.S. § 13-1002 and § 13-3405(A)(2) and (B)(6) is a crime involving moral turpitude. The court declined to address the issue of whether solicitation to possess a small amount of marijuana for sale would constitute a CMT. Although solicitation to possess for sale is still not removable as a controlled substance offense by *Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999), discussed below, defense counsel should assume that Solicitation to Possess for Sale will be found to be a CMT.

Because the potential sentence is less for solicitation than for the principle offense, a conviction may prevent the person from becoming deportable or inadmissible for a single CMT. Solicitation to commit a class 5 or 6 felony is a misdemeanor. See CMT discussion at 1. **Attempt, supra** and Note: CMT.

**Aggravated Felony:** The Ninth Circuit held that solicitation under A.R.S. §13-1002 is not a drug trafficking aggravated felony, even if the principle offense is a drug trafficking offense. *Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999) (Arizona conviction for solicitation to possess marijuana for sale is not an aggravated felony because the Controlled Substances Act does not specifically criminalize solicitation or contain any broad catch-all provision).

Solicitation under A.R.S. §13-1002 should not be held to be an aggravated felony in non-drug cases as well, based on the fact that conspiracy and attempt are specifically included in the aggravated felony definition (see 8 USC 1101(a)(43)(U)) while solicitation is not. For example, solicitation to commit a theft should be held not to constitute the aggravated felony “theft.”

**Other grounds: Deportable and Inadmissible Drug Conviction.** Regarding controlled substance convictions, the Ninth Circuit has held that solicitation under A.R.S. 13-1002 does not cause deportability under the controlled substance ground because (a) it is a generic offense unrelated to
controlled substances and (b) attempt and conspiracy, but not solicitation, are included in the controlled substance grounds. *Coronado-Durazo v. INS*, 123 F.3d 1322, 1326 (9th Cir. 1997) (A.R.S. §13-1002 is not a deportable controlled substance offense even where the offense solicited related to controlled substances, disapproving *Matter of Beltran*, 20 I. & N. Dec. 521, 528 (BIA 1992)). Thus a plea to solicitation to possess a controlled substance avoids deportability altogether in a drug case. It also should not cause inadmissibility as a drug conviction. However, solicitation to possess a controlled substance for sale is a CMT, and therefore might cause the person to become inadmissible or deportable under the CMT grounds. *Barragan-Lopez v. Mukasey*, 508 F.3d 899 (9th Cir. 2007). Even more damaging, if evidence shows that the solicitation related to trafficking in drugs, the conviction will cause the person to become inadmissible by giving the government “reason to believe” the person has engaged in drug trafficking. This penalty does not require a drug conviction. See 8 USC § 1182(a)(2)(C).

**Other Grounds: In General.** A person is deportable under the firearms ground for “offering to sell” a firearm, but not for other solicitation offenses. Solicitation ought to prevent deportability under the domestic violence ground.

**Note:** solicitation incorporated into substantive offenses, such as offering to commit a drug offense. The Ninth Circuit held that offering to commit a drug trafficking offense is not an aggravated felony, including when the offense is included in a drug statute instead of under a separate “generic” statute such as A.R.S. §13-1002. This means that a plea to, e.g., offering to sell or offering to transport for sale under A.R.S. §13-3405(A)(4) should avoid conviction of an aggravated felony. See *U.S. v Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (en banc) (California statute prohibiting offering to sell a drug is not an aggravated felony). In practice, however, immigration judges are not consistently applying this precedent to Arizona law and will usually find the offense to be categorically an aggravated felony. For this reason, Solicitation under § 13-1002 is a much better plea. If Solicitation is not available, the plea either should be explicitly to offering to commit the offense, or it should leave the “record of conviction” vague enough so that offering to sell or transport is an option. See “Note: Safer Pleas.”

Immigration attorneys have a good argument that “offering to” commit a drug trafficking offense under statutes such as A.R.S. §§ 13-3405(A)(4), 3407(A)(7), or 3408(A)(7) also should not be a deportable offense as a conviction relating to a controlled substance. See discussion in *Defending Immigrants in the Ninth Circuit*, § 3.4(G). However, to date, Arizona immigration judges have not accepted this argument, and such cases will have to be taken to the Ninth Circuit, during which time the noncitizen will likely remain detained.

3. **Conspiracy, A.R.S. §13-1003.**

**Summary:** Conspiracy will incur the same immigration consequences as the underlying crime, with the possible exception of domestic violence; see “other grounds.”

**Crime Involving Moral Turpitude (CMT):** Conspiracy to commit a CMT is a CMT. See, e.g., *McNaughton v INS*, 612 F.2d 457 (9th Cir. 1980).

**Aggravated Felony:** Conspiracy to commit an aggravated felony is an aggravated felony. 8 USC § 1101(a)(43)(U).

**Other Grounds: Domestic Violence:** Most grounds of inadmissibility and deportability specifically list conspiracy to commit the offense. The domestic violence deportation ground does not, however. See 8 USC §1227(a)(2)(E). Therefore a plea to conspiracy to commit a “crime of domestic
violence,” stalking, or a crime of child abuse, neglect or abandonment arguably prevents deportability under that particular ground. The conviction still will be a crime involving moral turpitude or an aggravated felony, if the principle offense is. See “Note: Domestic Violence.”

A person commits facilitation if, acting with knowledge that another person is committing or intends to commit an offense, the person knowingly provides the other person with means or opportunity for the commission of the offense.

Summary: A conviction for “facilitation” will likely subject the defendant to removability for a “theft offense,” as well as other grounds of removability. See discussion of Duenas-Alvarez, below. However, because it reduces the potential sentence, facilitation can help prevent a person from becoming removable for CMT.

Crime Involving Moral Turpitude (CMT): Criminal defense counsel should assume that facilitation will be a CMT if the principal offense is. However, facilitation carries a lower potential sentence. Therefore a person with a single CMT conviction may be able to avoid deportability or inadmissibility. See CMT discussion at 1. Attempt, supra.

Aggravated Felony: Counsel should assume that conviction of facilitating an offense that is an aggravated felony will be held an aggravated felony, because aiding and abetting is. Facilitation should only be considered if solicitation and attempt are not available and the only other alternative would be to plead to a straight aggravated felony.

Facilitation is likely to be held to be have the same adverse immigration effect as does aiding and abetting. In Gonzales v. Duenas-Alvarez, 127 S. Ct. 815; 166 L. Ed. 2d 683 (2007), the Supreme Court overturned previous Ninth Circuit precedent and held that the generic definition of theft includes the offense of aiding and abetting. This holding will be applied to aggravated felonies other than theft as well. Under Arizona law, “facilitation” is commonly used by prosecutors to charge a person as an aider and abettor rather than as a principal. See Arizona v. Harris, 134 Ariz. 287, 288, 655 P.2d 1339, 1340 (App. 1982); Arizona v. Gooch, 139 Ariz. 365, 367, 678 P.2d 946, 948 (Ariz. 1984). Immigration attorneys can argue, however, that facilitation should be treated as a separate offense, like solicitation.

Other Grounds: Drugs. Regarding controlled substances, in Matter of Del Risco, 20 I. & N. Dec. 109, 110 (BIA 1989), the BIA held that facilitation of sale of cocaine under ARS § 13-1004 is a crime that “relates to” a controlled substance and therefore is a basis for deportation. However, Del Risco may have been overruled in the Ninth Circuit by Coronado-Durazo v. INS, 123 F.3d 1322, 1326 (9th Cir. 1997), discussed above, if the principles applied to solicitation in that case would require the same result for facilitation. In Del Risco the Board reasoned that although facilitation is a distinct offense from the underlying offense of sale, the nature of the offense still related to controlled substances. But in Coronado-Durazo the Ninth Circuit adhered to a “plain language” analysis, pointing out that solicitation (which also could be said to “relate” to controlled substances) was not listed in the drug grounds and was a generic offense, distinct from controlled substance offenses. While solicitation is by far the safer plea, defense counsel facing a drug charge also could consider facilitation as better than a plea to a straight drug offense. See Note: Drugs.

Other grounds: In general. Counsel should assume that a conviction for facilitation does not avoid deportation grounds relating to domestic violence/stalking/child abuse, firearms, or managing a prostitution business; and inadmissibility for two or more convictions with an aggregate sentence of five
or more years. As in the aggravated felony category, facilitation should be used only when there is no other alternative. However, if a plea to facilitation makes the offense a misdemeanor, it might prevent the offense from being a crime of violence (because there is a broader test for when a felony constitutes a crime of violence than when a misdemeanor does) and thereby prevent it from being a crime of domestic violence. See discuss in 1. attempt, supra and Note: Domestic Violence.

5. Negligent Homicide, A.R.S. § 13-1102
“A person commits negligent homicide if with criminal negligence such person causes the death of another person.” ARS § 13-105(d) states that "Criminal negligence" means, with respect to a result or to a circumstance described by a statute defining an offense, that a person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.”

Summary: Under current law this is a good plea, because negligence is not a crime of violence or moral turpitude offense. As always, however, counsel should make every attempt to obtain a sentence imposed of less than a year to make sure the offense is not an aggravated felony.

Crime Involving Moral Turpitude (CMT): Negligent homicide should not be held a CMT. See Matter of Perez-Contreras, 20 I&N Dec. 615 (BIA 1992) (third degree assault with criminal negligence, in which offender failed to be aware of a substantial risk of injury flowing from his conduct, was not a CMT). Where there is “no intent required for conviction, nor any conscious disregard of a substantial and unjustifiable risk, we find no moral turpitude inherent in the statute.” Id. at 619.

Aggravated Felony: This is not an aggravated felony as a crime of violence even with a sentence imposed of a year or more. But as always, where possible counsel should obtain a sentence of less than 365 days, in case there are future legislative changes. One recent proposal in Congress was for manslaughter to be legislatively classed as a crime of violence, and thus an aggravated felony, if a year’s sentence was imposed.

An offense that involves only negligence or even negligence amounting to reckless causation of injury will not be held a crime of violence within 18 USC §16, and thus will not be an aggravated felony under 8 USC §1101(a)(43)(F) even if a sentence of a year or more is imposed. Leocal v. Ashcroft, 125 S.Ct. 377 (2004) (negligent DUI is not a crime of violence because does not create risk that force will be used, just that injury will occur); Lara-Cazares v. Gonzalez, 408 F.3d 1217 (9th Cir. 2004) (killing a person by DUI with gross negligence, amounting to recklessness, is not a DUI because it does not create a risk that force will be used, under Leocal); Fernandez-Ruiz v. Gonzalez, 466 F.3d 1121 (9th Cir. 2006) (en banc) (recklessly causing physical injury to another does not meet the federal definition of a “crime of violence” under 18 U.S.C. § 16). See further discussion at ARS § 13-1203, assault.

Other Grounds: As long as this is not a crime of violence, even if the record establishes that the defendant and victim had a domestic relationship this should not be a “crime of domestic violence” and should not cause deportability under the domestic violence ground. See Note: Domestic Violence.

A person commits manslaughter by:
1. Recklessly causing the death of another person; or
2. Committing second degree murder as defined in section 13-1104, subsection A upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim; or
3. Intentionally aiding another to commit suicide; or
4. Committing second degree murder as defined in section 13-1104, subsection A, paragraph 3, while being coerced to do so by the use or threatened immediate use of unlawful deadly physical force upon such person or a third person which a reasonable person in his situation would have been unable to resist; or
5. Knowingly or recklessly causing the death of an unborn child by any physical injury to the mother.

**Summary:** While a plea to Negligent Homicide A.R.S. § 13-1102 is safer, this statute contains several subsections that may not be categorically removable. Defense counsel should avoid pleading to subsection (2) and generally plead to the straight statutory language of the offense.

**Crime Involving Moral Turpitude (CMT):** Manslaughter involving recklessness has been held to be a CMT. *Franklin v. INS,* 72 F.3d 571 (8th Cir. 1995); *Matter of Wojtkow,* 18 I&N Dec. 111 (BIA 1981). Therefore, A1 is likely to be found a CMT. For the same reason, A5 is divisible and would be held a CMT if the record of conviction demonstrated a mens rea of “recklessness” rather than “knowingly.” Since A2 adopts the “heat of passion” element commonly used by voluntary manslaughter definitions, defense counsel should assume it will be considered a CMT. While attempted suicide has been held NOT to be a CMT, *Matter of D,* 4 I&N Dec. 149 (BIA 1950), it is unclear whether aiding another to commit suicide, as in A3, would be similarly held. A4 arguably would not be a CMT since the act was not committed voluntarily and encompasses conduct that even a “reasonable person” could not have resisted.

**Aggravated Felony:** Since an offense with a mens rea of recklessness is not a “crime of violence,” A1 and A5 should not categorically be held to be an aggravated felony. See *Fernandez-Ruiz v. Gonzales,* 466 F.3d 1121 (9th Cir. 2006) (en banc) (recklessly causing physical injury to another does not meet the federal definition of a “crime of violence” under 18 U.S.C. § 16). Defense counsel should assume that A2 will be held an aggravated felony as either a “murder” or a “crime of violence” aggravated felony under 8 U.S.C. § 1101(a)(43)(A) or (F). See Second-degree Murder, Aggravated Felony. Although there are arguments against this, where possible counsel should conservatively assume that intentionally aiding another to commit suicide will meet the definition of an aggravated felony for “murder” or, if it involves force and carries a sentence of one year or more, will meet the aggravated felony definition as a “crime of violence.” Arguably, A4 is not an aggravated felony since it lacks the voluntary and intentional nature of murder or a crime of violence.

**Other Grounds:** An offense cannot satisfy the domestic violence ground of removability without first being a “crime of violence”; therefore, only subsections A2 and possibly A3 or A4 could be considered removable as a crime of domestic violence if committed against a person who meets the definition in A.R.S. § 13-3601(A)(1). If the record of conviction demonstrates that the offense is committed against a child, may be removable as an offense of child abuse, abandonment, or neglect.

7. **Second-degree Murder, A.R.S. 13-1104**
A person commits second degree murder if without premeditation:
1. The person intentionally causes the death of another person, including an unborn child or, as a result of intentionally causing the death of another person, causes the death of an unborn child; or
2. Knowing that the person's conduct will cause death or serious physical injury, the person causes the death of another person, including an unborn child or, as a result of knowingly causing the death of another person, causes the death of an unborn child; or
3. Under circumstances manifesting extreme indifference to human life, the person recklessly engages in conduct that creates a grave risk of death and thereby causes the death of another person, including an unborn child or, as a result of recklessly causing the death of another person, causes the death of an unborn child.

**Summary:** “Murder” is included in the definition of aggravated felony at 8 U.S.C. § 1101(a)(43)(A) and will be considered an aggravated felony regardless of the length of sentence imposed. However, “murder” for immigration purposes is not defined by reference to a federal statute, and the BIA has yet to adopt a “generic” definition of the offense. Counsel should assume that a conviction for second-degree murder is always removable, although immigration counsel may have an argument that A3 is not.

**Crime Involving Moral Turpitude (CMT):** Counsel should assume that a conviction for second-degree murder will constitute a CMT for immigration purposes.

**Aggravated Felony:** Counsel should assume that a conviction for second-degree murder will be considered an aggravated felony as “murder” within 8 U.S.C. § 1101(a)(43)(A), regardless of the sentence imposed. However, since A3 references a *mens rea* of recklessness rather than an intent to cause death or a knowledge that death will occur, immigration counsel may have an argument that it does not fit the commonly used definition of “murder” and bears a greater similarity to manslaughter, which is not categorically an aggravated felony. If a plea to A.R.S. § 13-1104 cannot otherwise be avoided, counsel should attempt to designate A3 in the plea, judgment, and any other court documents.

**Other grounds:** If the record of conviction demonstrates a domestic relationship under A.R.S. § 13-3601, a conviction for second-degree murder would likely also be removable under the grounds of domestic violence or child abuse, neglect, or abandonment.

8. First-degree murder, A.R.S. § 13-1105

A person commits first degree murder if:

1. Intending or knowing that the person's conduct will cause death, the person causes the death of another person, including an unborn child, with premeditation or, as a result of causing the death of another person with premeditation, causes the death of an unborn child.
2. Acting either alone or with one or more other persons the person commits or attempts to commit sexual conduct with a minor under section 13-1405, sexual assault under section 13-1406, molestation of a child under section 13-1410, terrorism under section 13-2308.01, marijuana offenses under section 13-3405, subsection A, paragraph 4, dangerous drug offenses under section 13-3407, subsection A, paragraphs 4 and 7, narcotics offenses under section 13-3408, subsection A, paragraph 7 that equal or exceed the statutory threshold amount for each offense or combination of offenses, involving or using minors in drug offenses under section 13-3409, kidnapping under section 13-1304, burglary under section 13-1506, 13-1507 or 13-1508, arson under section 13-1703 or 13-1704, robbery under section 13-1902, 13-1903 or 13-1904, escape under section 13-2503 or 13-2504, child abuse under section 13-3623, subsection A, paragraph 1, or unlawful flight from a pursuing law enforcement vehicle under section 28-622.01 and in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person.

**Summary:** “Murder” is included in the definition of aggravated felony at 8 U.S.C. § 1101(a)(43)(A) and will be considered an aggravated felony regardless of the length of sentence imposed. Counsel should assume that a conviction for first-degree murder is always removable.
Crime Involving Moral Turpitude (CMT): Counsel should assume that a conviction for first-degree murder will constitute a CMT for immigration purposes.

Aggravated Felony: Counsel should assume that a conviction for first-degree murder will be considered an aggravated felony as “murder” within 8 U.S.C. § 1101(a)(43)(A), regardless of the sentence imposed.

Other grounds: If the record of conviction demonstrates a domestic relationship under A.R.S. § 13-3601, a conviction for first-degree murder would likely also be removable under the grounds of domestic violence or child abuse, neglect, or abandonment.

A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury. Endangerment involving a substantial risk of imminent death is a class 6 felony. In all other cases, it is a class 1 misdemeanor.

Summary: Under current law this is not an aggravated felony even with a 365-day sentence. Still, as always counsel should attempt to get a sentence imposed of 364 days or less to prevent this from possibly being held an aggravated felony. Counsel also should follow guidance regarding the record of conviction, below.

Crime Involving Moral Turpitude (CMT): Probably not, unless serious injury is threatened. No case law has yet defined whether endangerment is a crime involving moral turpitude, although unpublished BIA case law has suggested it is not. Counsel should be conservative and try to keep the record vague, i.e. use boilerplate statutory language in the plea agreement. Mere risk of physical injury gives immigration counsel an argument that the conviction is not a CMT. Even if it is a CMT, a single class 1 misdemeanor conviction would not cause deportability or inadmissibility. Recklessly causing substantial risk of imminent death may be more likely a CMT.

Aggravated Felony: No. Under Ninth Circuit law, a mens rea of recklessness is insufficient to meet the definition of a “crime of violence.” Fernandez-Ruiz v. Gonzales, 466 F.3d 1121 (9th Cir. 2006) (en banc) (recklessly causing physical injury to another does not meet the federal definition of a “crime of violence” under 18 U.S.C. § 16). Since the statute can only be violated using recklessness, it is categorically not an aggravated felony. See further discussion at ARS § 13-1203, assault.

Other Grounds: This is not a domestic violence offense because it is not a crime of violence. However, if the record demonstrates that the person endangered was a minor, charges of removal may be brought on the basis of child abuse, neglect, or abandonment. See 8 U.S.C. § 1227(a)(2)(E)(i). Counsel should attempt to cleanse the record of any mention that victim was a minor.

10. Threatening or intimidating, ARS § 13-1202
A person commits threatening or intimidating if the person threatens or intimidates by word or conduct: 1. To cause physical injury to another person or serious damage to the property of another; or 2. To cause, or in reckless disregard to causing, serious public inconvenience including, but not limited to, evacuation of a building, place of assembly or transportation facility; or 3. To cause physical injury to another person or damage to the property of another in order to promote, further or assist in the interests of or to cause, induce or solicit another person to participate in a criminal street gang, a criminal syndicate or a racketeering enterprise.
A1 or A2 is a class 1 misdemeanor, except that it is a class 6 felony if the offense is committed in retaliation for certain anti-crime activities. A3 is a class 4 felony.

**Crime Involving Moral Turpitude (CMT):** Unclear, but might be divisible. A1 and A2 should not be held CMT because they do not require any “wrong intent.” The Arizona Supreme Court has stated that it is not necessary for the prosecution to prove “intent or any other culpable mental state because A.R.S. section 13-1202(A)(1) is a strict liability crime.” In re Kyle M., 200 Ariz. 447, 449 (Ariz. Ct. App. 2001). Furthermore, the intended victim need not even hear the threat; and there is no requirement that the victim of the threat was scared or felt threatened. See In re Juvenile Action No. 55, 600 P.2d 47 (AZ 1979)(defendant found guilty of threatening or intimidating another person under §13-1202 even where the threatening remark was not communicated directly to the victim); In re Ryan A., 39 P.3d 543 (AZ 2002)(“a subjective state of fear on the part of the intended victim is not required to prove this offense”). A2 could be violated by recklessly carrying flammable materials in a public place.

Because A3 requires the person to threaten in order to support gang or racketeering activity, it is likely that the DHS may charge it as a CMT. Criminal defense counsel should attempt to avoid this plea, or if that is not possible to keep the record of conviction clear of damaging information.

**Aggravated Felony as a Crime of Violence:** Both A1 and A2 are misdemeanors that cannot sustain a sentence of a year, but will be held a class 6 felony if done in retaliation for certain activities. There counsel should obtain a sentence of 364 days or less, or keep the record vague between A1 and A2. A1 is categorically a crime of violence, while A2 is not since it does not necessarily involve a threat to use force on people or property (e.g., it could involve threatening to pull a fire alarm).

A3 can be a felony and will likely be charged as a crime of violence. See Rosales-Rosales v. Ashcroft, 347 F.3d 714 (9th Cir. 2003) (Calif. P.C. § 422, which punishes "[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement ... is to be taken as a threat, even if there is no intent of actually carrying it out,” held a crime of violence).

**Other Grounds: Domestic Violence.** A1 will be charged as a deportable crime of domestic violence if the conviction specifically cites § 13-3601 in the judgment, or if the record of conviction otherwise establishes that the victim had the requisite domestic relationship. 8 USC §1227(a)(2)(E)(i). No sentence is required and a misdemeanor will suffice. Consider a plea to assault, § 13-1203(A)(3). See Note: Domestic Violence.

11. **Assault, ARS § 13-1203**
A. A person commits assault by:
1. Intentionally, knowingly or recklessly causing any physical injury to another person or
2. Intentionally placing another person in reasonable apprehension of imminent physical injury or
3. Knowingly touching another person with the intent to injure, insult or provoke such a person.
B. Assault committed intentionally or knowingly pursuant to subsection A, paragraph 1 is a class 1 misdemeanor. Assault committed recklessly pursuant to subsection A, paragraph 1 or assault pursuant to subsection A, paragraph 2 is a class 2 misdemeanor. Assault committed pursuant to subsection A, paragraph 3 is a class 3 misdemeanor.

**Crime Involving Moral Turpitude:** Possibly if A1 is coupled with §13-3601 and convicted as a class 1 misdemeanor. In general, simple assault is not a CMT. Matter of re Fualaau, 21 I&N Dec. 475 (BIA 1996) (simple assault not CMT because statute only required bodily injury rather than serious
bodily injury). However, in *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1165 (9th Cir. 2006), the Ninth Circuit found that a simple assault, if committed “willfully” against a person with whom the defendant has a domestic relationship and if resulting in “serious bodily injury,” would constitute a CMT. *See also Grageda v. INS*, 12 F.3d 919, 922 (9th Cir. 1993). Since A1 as a class 1 misdemeanor carries a mens rea of intent pursuant to § 13-1203(B), the government may argue that it is a CMT. However, immigration counsel can counter that A1 is overbroad since it requires “any physical injury” rather than “serious bodily injury.” If the noncitizen must accept a class 1 misdemeanor, counsel should keep evidence of any “serious bodily injury” out of the record of conviction.

**Aggravated Felony: Crime of Violence.** To be an aggravated felony the conviction must be a crime of violence. Neither A3, nor recklessly causing physical injury under A1, is categorically a crime of violence. *See discussion at Other Grounds: Domestic Violence, below.*

Regarding the year’s sentence, simple assault under Arizona law is only punishable as a misdemeanor with a maximum sentence of six months. If the sentence goes to 365 days or more due to a recidivist enhancement, this counts as one year or more and a crime of violence will be held an aggravated felony. *See US v. Rodriguez*, 128 S.Ct. 1783 (US 2008), reversing *U.S. v Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc) on issue of recidivist enhancements. However, since assault contains no recidivist sentence, and since the maximum sentence is six months, a sentence of 365 days or more is not possible and assault can never be an aggravated felony.

**Other Grounds: Domestic Violence.** To be a deportable domestic violence offense the conviction must be of (a) a crime of violence (b) committed against someone with whom the defendant had a domestic relationship, as established by the record of conviction. If one of these factors cannot be proved, the offense does not cause deportation under this ground. There is no requirement of a year’s sentence. *See Note: Domestic Violence.*

In *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc), the Ninth Circuit found that a conviction for a class 2 misdemeanor assault under § 13-1203 did not categorically constitute a crime of violence under 18 U.S.C. § 16(a) since it involves recklessness under A1. Therefore, a domestic violence conviction for simple assault under A1 is not categorically removable as a “crime of domestic violence” unless the government can prove that the offense was committed intentionally, rather than recklessly. *However,* the government has successfully argued that, since assault committed intentionally or knowingly is punishable as a class 1 misdemeanor under § 13-1203(B), *any* conviction for A1 as a class 1 misdemeanor will automatically be considered a “crime of violence.”

In general, mere offensive touching under A3 is not a crime of violence. *See Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006) (finding California Spousal Battery which includes offensive touching not crime of violence); *Singh v. Ashcroft*, 386 F. 3d 1228 (9th Cir. 2004) (Oregon harassment statute is not necessarily a crime of violence because it can be violated by mere offensive touching). Therefore, a plea to A3, even with a mens rea of “intentionally,” should not be held a crime of violence.

*To avoid a crime of violence,* counsel should plead to A1 as a class 2 or 3 misdemeanor, A3, or leave the record vague between subsections. Where possible, counsel should also attempt to keep the record clear of information that more than recklessness or mere offensive touching was involved.

*To avoid proof of the requisite domestic relationship,* counsel should attempt to avoid the statutory reference to §13-3601, as well as any other information in the record that establishes the relationship. *See Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004) (holding that immigration authorities cannot use evidence from outside the record of conviction to establish that a domestic relationship existed.
for the purpose of proving deportability for conviction of a crime of domestic violence) and Note: Record of Conviction.

12. **Aggravated Assault, ARS § 13-1204**

A. A person commits aggravated assault if the person commits assault as defined in section 13-1203 under any of the following circumstances:

1. If the person causes serious physical injury to another.
2. If the person uses a deadly weapon or dangerous instrument.
3. If the person commits the assault by any means of force that causes temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part or a fracture of any body part.
4. If the person commits the assault while the victim is bound or otherwise physically restrained or while the victim's capacity to resist is substantially impaired.
5. If the person commits the assault after entering the private home of another with the intent to commit the assault.
6. If the person is eighteen years of age or older and commits the assault on a child who is fifteen years of age or under.
7. If the person commits assault as prescribed by section 13-1203, subsection A, paragraph 1 or 3 and the person is in violation of an order of protection…
8. If the person commits the assault knowing or having reason to know the victim is [a peace officer, firefighter, EMT, teacher, school nurse, health care practitioner, or prosecutor…] 
9. If the person knowingly takes or attempts to exercise control over [a peace officer’s weapon]…
10. If the person [is imprisoned and attacks an employee of the jail or prison…]

**Crime Involving Moral Turpitude (CMT):** Yes, but with some possible exceptions. There is an argument that A2 is not a CIMT under *Carr v. INS*, 86 F.3d 949 (9th Cir. 1996), but some immigration judges have held to the contrary. Simple assault knowing that the person was a police officer under A8 should not be a CMT. The same might be true for other occupations listed in A8. This is especially true if it is possible to identify the assault as, or leave open the possibility that it was, mere offensive touching under §13-1203(A)(3).

**Aggravated Felony: Crime of Violence.** An intentional aggravated assault with a sentence imposed of one year or more will be considered a crime of violence. However, an aggravated assault with a *mens rea* of recklessness (as under § 13-1203(A)(1)) or the use of *de minimus* force (under (A)(3)) may not be a crime of violence, even with a sentence of one year or more. See *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006).

Immigration law uses the federal definition of a “crime of violence” found at 18 U.S.C. §16. Section 16(a) of 18 U.S.C. requires the “use, attempted use, or threatened use of physical force,” while section 16(b) requires that the offense be a felony and involve a “substantial risk” that physical force may be used. In *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc), the Ninth Circuit found that a conviction for misdemeanor assault under § 13-1203 did not categorically constitute a crime of violence under 18 U.S.C. § 16(a) since recklessness under (A)(1) would not involve the “use, attempted use, or threatened use of physical force.” However, the court did not reach the issue of whether a felony assault under § 13-1204 committed with a mens rea of recklessness would meet the definition of a crime of violence under section 16(b) by presenting a “substantial risk” that physical force may be used.

Defense counsel should conservatively assume that a conviction for aggravated assault with a sentence of one year or more will be held to be an aggravated felony. However, if a sentence of 364 days
or less is not possible, counsel should attempt to specify a subsection that is more likely to involve a mens rea of recklessness, such as A1, A2, A6, A7, or A8. Since A3, A4, A5, A9, A10 are more likely by nature to involve the intentional use of force, these subsections should be avoided. Furthermore, a plea to the underlying definition of assault at § 13-1203(A)(1) or (A)(3), and use of the specific word “recklessness” in the plea agreement, will aid immigration counsel in arguing that the offense is not a crime of violence.

Other Grounds: Domestic Violence. See discussion of §13-1203.

Other Grounds: Firearms. Where firearms is an element of the statute (e.g., A9(a)), or where a weapon is an element and the record of conviction identifies the weapon as a firearm (e.g., A2), the offense will cause deportability under the firearms ground. See Note: Firearms.

13. Unlawfully Administering Intoxicating Liquors, Narcotic Drugs or Dangerous Drugs, ARS §13-1205
A person commits unlawfully administering intoxicating liquors, a narcotic drug or dangerous drug if, for a purpose other than lawful medical or therapeutic treatment, such person knowingly introduces or causes to be introduced into the body of another person, without such person’s consent, intoxicating liquors, a narcotic drug or dangerous drug. This is a class 6 felony, except it is a class 5 felony if the victim is a minor.

This may be a useful alternate to a sexual offense or drug crime.

Crime Involving Moral Turpitude (CMT): Assume yes, although no case law on point.

Aggravated Felony: Not as a drug offense; administration of drugs does not appear as a federal controlled substance offense. Conceivably DHS would charge it as a crime of violence, as an offense that is likely to lead to use of force, so avoid 365 day sentence.

Other Grounds: Controlled Substance conviction will make a person deportable and inadmissible only if the drug is identified as a federally recognized controlled substance in the record of conviction. Leave the record vague between alcohol and controlled substances. If that is not possible, try at least to leave the record vague as to what controlled substance was involved.

14. Dangerous or deadly assault by prisoner or juvenile, ARS §13-1206
A person, while in the custody of the state department of corrections, the department of juvenile corrections, a law enforcement agency or a county or city jail, who commits an assault involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or who intentionally or knowingly inflicts serious physical injury upon another person is guilty of a class 2 felony.

Crime Involving Moral Turpitude (CMT): Probably. An assault involving a deadly weapon or dangerous instrument is arguably not a CIMT under Carr v. INS, 86 F.3d 949 (9th Cir. 1996), but some immigration judges have held to the contrary. Assault in which a person intentionally or knowingly inflicts serious physical injury is likely a CIMT. In the absence of better options, plead to language involving a deadly weapon or dangerous instrument (though not a firearm).

Aggravated Felony: Crime of Violence. Assuming that this statute incorporates the definition of assault found in § 13-1203, a conviction with a sentence of one year or more is not categorically an
aggravated felony since it could involve a mens rea of recklessness. If a sentence of one year or more cannot be avoided, defense counsel should try to incorporate language of “recklessness” in the plea agreement. See Note: Assault.

**Other Grounds: Firearms.** If the record of conviction mentions use of a “firearm,” the client may be deported under the firearms ground. Try to plead only to use of a deadly weapon or dangerous instrument. The record includes the judgment, plea agreement or plea colloquy, or charging document to the extent there is proof that the defendant pled as charged; it may also include a police or probation report if this is stipulated as a factual basis for the plea.

**15. Drive-by shooting, ARS § 13-1209.**
Intentionally discharging a weapon from a motor vehicle at a person, another occupied motor vehicle or an occupied structure. Drive by shooting is a class 2 felony.

**Crime Involving Moral Turpitude (CMT):** Yes. Matter of Muceros, Index Decision (BIA 2000)(the willingness to risk potential serious harm regardless of whether injury is intended or actually occurs renders drive by shooting under Cal. Pen. Code § 246 a CMT) (see http://www.usdoj.gov/eoir/vll/intdec/indexnet.html).

**Aggravated Felony: Crime of Violence.** Yes if a 365 day or more sentence.

**Other Grounds: Firearms.** Yes, deportable; see Note: Firearms.

**16. Discharging a firearm at a structure, ARS § 13-1211.**
A. A person who knowingly discharges a firearm at a residential structure is guilty of a class 2 felony.
B. A person who knowingly discharges a firearm at a nonresidential structure is guilty of a class 3 felony.

**Crime Involving Moral Turpitude (CMT):** This will likely be held a CMT, although immigration counsel at least could argue that B not a CMT. Plead to B, or leave the record of conviction vague between A and B, because immigration attorneys can argue that section B does not involve moral turpitude. Matter of Muceros, Index Decision (BIA 2000) (willfully shooting at inhabited dwelling house, whether occupied or not, or at occupied structure under Cal. Pen. Code § 246 is a CMT).

**Aggravated Felony: Crime of Violence.** Divisible. An aggravated felony crime of violence requires as an element the use, attempted use, or threatened use of physical force against the person or property of another, or a “substantial risk” that such force will be used in a felonious offense. 18 U.S.C. § 16. By careful pleading, counsel can provide immigration counsel with an argument that a particular disposition is not against the person or property of another and thus is not an aggravated felony. Counsel must not permit the record to preclude the possibility that (a) the property was unoccupied (i.e., there was not a current resident, as opposed to the current resident was not home at the time) and (b) the property was owned by the defendant. Counsel should plead to the generic language of the statute and avoid references to an inhabited residence or the property of another.

Rationale: Regarding “against a person,” shooting at an “inhabited dwelling place” under California law has been held a crime of violence since it “necessarily threatens the use of physical force against the resident.” U.S. v. Cortez-Arias, 403 F.3d 1111, 1116 (9th Cir. 2005). However, the Ninth Circuit in U.S. v. Martinez-Martinez, 468 F.3d 604 (9th Cir. 2006) distinguished the Arizona statute by
finding that the definition of “residence” in ARS § 13-1211 is broader than that of a California “inhabited dwelling house,” because it includes dwellings in which no one is currently living. Therefore, the discharge of a firearm at either a residential or nonresidential structure appears to be divisible as a crime of violence against a person, since it can be committed against a structure where no one is currently living. The government will likely argue that the offense is a crime of violence under 18 U.S.C. § 16(b) as a felony that involves a “substantial risk” that force will be used – an issue that Martinez-Martinez did not address. However, immigration counsel may have arguments against this.

Regarding the use of force against “property of another,” § 13-1211 includes offenses that are committed against one’s own property. Unless the record of conviction demonstrates that the offense was committed against the property of another, the offense is not a crime of violence against property. See Jordison v. Gonzales, 501 F.3d 1134 (9th Cir. 2007).

Other Grounds: Firearms. Yes, deportable. Plead to an aggravated assault that doesn’t require use of firearm, or endangerment, or a weapons possession charge that does not identify the weapon as a firearm or destructive device. Better is a plea to simple possession of a weapon not identified as a firearm; see § 13-3102. See Note: Firearms.

Other Grounds: Domestic Violence. Arguably the domestic violence deportation ground covers only acts against persons, not property. However, to ensure that the conviction does not cause deportability under this ground, counsel should not permit the record of conviction to establish that the property was occupied, or even controlled or owned, by a person with whom the defendant had a domestic relationship.

17. Custodial Interference, ARS § 13-1302
A. A person commits custodial interference if, knowing or having reason to know that the person has no legal right to do so, the person does one of the following:
1. Takes, entices or keeps from lawful custody any child, or any person who is incompetent, and who is entrusted by authority of law to the custody of another person or institution.
2. Before the entry of a court order determining custodial rights, takes, entices or withholds any child from the other parent denying that parent access to any child.
3. If the person is one of two persons who have joint legal custody of a child takes, entices or withholds from physical custody the child from the other custodian.
4. At the expiration of access rights outside this state, intentionally fails or refuses to return or impedes the return of a child to the lawful custodian.

Crime Involving Moral Turpitude (CMT): Probably not, particularly for subsections A1, A2, and A3 since there is not necessarily an intentional or even reckless or negligent requirement. Even A4 may not be a CMT since the statute does not require cruelty, depravity, or emotional harm. State v. Bean, 174 Ariz. 544, 851 P.2d 843 (Ct. App. 1992).

Aggravated Felony: It appears not to be, although as always counsel should strongly attempt to avoid a sentence of a year or more for any single count.

Other Grounds: Domestic Violence. Under 8 U.S.C. § 1227(a)(2)(E), a crime of child abuse, child neglect, or child abandonment is a deportable offense. The Board of Immigration Appeals has broadly defined “child abuse” as an offense involving an “intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person’s physical or mental well-being, including sexual abuse or exploitation.” Matter of Velasquez-
Herrera, 24 I&N Dec. 503 (BIA 2008). The government may argue that a conviction for § 13-1302 will “impair the physical or mental well-being” of a child but immigration attorneys have arguments that it does not. A plea to unlawful imprisonment with no reference to § 13-3601 or the age of the victim may be safer.

**Other Grounds: Inadmissible for Taking a Child Outside the U.S. in violation of a custody Decree.** Note that a noncitizen who removes a citizen child outside the U.S. in violation of a court decree, or assists in this, will be inadmissible until the child is returned to the rightful party.

18. **Unlawful Imprisonment, ARS § 13-1303**
A person commits unlawful imprisonment by knowingly restraining another person. “Restraint” is defined to mean restricting another person’s movements by “physical force, intimidation or deception” or “any means including acquiescence of the victim if the victim is a child less than eighteen years old or an incompetent person and the victim's lawful custodian has not acquiesced in the movement or confinement.” A.R.S. §13-1301. Unlawful imprisonment is a class 6 felony unless the victim is released voluntarily by the defendant without physical injury in a safe place prior to arrest in which case it is a class 1 misdemeanor.

**Summary:** This is a divisible statute which may be a safer alternate plea, depending on sentence and record factors. To avoid an aggravated felony, counsel should obtain a sentence of less than 365 days for any single count, or at least keep the record clear of evidence that the restraint was effected by force. To avoid deportability under the domestic violence or child abuse ground, counsel should avoid evidence in the record that force was used or threatened against anyone with a domestic relationship, or abuse against a child was involved. In that case, while a §13-3601 notation will likely cause immigration authorities to charge the offense under the domestic violence or child abuse ground, immigration counsel at least will have a strong argument against it being so held. Then it is crucial to try to bargain for a class 1 misdemeanor, which will prevent the offense from being classed as a crime of violence. If the victim was a child and the record of conviction is silent as to the details, there are strong arguments that it is not a deportable child abuse offense.

**Crime Involving Moral Turpitude (CMT):** Maybe not. Knowingly restraining another person, without more, probably does not by its nature involve evil intent to amount to moral turpitude. Unlawful imprisonment is distinguished from kidnapping by its lack of intent to do harm. See, e.g., State v. Lucas, 146 Ariz. 597, 604 (1985), State v. Flores, 140 Ariz. 469, 473 (1984). Even if the record shows use of force, mere use of force (as opposed to force with intent to commit great bodily harm) does not necessarily involve moral turpitude. This section, for example, could be violated by a storeowner who unreasonably decided that a person had stolen something, and who detained the person as a shoplifter. If victim is a child could plead to §13-1302 Custodial Interference.

**Aggravated Felony: Crime of Violence.** Counsel can avoid an aggravated felony by obtaining a sentence of 364 or less. Further, the offense is not necessarily a crime of violence, since it can be carried out by deceit. Keep the record free of reference to violence. However, the government will argue that a felony offense is an aggravated felony under 18 USC §16(b) because it creates a situation carrying an inherent risk that force will be used.

**Other Ground: Domestic Violence and Child Abuse:** A.R.S. § 13-1303 will be a “crime of domestic violence” and cause deportability under the DV ground only where (a) the record shows that the victim has the required domestic relationship, and (b) the offense is a “crime of violence” as defined in 18 USC §16. DHS will charge false imprisonment as a deportable domestic violence offense if §13-3601 is
in the judgment. Counsel should attempt to avoid the §13-3601 notation, as well as other evidence in the record of conviction showing a domestic relationship. However, if the offense is a misdemeanor and the record of conviction does not establish that force or threat of force was used (e.g., leaves open the possibility that the restraint was by deceit or other means), immigration counsel will have a strong argument that the conviction does not trigger deportation under that ground.

A noncitizen is deportable under the DV ground if convicted of a crime of child abuse, neglect or abandonment. Where possible, keep the victim’s age out of the record, for two reasons. First, if the record indicates that this is a child, the court may go to the record to see if the offense constituted child abuse. While false imprisonment of a child does not necessarily constitute abuse – it can be accomplished simply by transporting the child without the permission of the guardian – this still carries a risk. Second, leaving open the possibility that the victim was a child creates a good defense to a charge of a crime of domestic violence, since it is clear that false restraint of a child can be accomplished nonviolently. With a very vague record of conviction, however, immigration counsel can make a categorical argument that the offense could be committed by a storeowner who unreasonably decided that a minor had stolen something, and who detained the person as a shoplifter.

Note that the DV ground contains no sentence requirement: obtaining a sentence imposed of less than 365 days will not protect the person from deportability under the DV ground, as it would against conviction of an aggravated felony. See Notes “Record of Conviction” and “Domestic Violence.”

A person commits kidnapping by knowingly restraining another person with the intent to commit certain designated crimes, including “aid in the commission of a felony.” It is punished as a class 2-4 felony depending on various factors.

Summary. This is a dangerous conviction for immigration purposes because it is a moral turpitude offense and is likely to be held a crime of violence (although with careful control of the record of conviction, immigration counsel can be provided means to argue against this). A crime of violence is an aggravated felony if a sentence of 365 days or more is imposed, and is a deportable domestic violence offense if committed against a person with a domestic relationship. For an alternate plea, see Unlawful Imprisonment or Assault.

Crime Involving Moral Turpitude (CMT): Kidnapping is a CMT. (If this plea is unavoidable, immigration counsel at least will have some argument if the record of conviction leaves open the possibility that the restraint was by deceit and the intent was to “otherwise aid in the commission of a felony,” and the felony either is unidentified or is not a CMT.)

Aggravated Felony: Crime of Violence. Obtain a sentence of 364 days or less to avoid an aggravated felony conviction. The exception is if the crime involved ransom; see below. (If a sentence of 365 or more is imposed, counsel at least can provide immigration counsel with a defense argument by doing the following: create a record of conviction that does not eliminate the possibility that the restraint was effected by deceit, the intent was to “aid in the commission of a felony,” and the felony either is not identified or is not a crime of violence. The government will argue that under 18 USC §16(b), any felony kidnapping offense is a crime of violence because it contains the inherent risk that force will be used.)

Aggravated Felony: Ransom. An “offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom)” is an aggravated felony regardless of the sentence
imposed. 8 USC § 1101(a)(43)(H). Thus, communicating interstate, mailing, transporting, receiving or possessing a ransom in connection with a kidnapping is an aggravated felony.

**Other Grounds: Domestic Violence:** This will be held a deportable crime of domestic if it is combined with §13-3601, or if the record otherwise identifies a qualifying domestic relationship. Note that this ground does not require a minimum sentence, and therefore may be satisfied under any sentencing disposition. See Notes “Record of Conviction” and “Domestic Violence.” If the §13-3601 cannot be avoided, see “aggravated felony: crime of violence” above for suggestions on how to attempt to avoid a record that proves a crime of violence.

### 20. Access Interference, ARS § 13-1305

A person commits access interference if, knowing or having reason to know that the person has no legal right to do so, the person knowingly engages in a pattern of behavior that prevents, obstructs or frustrates the access rights of a person who is entitled to access to a child pursuant to a court order. If the child is removed from this state, access interference is a class 5 felony. Otherwise access interference is a class 2 misdemeanor.

**Crime Involving Moral Turpitude (CMT):** Probably will be held a CMT, although some case law suggests that it is not. Matter of P, 6 I&N Dec. 400 (BIA 1954) (criminal contempt for refusing to obey an injunction is not a CMT). Unlike § 13-1302 Custodial Interference, this statute requires “knowingly” obstructing access rights, which is more likely to be held a CMT.

**Aggravated Felony:** No, although as always counsel should attempt to avoid a sentence of a year or more for any single count.

**Other Grounds: Domestic Violence.** Possibly. Under 8 U.S.C. § 1227(a)(2)(E), a crime of child abuse, child neglect, or child abandonment is deportable. The Board of Immigration Appeals has broadly defined “child abuse” as an offense involving an “intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person’s physical or mental well-being, including sexual abuse or exploitation.” Matter of Velasquez-Herrera, 24 I&N Dec. 503 (BIA 2008). Because this statute requires behavior committed “knowingly,” it is more likely to be held a crime of child abuse. A plea to Custodial Interference or False Imprisonment is safer.


A person commits indecent exposure if he or she exposes his or her genitals or anus or she exposes the areola or nipple of her breast or breasts and another person is present and the defendant is reckless about whether such other person as a reasonable person would be offended or alarmed by the act. Indecent exposure is a class 1 misdemeanor. Indecent exposure to a person under the age of fifteen years is a class 6 felony.

**Summary:** This is a safer alternative to sex offenses, except that if the victim was a child the offense may be charged as deportable child abuse. To avoid that, plead to disorderly conduct with no indication of sexual conduct and/or age in the record. If a disorderly conduct plea is not possible, plead to the generic language of indecent exposure and try to leave specific sexual conduct and/or age out of the record.
Crime Involving Moral Turpitude (CMT): Not with an adult, and almost certainly not with a minor since no lewd intent is required, but merely recklessness regarding the possibility of causing offense. See, e.g., Matter of Mueller, 11 I&N Dec. 268 (BIA 1965) (conviction of indecently exposing a sex organ under Wisconsin statute is not a CMT because of lack of requirement of sexual intent). This offense could be committed by topless or nude sunbathing, or an intoxicated man who needed to urinate in public.

Aggravated felony: Sexual Abuse of a Minor. No, because there is no sexual intent. Compare Matter of Rodriguez-Rodriguez, 22 I&N Dec. 991 (BIA 1999) (Texas indecent exposure is SAM because of intent to arouse).

Other: Child Abuse. In the past DHS has charged indecent exposure to a child/minor as a crime of “child abuse,” which is not an aggravated felony but a ground of removal. In Rebilas v. Keisler, 506 F.3d 1161 (9th Cir. 2007), the Ninth Circuit suggested in the context of a charge of sexual abuse of a minor that “abuse” would not necessarily occur in a context where the minor was not aware of the offensive conduct. This should apply to indecent exposure as well. Immigration attorneys can also argue that there are minor ways to violate the statute (nude sunbathing, public urination) that do not to constitute child abuse. Still, where possible bargain to keep age and, certainly, egregious behavior out of the record of conviction, or better yet plead to disorderly conduct.


Public Sexual Indecency, Public Sexual Indecency To A Minor, ARS § 13-1403
A. A person commits public sexual indecency by intentionally or knowingly engaging in any of the following acts, if another person is present, and the defendant is reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act: 1. An act of sexual contact. 2. An act of oral sexual contact. 3. An act of sexual intercourse. 4. An act of bestiality. (Class 1 misdemeanor)
B. A person commits public sexual indecency to a minor if he intentionally or knowingly engages in any of the acts listed in subsection A and such person is reckless whether a minor under the age of fifteen years is present. (Class 5 felony)

Summary: If the victim is a minor, this can be a dangerous offense. Plead to disturbing the peace, or if needed to indecent exposure. Where possible leave the record vague as to the age of the victim if the victim was under 18. Immigration counsel will have strong arguments against this having consequences even where the victim was a minor, but they may not prevail and the person will be detained during the fight.

Crime Involving Moral Turpitude (CMT): Maybe. This offense committed in front of an adult ought not to be held a CMT, because recklessness about the possibility of offending a person is not a CMT. While the government might charge this as a CMT where the victim was a minor, immigration counsel at least have strong arguments against it. The only intent requirement is that the defendant was reckless as to whether a minor is present in the sense of being within viewing range, not whether it would alarm or offend the minor.

Aggravated felony: Divisible. In Rebilas v. Keisler, 506 F.3d 1161 (9th Cir. 2007), the Ninth Circuit found that a conviction for § 13-1403(B) was not categorically sexual abuse of a minor since the minor need not be aware of the conduct. The court noted that “[w]hen the minor is unaware of the offender's conduct, the minor has not been ‘abused’ as that term is commonly or generically defined, because the minor has not been physically or psychologically harmed.” Id. at 1163. However, the
immigration court may examine the record of conviction to determine whether the minor was aware of the conduct and therefore “abused.” Plead to the generic statutory language of the offense with no mention of the minor’s awareness of the conduct. If the record refers to the minor’s awareness, it may be better to plead to Indecent Exposure.

**Other Grounds: DV/Child Abuse:** The Board of Immigration Appeals has defined “child abuse” as an offense involving an “intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person’s physical or mental well-being, including sexual abuse or exploitation.” *Matter of Velasquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). Under *Rebilas, supra*, immigration counsel can argue that “child abuse” was not committed if the minor was unaware of the offender’s conduct. See Aggravated Felony. A plea to Indecent Exposure may be safer, but if this is not possible, try to keep the victim’s age and the minor’s awareness of the conduct out of the record of conviction. See Note: Domestic Violence.

### 22. Sexual Abuse, ARS §13-1404

“A person commits sexual abuse by intentionally or knowingly engaging in sexual contact with any person fifteen or more years of age without consent of that person or with any person who is under fifteen years of age if the sexual contact involves only the female breast.” “Without consent” may involve force or threat of force, the victim’s incapacity by drugs, etc. or inability to understand the nature of the act, or deceit. See discussion of ARS §13-1406, infra. The mere fact of minority does not establish lack of consent. *State v. Getz*, 189 Ariz. 561, 564 (Ariz., 1997). "Sexual contact" means "any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact.”

B. Sexual abuse is a class 5 felony unless the victim is under fifteen years of age in which case sexual abuse is a class 3 felony punishable pursuant to section 13-604.1

#### Crime Involving Moral Turpitude (CMT):

Knowingly or intentionally engaging in sexual touching without the consent of the victim will be held a CMT regardless of the victim’s age.

#### Aggravated Felony: Sexual Abuse of a Minor.

Where the record establishes that the sexual abuse was committed against a person under the age of 18, it will be held an aggravated felony as “sexual abuse of a minor” within 8 USC § 1101(a)(43)(A). This will be true regardless of sentence imposed. A conviction where the victim is an adult, or where the record of conviction does not establish the age of the victim, will not be an aggravated felony as “sexual abuse of a minor.” See ARS § 13-1405 and Note: Sexual Offenses for suggestions for safer pleas.

#### Aggravated Felony: Crime of Violence.

A crime of violence is an aggravated felony if the sentence to imprisonment is 365 days or more. 8 USC § 1101(a)(43)(F). To be a crime of violence within 18 U.S.C § 16 the offense must have use, attempted use, or threat of use of physical force as an element, or be a felony that “by its nature, involves a substantial risk that physical force against the person … of another may be used in the course of committing the offense.” 18 U.S.C § 16. If the record establishes that the abuse was by force or threat of force, the offense is a crime of violence. Even if it leaves open the possibility that deceit rather than force was used, it still is likely to be held a crime of violence as an offense involving a risk that physical force might be used, although immigration counsel at least could argue against this. Counsel can avoid this result by obtaining a sentence imposed of 364 days or less.

#### Other Grounds: DV/Child abuse.

The Board of Immigration Appeals has defined “child abuse” as an offense involving an “intentional, knowing, reckless, or criminally negligent act or omission...
that constitutes maltreatment of a person under 18 years old or that impairs such a person’s physical or mental well-being, including sexual abuse or exploitation.” Matter of Velasquez-Herrera, 24 I&N Dec. 503 (BIA 2008). This conviction would likely be held to constitute “child abuse” if the victim is under 18 years old and the age of the victim appears in the record of conviction. If the victim is 18 years or older and the § 13-3601 notation attaches, it may be removable as a crime of domestic violence if the record of conviction indicates the use or threat of force.

23. Sexual Conduct with a Minor, ARS § 13-1405
“A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.” The offense is a class 2 felony if the child is under 15, or if the child is at least 15 years old but the perpetrator is in a parental or guardianship relationship. Probation or parole is not allowed. Otherwise it is a class 6 felony.

Summary: This is currently an aggravated felony regardless of sentence imposed, including if the victim is 15 or over. Do not plead to this offense. See Note: Safer Pleas for alternatives. For a sympathetic case, e.g. involving older teenage victim with perpetrator near age, investigate § 13-1201, 1303, 2907.01, 2908. If felony time is required, consider, e.g. aggravated assault with sentence of less than a year, or if a sentence of more than a year is unavoidable, with a vague record of conviction.

In Estrada-Espinoza v. Gonzales, 498 F.3d 933 (9th Cir. 2007), the Ninth Circuit conceded that it was bound by precedent to find a conviction for consensual sex with a minor an aggravated felony. However, the Ninth Circuit is considering Estrada-Espinoza en banc, and there is some hope that the ruling will be changed. Further, the Ninth Circuit found that consensual intercourse between a person under the age of 16 and a person over the age of 21 is not necessarily a crime involving moral turpitude. This means that a person convicted of this offense may be eligible to apply for, e.g., a green card via a family visa petition, even despite having the aggravated felony conviction. Thus in some cases, if the alternative plea is onerous and immigration relief still might be available despite this conviction, a plea to a class 6 felony may be an acceptable option. If you have such a situation, contact Kara Hartzler at khartzler@firrp.org for an individual assessment.

Crime Involving Moral Turpitude (CMT): In Quintero-Salazar v. Keisler, 506 F.3d 688 (9th Cir. 2007) the court found that Calif. Penal Code § 261.5(d), which prohibits consensual intercourse between a person under the age of 16 and a person at least 21 years of age, is not categorically a crime involving moral turpitude. However, with an adverse record of conviction (e.g., a younger victim, greater age difference, or other adverse factor), this could be held a CMT. Counsel should keep the record vague. For a class 2 felony, if the perpetrator was a parent or guardian the offense is a CMT; if the victim was under the age of 15, it is very likely that the offense will be held a CMT.

Aggravated Felony: Sexual Abuse of a Minor. Under current law this is an aggravated felony as sexual abuse of a minor, regardless of sentence imposed, even if the victim is 15 or older. Estrada-Espinoza v. Gonzales, 498 F.3d 933 (9th Cir. 2007); Afridi v Gonzales, 442 F.3d 1212 (9th Cir. 2006). But this issue currently is before the Ninth Circuit en banc, and the court may reverse this rule. See Summary, above.

Other Grounds: Child Abuse. Yes. See Note: Domestic Violence. The Board of Immigration Appeals has defined “child abuse” as an offense involving an “intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person’s physical or mental well-being, including sexual abuse or exploitation.” Matter of Velasquez-Herrera, 24 I&N Dec. 503 (BIA 2008). Arguably, consensual sex with a 16 or 17 year-old
may not meet this definition; however, counsel should assume conservatively that the government will charge it under this ground.

24. **Sexual Assault (including rape), A.R.S. §13-1406**

“A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person.” “Without consent” includes any of the following: (a) coercion by the immediate use or threatened use of force against a person or property; (b) victim’s incapacity or lack of comprehension caused by mental disorder, alcohol, sleep etc., where the defendant knew or should have known this; (c) victim was intentionally deceived as to the nature of the act; (d) victim was intentionally deceived to believe that the perpetrator was the victim's spouse. Class 5 felony, but additional penalties apply if the victim was under 15 or “date-rape” drugs were applied.

**Crime Involving Moral Turpitude (CMT): Yes.**

**Aggravated Felony:** Yes, unless the following three conditions are met: the record does not establish that the victim was under 18 years of age; the record does not establish that the offense was intercourse as opposed to oral sex; and a sentence of less than a year was imposed. Also the record must not establish that the offense involved the date-rape drug flunitrazepam.

The reasoning is as follows. If the record establishes that the victim was under the age of 18, it will be an aggravated felony regardless of sentence as “sexual abuse of a minor” under 8 USC §1101(a)(43)(A). Regardless of the age of the victim, this is a “crime of violence,” which is an aggravated felony if a sentence of a year or more is imposed. 8 USC §1101(a)(43)(F). Regardless of sentence or age of victim, rape, including rape by intoxication, is an aggravated felony within 8 USC §1101(a)(43)(A). *Castro-Baez v. INS*, 217 F.3d 1057 (9th Cir. 2000). Oral sexual contact likely will not be considered rape, however. Possession of flunitrazepam (a date-rape drug) is an aggravated felony as a drug trafficking offense. 8 USC §1101(a)(43)(B).

**Otherwise Removable:** If the record of conviction reveals that the victim had a domestic relationship with the perpetrator as set forth in 8 USC § 1227(a)(2)(E), or the victim was a child, then the conviction will be a deportable offense under the domestic violence and child abuse grounds. See **Note: Domestic Violence.**

25. **Sexual Assault of Spouse, ARS §1406.01 (Repealed)**

This section was repealed, but we preserve the analysis for counsel to evaluate past convictions. The offense involved intentionally or knowingly engaging in sexual intercourse or oral sexual contact with a spouse by force or threat of force. A first offense was a class 6 felony, and the judge had discretion to make it a class 1 misdemeanor with mandatory counseling. A subsequent offense was a class 2 felony with no suspension of sentence, probation, pardon or release except under § 31-233, subsection A or B until the sentence imposed by the court has been served or commuted.

**Crime Involving Moral Turpitude (CMT): Yes.**

**Aggravated Felony:** To have avoided an aggravated felony, counsel must have created a record of conviction that leaves open the possibility that the offense was oral contact rather than rape, and obtained a sentence imposed of 364 days or less. See discussion of sexual assault, *supra.*

A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child under fifteen years of age. Molestation is a class 2 felony.

Crime Involving Moral Turpitude (CMT): Yes.

Aggravated Felony: Molestation of a child under the age of 14 is an aggravated felony as sexual abuse of a minor under 8 USC § 1101(a)(43)(A), regardless of sentence imposed. See e.g., United States v. Baron-Medina, 187 F.3d 1144 (9th Cir. 1999) (conviction of California Pen. Code § 288(a) for lewd conduct with a child under the age of 14 is an aggravated felony for sentencing enhancement purposes). Immigration counsel at least could argue that this would not be the case for a victim between 14 and 15 years of age, although there is no guarantee of this and this is not a safe plea.

Other Grounds: Child Abuse. Conviction will cause deportability as an act of child abuse under the domestic violence ground at 8 USC §1227(a)(2)(E).

28. Voyeurism, ARS § 13-1424
A. It is unlawful to knowingly invade the privacy of another person without the knowledge of the other person for the purpose of sexual stimulation.
B. It is unlawful for a person to disclose, display, distribute or publish a photograph, videotape, film or digital recording that is made in violation of subsection A of this section without the consent or knowledge of the person depicted.
C. For the purposes of this section, a person's privacy is invaded if both of the following apply:
1. The person has a reasonable expectation that the person will not be photographed, videotaped, filmed, digitally recorded or otherwise viewed or recorded.
2. The person is photographed, videotaped, filmed, digitally recorded or otherwise viewed, with or without a device, either:
   (a) While the person is in a state of undress or partial dress.
   (b) While the person is engaged in sexual intercourse or sexual contact.
   (c) While the person is urinating or defecating.
   (d) In a manner that directly or indirectly captures or allows the viewing of the person's genitalia, buttock or female breast, whether clothed or unclothed, that is not otherwise visible to the public.

Crime Involving Moral Turpitude (CMT): Maybe. An offense with the element of lewdness or sexual gratification is generally held to be a crime involving moral turpitude. Matter of Alfonso-Bermudez, 12 I&N Dec. 225 (BIA 1967). Since Voyeurism requires that the offense be committed “for the purpose of sexual stimulation,” immigration judges will likely find that it involves moral turpitude.

Aggravated Felony: If the victim was a minor, the government may charge the offense as an aggravated felony for sexual abuse of a minor under 8 U.S.C. § 1101(a)(43)(A). Counsel must keep the record free of evidence that the victim was under the age of 18.
Domestic Violence/Child abuse: Though unlikely, this offense could potentially be charged as stalking under the domestic violence ground of removal, or as child abuse, if the record shows that the victim is a minor.

28. **Criminal Trespass, ARS §§ 13-1502-4**

*Criminal Trespass in the Third Degree, ARS § 13-1502*

A person commits criminal trespass in the third degree by:
1. Knowingly entering or remaining unlawfully on any real property after a reasonable request to leave by the owner or any other person having lawful control over such property, or reasonable notice prohibiting entry.
2. Knowingly entering or remaining unlawfully on the right-of-way for tracks, or the storage or switching yards or rolling stock of a railroad company. Criminal trespass in the third degree is a class 3 misdemeanor.


**Aggravated Felony:** No, punishable only as misdemeanor.

*Criminal Trespass in the Second Degree, ARS § 13-1503*

A person commits criminal trespass in the second degree by knowingly entering or emaining unlawfully in or on any nonresidential structure or in any fenced commercial yard. Criminal trespass in the second degree is a class 2 misdemeanor.

**Crime Involving Moral Turpitude (CMT):** No. See Supra Criminal Trespass in the Third Degree.

**Aggravated Felony:** No, only punishable as misdemeanor.

*Criminal Trespass in the First Degree, ARS § 13-1504*

A. A person commits criminal trespass in the first degree by knowingly:
1. Entering or remaining unlawfully in or on a residential structure.
2. Entering or remaining unlawfully in a fenced residential yard.
3. Entering any residential yard and, without lawful authority, looking into the residential structure thereon in reckless disregard of infringing on the inhabitant's right of privacy.
4. Entering unlawfully on real property that is subject to a valid mineral claim or lease with the intent to hold, work, take or explore for minerals on the claim or lease.
5. Entering or remaining unlawfully on the property of another and burning, defacing, mutilating or otherwise desecrating a religious symbol or other religious property of another without the express permission of the owner of the property.
6. Entering or remaining unlawfully in or on a critical public service facility.
B. Subsection A, paragraph 1, 5 or 6 is a class 6 felony. Subsection A, paragraph 2, 3 or 4 is a class 1 misdemeanor.
**Aggravated Felony:** Maybe; try to obtain a sentence of 364 or less. DHS might charge A1, A5 or A6 as an aggravated felony crime of violence if the sentence is 365 days or more. Felony burglary of a dwelling has been upheld as a crime of violence under 18 USC §16(b) because of the danger that the owners would surprise the burglar and violence would ensue. *United States v. Becker*, 919 F.2d 568, 573 (9th Cir. 1990). The Fifth Circuit applied this same theory to criminal trespass and found it to be a crime of violence. See *U.S. v. Delgado-Enriquez*, 188 F.3d 592, 595 (5th Cir. 1999). Leave record vague between A1/A5 and A6, since A6 may present a weaker case.

**Crime Involving Moral Turpitude (CMT):** Divisible. Mere unlawful entry under A1 or A2, and probably A3, is not a CMT. A4 and A5 are probably CMT’s. Leave record open to possibility of A1 or A2.

**29. Possession of Burglary Tools, ARS § 13-1505**
A. A person commits possession of burglary tools by:
1. Possessing any explosive, tool, instrument or other article adapted or commonly used for committing any form of burglary as defined in sections 13-1506, 13-1507 and 13-1508 and intending to use or permit the use of such an item in the commission of a burglary.
2. Buying, selling, transferring, possessing or using a motor vehicle manipulation key or master key…. C. Possession of burglary tools is a class 6 felony.

**Crime Involving Moral Turpitude (CMT):** This is a divisible statute. Counsel should keep the record of conviction clear of evidence of defendant’s intent to use the tools to commit a particular kind of burglary: one where the offense to be committed upon entry involves moral turpitude, such as theft. In other words, counsel either should not permit the record of conviction to describe the intended burglary, or should phrase the intent in a vague manner such as “theft or any felony” or “a felony.”

A1. The issue is the intent within the burglary the person intends to commit. Burglary under 13-1506, 13-1507, and 13-1508 is not a CMT if the record of conviction establishes that the client is guilty of “theft or any felony” or “a felony.” Matter of S-, 6 I&N Dec. 769 (BIA 1955) (possession of burglary tools with intent to commit any offense is not a CMT unless accompanied by an intent to use the tools to commit a specific crime which is itself a CMT). It is a CMT if the record establishes that the intent is to commit theft or another CMT.

A2. This is not a CMT since there is no element in this section requiring an intent to commit a CMT. See Matter of S-, id.

**Aggravated Felony:** No. This does not equal burglary or a crime of violence. However, as with all offenses, for further protection counsel should attempt to obtain a sentence of 364 days or less, which ought to be possible for this class 6 felony.

**30. Burglary Offenses**

**Burglary in the Third Degree, ARS §13-1506**
A. A person commits burglary in the third degree by:
1. Entering or remaining unlawfully in or on a nonresidential structure or in a fenced commercial or residential yard with the intent to commit any theft or any felony therein.
2. Making entry into any part of a motor vehicle by means of a manipulation key or master key, with the intent to commit any theft or felony in the motor vehicle.
B. Burglary in the third degree is a class 4 felony.

**Summary:** Obtaining a sentence imposed of 364 days or less will avoid aggravated felony classification. If a sentence of a year or more is imposed, however, counsel still can guard against AF classification. In sum, if a sentence of a year or more will be imposed, to avoid both a CMT and aggravated felony conviction the client should plead to A1 with record of conviction stating “nonresidential structure or in a fenced commercial or residential yard” or any wording that includes “a fenced commercial yard,” and “theft or any felony” or “a felony;” or plead to A2 with a record of conviction stating “theft or any felony” or “a felony.” If possible, it is better to leave the record vague between conviction under A1 or A2. Burglary is potentially a CMT, but careful creation of the record of conviction can avoid this as well.

**Crime Involving Moral Turpitude:** This is a divisible statute. The key is to avoid a record demonstrating that the intent was to commit a CMT after entry.

A1, A2. Unlawful entry or remaining unlawfully are not themselves CMTs. *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005); *Matter of G*, I & N. Dec. 403 (BIA 1943); *Matter of M*, 1 I. & N. Dec. 132 (BIA 1960). Burglary becomes a CMT only if the intended offense involves moral turpitude. Entry with intent to commit larceny is a CMT, while entry with intent to commit an undesigned offense (“a felony”) or an offense that does not involve moral turpitude is not. *Matter of M*, 2 I. & N. Dec. 721 (BIA 1946). Defense counsel should create a record of conviction where the client is guilty only of “theft or any felony” or “a felony.” However, because Arizona theft statutes include subsections that do not require intent to permanently deprive the owner of benefits, and since traditionally an intent to permanently deprive is required for moral turpitude, even a plea to intent to commit an undesigned theft may avoid CMT. The disadvantage of “any theft” is that immigration judges are trained to think that any theft is a CMT, while they recognize that “any felony” may not be.

**Aggravated Felony, Bottom-Line:** With a sentence imposed of a year or more, this could be held an AF as either burglary, a crime of violence, or attempted theft. The very best course is to obtain a sentence imposed of 364 days or less. However, even with a sentence of a year or more imposed, counsel can guard against AF status by working with the record of conviction. The record of conviction should leave open the possibility that the burglary involved entry of a motor vehicle (or, if that is not possible, of a fenced commercial yard) with intent to commit an undesigned felony or, if that is not possible, “any theft.”

**Explanation: AF as Burglary.** Burglary is an aggravated felony with a one year sentence or more imposed. 8 USC §1101(a)(43)(G). The generic definition of burglary applicable to this aggravated felony ground is “an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.” *Taylor v. United States*, 494 U.S. 575 (1990) (emphasis added).

A1. Because only burglary of a structure is an aggravated felony and this section includes a fenced commercial yard, this is a potential safe plea. See *U.S. v Wenner*, 351 F.3d 969 (9th Cir. 2003) (Wash. burglary). Defense counsel should create a record of conviction where the client is guilty of entering a “nonresidential structure or a fenced commercial or residential yard” or some wording that leaves open the possibility that it involved a “fenced commercial yard.” Burglary of a residential yard might be considered a crime of violence (see below) so counsel should make sure that commercial yard is included in the record.

A2. Auto burglary in general is not AF burglary because it does not involve wrongful entry of a structure. *Ye v INS*, 214 F.3d 1128 (9th Cir. 2000). Therefore this section is not an aggravated felony as burglary.
**Explanation; AF as Attempted Theft.** Conviction of an attempt to commit an offense involving theft is an aggravated felony if a sentence of one year or more is imposed. Defense counsel should keep the record of conviction clear of what the intended crime was, i.e., plead to “theft or any felony” in the disjunctive, or to “any felony.” Immigration counsel can point to Ninth Circuit decisions holding that Arizona theft is broader than the generic definition of theft, and even if the record of conviction reveals that defendant intended to commit “any theft” it is unclear whether it was theft of services or theft of property, or whether any intent to deprive the owner was involved.

**AF as a Crime of Violence:**

A1. Felony burglary of a residence is a crime of violence because of the inherent risk that the burglar will encounter one of its lawful occupants and force will be used. *U.S. v. Becker*, 919 F.2d 568, 571 (9th Cir. 1990). Burglary of even a residential yard similarly may be held a crime of violence. *James v. United States*, 127 S.Ct. 1586, 1589 (2007). However, immigration counsel have arguments that burglary of a fenced residential yard under Arizona law is not categorically a crime of violence since the definition of “residential structure” under ARS § 13-1501(11) includes structures that are not occupied, i.e. that do not have tenants or homeowners residing there. See *U.S. v. Martinez-Martinez*, 468 F.3d 604 (9th Cir. 2006) (holding that discharging a firearm at a residential structure under ARS § 13-1211 is not categorically a crime of violence since the structure need not be occupied under the statute in order to be defined as “residential”). If burglary of an unoccupied residence is not a crime of violence, then the same should hold true for burglary of a fenced yard of an unoccupied residence. However, defense counsel can create additional safeguards by pleading to either burglary of a “nonresidential structure or in a fenced commercial or residential yard” or “a fenced commercial yard.”

A2. Auto burglary is not a crime of violence as long as the record of conviction does not establish that actual violence was used, e.g. does not establish that the car window was smashed, as opposed to found open. *Ye v. INS*, *supra*.

**Domestic Violence:** Where felony burglary is a crime of violence and there is a DV type victim, it is possible that it will be held a domestic violence offense triggering deportation. Counsel should keep the record of conviction from identifying the domestic relationship. However, immigration counsel have a strong argument that only crimes against persons, not property, qualify as deportable domestic violence offenses.

**Burglary in the Second Degree, ARS §13-1507**

A. A person commits burglary in the second degree by entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein.

B. Burglary in the second degree is a class 3 felony.

**Summary:** To avoid an aggravated felony, obtain a sentence of less than a year. To avoid a CMT, plead to intent to commit “theft or any felony.” To avoid possible exposure to the domestic violence ground, avoid identification of the domestic relationship in the record of conviction.

**Crime Involving Moral Turpitude:** See discussion at ARS §13-1506, *supra*. To avoid a CMT, defense counsel should create a record of conviction where the client is guilty only of “theft or any felony” or “a felony.”

**Aggravated Felony as Burglary:** Counsel should assume that burglary of a dwelling is an aggravated felony as a “burglary” offense if a sentence of a year or more is imposed, and should do everything possible to obtain a sentence of 364 days or less for each count.
However, if that can’t be avoided counsel can provide immigration attorneys an argument that the offense is not an aggravated felony by doing two things. First, to provide an argument that the offense is not an aggravated felony as burglary, counsel should create a record that leaves open the possibility that (a) the person remained unlawful “on” rather than “in” a residential structure, and/or (b) the entry or remaining was with consent, albeit with unauthorized intent (see State v. Altamirano, 166 Ariz. 432 (Ct. App. 1990). This is because the definition of burglary for immigration purposes is entry or remaining in, not on, a structure, and where the entry is unlawful, meaning without consent. See Note: Burglary.

Second, counsel should review the discussion in the next section of how to attempt to prevent the conviction from being an aggravated felony under a separate classification as a “crime of violence.”

**Aggravated Felony as a Crime of Violence:** Generally, felony burglary of a dwelling is a “crime of violence” under 18 USC § 16(b), because of the inherent risk that the burglar will encounter the resident and violence will ensue. A conviction of a crime of violence is an aggravated felony if a sentence of a year or more is imposed. To avoid this possibility, counsel should make every attempt to obtain a sentence of 364 days or less for each individual count.

If that is not possible, however, counsel can provide immigration attorneys with an argument that the offense is not a crime of violence if the record leaves open the possibility (a) that no force was used against the property (e.g., a window was not broken to gain entrance) and (b) the dwelling was not occupied at the time (meaning that it was not currently rented or lived in, as opposed to that the occupant was not at home). Regarding the latter point, the Arizona definition of dwelling includes an unoccupied dwelling. See U.S. v. Martinez-Martinez, 468 F.3d 604 (9th Cir. 2006), Immigration counsel have a good argument that there is no inherent risk that a confrontation will ensue and force will be used in the burglary of a residential structure that is not inhabited.

Where a sentence of a year or more is imposed, counsel also must ensure that the record does not establish that the offense is an aggravated felony as “burglary”; see above section.

**Domestic Violence:** Where felony burglary is a crime of violence and there is a DV type victim, it is conceivable that it will be held a domestic violence offense triggering deportation. Counsel should keep the record of conviction from identifying the domestic relationship. Immigration counsel will argue that only crimes against persons, not property, qualify as deportable domestic violence offenses.

**Burglary in the First Degree, ARS §13-1508**

A. A person commits burglary in the first degree if such person or an accomplice violates the provisions of either section 13-1506 or 13-1507 and knowingly possesses explosives, a deadly weapon or a dangerous instrument in the course of committing any theft or any felony.

B. Burglary of a nonresidential structure or a fenced commercial or residential yard is a class 3 felony. It is a class 2 felony if committed in a residential structure.

**Crime Involving Moral Turpitude:** With the correct record of conviction, this might escape classification as a CMT since all of the component offenses may be non-CMTs. Entry with intent to commit an undesignated offense ("a felony") or an offense that does not involve moral turpitude is not a CMT. Matter of M, 2 I. & N. Dec. 721 (BIA 1946). The additional element of a weapon might not transform the conviction into a CMT. See, e.g., Matter of Montenegro, 20 I. & N. Dec. 603 (1992) ("The moral condemnation comes from the act of burglary or rape, not the fact that the criminal had a gun in his pocket").
Aggravated Felony: The only truly safe strategy is to avoid a sentence of a year or more. There is no case on point. Although simple possession of a weapon is not a crime of violence, Matter of Rainford, 20 I&N Dec. 598 (BIA 1992), it is possible that a court would hold that the presence of a weapon will transform an offense that is not a crime of violence into a crime of violence.

Firearms Deportation Ground: A noncitizen is deportable if he is convicted of possessing a firearm or destructive device in violation of the law. 8 USC § 1227(a)(2)(C). A destructive device includes explosives. To avoid this ground, counsel should keep the record of conviction vague as to the weapon of possession and plead defendant to the statutory language in the disjunctive “explosives, a deadly weapon or a dangerous instrument,” or “deadly weapon,” or “dangerous instrument.” Examples of non-firearm dangerous weapons are: knives, sticks, clubs, rods, etc.

Domestic Violence: Where felony burglary is a crime of violence and there is a DV type victim, it is conceivable that it will be held a domestic violence offense triggering deportation. Counsel should keep the record of conviction from identifying the domestic relationship. Immigration counsel will argue that only crimes against persons, not property, qualify as deportable domestic violence offenses.

31. Criminal Damage, ARS § 13-1602
A. A person commits criminal damage by recklessly:
   1. Defacing or damaging property of another person; or
   2. Tampering with property of another person so as substantially to impair its function or value; or
   3. Tampering with the property of a utility.
   4. Parking any vehicle in such a manner as to deprive livestock of access to the only reasonably available water.
   5. Drawing or inscribing a message, slogan, sign or symbol that is made on any public or private building, structure or surface, except the ground, and that is made without permission of the owner.
B. Criminal damage is punished as follows:
   1. Criminal damage is a class 4 felony if the person recklessly damages property of another in an amount of ten thousand dollars or more, or if the person recklessly causes impairment of the functioning of any utility.
   2. Criminal damage is a class 5 felony if the person recklessly damages property of another in an amount of two thousand dollars or more but less than ten thousand dollars.
   3. Criminal damage is a class 6 felony if the person recklessly damages property of another in an amount of more than two hundred fifty dollars but less than two thousand dollars.
   4. In all other cases criminal damage is a class 2 misdemeanor.

Aggravated Felony: Probably not, although to be safe counsel should attempt to obtain a sentence of less than a year and/or keep the record clear of evidence that actual force was used. Under Supreme Court and Ninth Circuit precedent, a reckless causation of serious injury is not an aggravated felony. See Fernandez-Ruiz v. Gonzalez, 466 F.3d 1121 (9th Cir. 2006) (en banc) (Arizona assault is not categorically a “crime of violence” since it encompasses a mens rea of recklessness); Leocal v Ashcroft, 125 S.Ct. 377 (2004) (negligent DUI is not a crime of violence because does not create risk that force will be used, just that injury will occur); Lara-Cazares v Gonzalez, 408 F.3d 1217 (9th Cir. 2004) (killing a person by DUI with gross negligence, amounting to recklessness, is not a DUI because it does not create a risk that force will be used, under Leocal). In addition, the statute includes elements which do not require force, e.g., parking, drawing.

Crime Involving Moral Turpitude (CMT): Possibly if the damage is extensive enough. See Rodriguez-Herrera v. INS, 52 F.3d 238 (9th Cir. 1995)(second degree malicious mischief, Wash. Rev.
Code § 9A.48.080(1)(a), is a relatively minor offense that can be violated by causing $250 damage, and not a crime necessarily involving moral turpitude). Even damage far greater than $250 might escape CMT classification, however, since it can be the work of “pranksters with poor judgment. Consequently, unlike the crimes of spousal abuse, child abuse, first-degree incest, and carnal knowledge of a fifteen year old, malicious mischief does not necessarily involve an "act of baseness or depravity contrary to accepted moral standards." Id. at 240.

Other Grounds: DV. Probably not. Immigration counsel have a strong argument that force must be against person, not property, to constitute a crime of domestic violence. 8 USC 1227(a)(2)(E)(i). Where possible, however, counsel should keep record of conviction clear of use of force, and/or of a domestic relationship with the owner of the property. Also, reckless mens rea should be held insufficient to meet the definition of a “crime of domestic violence.” See supra, section discussing aggravated felony. Conviction where victim was a child and referenced as a §3601 domestic violence conviction may render one removable as a crime of child abuse. Attempt to sanitize record of child’s age or plead to criminal damage against wife/partner only and not child.

33. Criminal littering or polluting, ARS § 13-1603
A. A person commits criminal littering or polluting if such person without lawful authority does any of the following:
1. Throws, places, drops or permits to be dropped on public property or property of another which is not a lawful dump any litter, destructive or injurious material which he does not immediately remove.
2. Discharges or permits to be discharged any sewage, oil products or other harmful substances into any waters or onto any shorelines within the state.
3. Dumps any earth, soil, stones, ores or minerals on any land.
B. Criminal littering or polluting is punished as follows:
1. A class 6 felony if a knowing violation of subsection A in which the amount of litter or other prohibited material or substance exceeds three hundred pounds in weight or one hundred cubic feet in volume or is done in any quantity for a commercial purpose.
2. A class 1 misdemeanor if the act is not punishable under paragraph 1 of this subsection and involves placing any destructive or injurious material on or within fifty feet of a highway, beach or shoreline of any body of water used by the public.
3. A class 2 misdemeanor if not punishable under paragraph 1 or 2 of this subsection.

Crime Involving Moral Turpitude (CMT): No, because no mens rea requirement. This is a good alternative to Criminal Damage § 13-1602 if counsel wants to ensure that offense is not a CMT. Also may be a good alternative to offenses involving hazardous materials from meth labs.

Aggravated Felony: No.

Other: No.

34. Aggravated criminal damage, ARS § 13-1604
A. A person commits aggravated criminal damage by intentionally or recklessly without the express permission of the owner:
1. Defacing, damaging or in any way changing the appearance of any building, structure, personal property or place used for worship or any religious purpose.
2. Defacing or damaging any building, structure or place used as a school or as an educational facility.
3. Defacing, damaging or tampering with any cemetery, mortuary or personal property of the cemetery or mortuary or other facility used for the purpose of burial or memorializing the dead.
4. Defacing, damaging or tampering with any utility or agricultural infrastructure or property, construction site or existing structure for the purpose of obtaining nonferrous metals as defined in section 44-1641.

**Crime Involving Moral Turpitude (CMT):** This is a more dangerous plea than Criminal Damage. Counsel should plead to a mens rea of recklessness or plead to both “intentionally and recklessly” to have the best chance of avoiding a CMT. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996) (where reckless conduct is an element, a crime of assault can be but is not automatically a CMT).

In general, there are strong arguments that mere vandalism is not a CMT, especially if there is not a great deal of damage. *See Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995)(second degree malicious mischief, Wash. Rev. Code § 9A.48.080(1)(a), is a relatively minor offense that can be violated by causing $250 damage, and not a crime necessarily involving moral turpitude). Because it is not clear how courts will react to the added element of a place of worship, school, etc., counsel should attempt to plead to regular criminal damage. Counsel should keep the record clear of onerous facts and where possible plead to the language of the statute.

**Aggravated Felony:** This could be an aggravated felony as a crime of violence if the record shows that there was an intent (as opposed to reckless action) to use force against the property of another.

8 U.S.C. § 1101(a)(43)(F). Counsel should try to obtain a sentence of less than one year. Even a sentence of a year or more should not make the offense an aggravated felony if the record indicates or leaves open the possibility of reckless as opposed to intentional action, or indicates or leaves open the possibility of nonviolent acts, e.g. spray-painting as opposed to smashing property.

**Other – Domestic Violence:** Immigration counsel have strong arguments that the use of force against property is not a crime of domestic violence, but if possible, defense counsel should try to exclude the § 13-3601 label from the record of conviction.


A person commits reckless burning by recklessly causing a fire or explosion which results in damage to an occupied structure, a structure, wildland or property. Class 1 misdemeanor.

**Crime Involving Moral Turpitude (CMT):** The government often charges this as a CMT, but immigration counsel would have a good argument that it is not if there is a vague record of conviction. Criminally reckless behavior may be a basis for a finding of moral turpitude (see e.g. *Matter of Medina*, 15 I. & N. Dec. 611 (BIA 1976), af'd sub nom. *Medina-Luna v. INS*, 547 F.2d 1171 (7th Cir. 1977)), but only if there is another aggravating factor present for an offense to constitute a CMT (*Matter of Fualaau*, 21 I. & N. 475 (BIA 1996)). In this case, reckless burning is a relatively minor offense and does not necessarily involve an "act of baseness or depravity." *See Rodriguez-Herrera v. INS*, 52 F.3d 238, 240 (9th Cir. 1995) (Wash. second-degree malicious mischief statute does not rise to the level of either depravity or fraud that would qualify it as necessarily involving moral turpitude because is a relatively minor offense and did not necessarily involve a base act contrary to moral standards).

**Aggravated Felony:** Reckless burning cannot be an aggravated felony as a crime of violence because as a Class 1 misdemeanor it carries a maximum sentence of less than 365 days. Even with a sentence of 365 days, it would still not likely be held as an aggravated felony due to the mens rea of recklessness. *See Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc).
35. **Arson of a structure or property, ARS § 13-1703.**
Knowingly and unlawfully damaging a structure or property by knowingly causing a fire or explosion. Arson of a structure is a class 4 felony. Arson of property is a class 4 felony if the property had a value of more than one thousand dollars. Arson of property is a class 5 felony if the property had a value of more than one hundred dollars but not more than one thousand dollars. Arson of property is a class 1 misdemeanor if the property had a value of one hundred dollars or less.

**Summary:** This can be a dangerous offense. Consider a plea to §§ 13-1602 or 1702. Avoiding a sentence imposed of a year or more will avoid an aggravated felony here.

**Crime Involving Moral Turpitude (CMT):** Arson is a CMT. *Borromeo v. INS*, 213 F.3d 641 (9th Cir. 2000)(arson constitutes a CMT); Matter of T, 6 I. & N. Dec. 835 (BIA 1955).

**Aggravated Felony:** Counsel should obtain 364 days or less sentence imposed, or arson of a structure or property may be an aggravated felony as a “crime of violence” under 18 U.S.C. § 16(b). See, e.g., Matter of Palacios-Pinera, 22 I&N Dec. 434 (BIA 1998) (intentionally damaging property by starting a fire or causing an explosion). Immigration counsel can argue that the statute is divisible because it includes the burning of one’s own structure or property, while a “crime of violence” requires that the property burned be that of another. *Jordison v. Gonzales*, 501 F.3d 1134 (9th Cir. 2007) (Cal. Penal Code § 452(c) not categorically a crime of violence because it can include the burning of one’s own property). If defense counsel must accept this plea, leave the record vague as to the owner of the structure or property. Alternate plea: Reckless Burning §13-1702.

37. **Arson of an occupied structure, ARS § 13-1704.**
A. A person commits arson of an occupied structure by knowingly and unlawfully damaging an occupied structure by knowingly causing a fire or explosion.
B. Arson of an occupied structure is a class 2 felony.

**Crime Involving Moral Turpitude (CMT):** Yes. See ARS § 13-1703.

**Aggravated Felony:** Counsel should assume that § 13-1703 will be held an aggravated felony as a crime of violence if a sentence of a year or more is imposed, although immigration counsel can attempt to argue that this offense also contemplates that the structure is occupied by the arsonist himself.

38. **Arson of an occupied jail or prison facility, ARS § 13-1705**
A. A person commits arson of an occupied jail or prison facility by knowingly causing a fire or explosion which results in physical damage to the jail or prison facility.
B. Arson of an occupied jail or prison facility is a class 4 felony

See ARS § 13-1704.

39. **Burning of wildlands, ARS § 13-1706**
A. It is unlawful for any person, without lawful authority, to intentionally, knowingly, recklessly or with criminal negligence to set or cause to be set on fire any wildland other than the person's own or to permit a fire that was set or caused to be set by the person to pass from the person's own grounds to the grounds of another person….
C. A person who violates this section is guilty of an offense as follows:
1. If done with criminal negligence, the offense is a class 2 misdemeanor.
2. If done recklessly, the offense is a class 1 misdemeanor.
3. If done intentionally or knowingly and the person knows or reasonably should know that the person's conduct violates any order or rule that is issued by a governmental entity and that prohibits, bans, restricts or otherwise regulates fires during periods of extreme fire hazard, the offense is a class 6 felony.
4. If done intentionally and the person's conduct places another person in danger of death or serious bodily injury or places any building or occupied structure of another person in danger of damage, the offense is a class 3 felony.

Summary: This is a good alternative to arson under §§ 13-1703, 13-1704, and 13-1705 if counsel can plead to a reckless or negligent mens rea. Otherwise, client may be better off with § 13-1703. Arson of a Structure or Property.

Crime Involving Moral Turpitude (CMT): The government will likely charge this as a CIMT, saying it matches the definition of “arson.” See § 13-1703, CMT. However, immigration counsel has a good argument if the mens rea is recklessness or negligence. See Matter of Fualaau, 21 I. & N. 475 (BIA 1996); Matter of Sweetster, 22 I&N Dec. 709 (BIA 1999).

Aggravated Felony: If counsel pleads to a mens rea of negligence or recklessness under C1 or C2, this should not be considered an aggravated felony as a “crime of violence.” See Fernandez-Ruiz v. Gonzales, 466 F.3d 1121 (9th Cir. 2006) (en banc); Leocal v Ashcroft, 125 S.Ct. 377 (2004). However, if this is not possible, and if the sentence is likely to be one year or more, it may be better to plead to § 13-1703 and leave statute vague as to owner of the property.

4039. Theft, ARS §13-1802
A. A person commits theft if, without lawful authority, the person knowingly:
   1. Controls property of another with the intent to deprive the other person of such property;
   2. Converts for an unauthorized term or use services or property of another entrusted to the defendant or placed in the defendant's possession for a limited, authorized term or use; or
   3. Obtains services or property of another by means of any material misrepresentation with intent to deprive the other person of such property or services; or
   4. Comes into control of lost, mislaid or misdelivered property of another under circumstances providing means of inquiry as to the true owner and appropriates such property to the person's own or another's use without reasonable efforts to notify the true owner; or
   5. Controls property of another knowing or having reason to know that the property was stolen; or
   6. Obtains services known to the defendant to be available only for compensation without paying or an agreement to pay the compensation or diverts another's services to the person's own or another's benefit without authority to do so.
B……
C. The inferences set forth in section 13-2305 apply to any prosecution under subsection A, paragraph 5 of this section….
E. Theft of property or services with a value of twenty-five thousand dollars or more is a class 2 felony. Theft of property or services with a value of three thousand dollars or more but less than twenty-five thousand dollars is a class 3 felony. Theft of property or services with a value of two thousand dollars or more but less than three thousand dollars is a class 4 felony. Theft of property or services with a value of one thousand dollars or more but less than two thousand dollars is a class 5 felony. Theft of property or services with a value of two hundred fifty dollars or more but less than one thousand dollars is a class 6 felony. Theft of any property or services valued at less than two hundred fifty dollars is a class 1
misdemeanor, unless such property is taken from the person of another or is a firearm or is a dog taken for the purpose of dog fighting in violation of section 13-2910.01, in which case the theft is a class 6 felony.

F. A person who is convicted of a violation of subsection A, paragraph 1 or 3 of this section that involved property with a value of one hundred thousand dollars or more is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except pursuant to section 31-233, subsection A or B until the sentence imposed by the court has been served, the person is eligible for release pursuant to section 41-1604.07 or the sentence is commuted.

Note: If the theft involves a car, besides the other options below consider pleading to joyriding, see ARS § 13-1803.

Aggravated Felony. Under immigration laws, an aggravated felony includes a theft offense (including receipt of stolen property) where a sentence of a year or more has been imposed. 8 USC § 1101(a)(43)(G). Avoid an aggravated felony by obtaining a sentence of 364 days or less.

If it is not possible to avoid a sentence of a year or more, however, an aggravated felony still can be avoided with careful control of the record of conviction. Counsel should create a record that leaves open the possibility that the offense was A2, A3 or A6 and involved theft of services, or was A2 or A4 and did not involve an intent to deprive the owner either temporarily or permanently.

Theft by material misrepresentation, section A3, is analyzed separately. This conviction will not be an aggravated felony under the theft category if a sentence of a year or more is imposed, but will be an aggravated felony as a crime of fraud or deceit if the loss to the victim/s exceeded $10,000. Regarding proof of $10,000 loss, see Note: Fraud.

Explanation. Theft for immigration purposes is defined as “a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner or rights and benefits of ownership, even if such deprivation is less than total or permanent.” U.S. v. Corona-Sanchez, 291 F.3d 1201, 1205 (9th Cir. 2002) (emphasis added).

In Huerta-Guevara v. Ashcroft, 321 F.3d 883, 887 (9th Cir. 2003), the Ninth Circuit held a conviction under A.R.S. §13-1802 was divisible for this purpose in at least two ways. First, some subparts include the theft of services as opposed to property (see A2, A3 and A6). Second, some subparts do not require an intent to deprive the owner, either temporarily or permanently (see A2, A4 and A5). The Ninth Circuit also found that identically worded subparts of §13-1814, theft of means of transportation, do not constitute theft for this purpose. Nevarez-Martinez v. INS, 326 F.3d 1053, 1055 (9th Cir. 2003). Counsel should try not to plead to A5, because in an earlier opinion the Ninth Circuit held that knowing possession of a stolen item can be construed as receipt of stolen property, which is an aggravated felony if a sentence of a year or more is imposed. Randhawa v. Ashcroft, 298 F.3d 1148, 1154 (9th Cir. 2002). Until the tension in the Ninth Circuit is resolved as to whether one may infer a criminal intent where the statute requires only “knowing,” the safest plea for theft would leave open the possibility that defendant stole services (i.e. judgment / indictment recite boilerplate statutory language thus leaving open possibility that defendant stole services or merely refers to 13-1802 without mentioning a specific subsection). Also, counsel should avoid a plea to A1, which the Ninth Circuit found to constitute a theft offense. Fernandez-Ruiz v. Gonzales, 468 F.3d 1159, 1170 (9th Cir. 2006).

Theft by material misrepresentation. The BIA recognizes the essential difference between theft (by stealth) and fraud or deceit (by trickery). Matter of Garcia-Madruga, 24 I&N Dec. 436 (BIA 2008). Section A3 is by trickery, not stealth, and therefore it is likely that it will not be considered theft and therefore a sentence of a year or more will not make it an aggravated felony. Where a sentence of a year
or more cannot be avoided, attempt to leave the record of conviction vague between A3 and other sections, or designate A3. As always, in case this argument does not prevail it is far better to obtain 364 days on any single count.

Note that a crime involving fraud or deceit is an aggravated felony under 8 USC § 1101(a)(43)(M)(i) if the victim's loss exceeds $10,000. Regarding proof of $10,000 loss, see Note: Fraud. If the $10,000 loss will be established, but a sentence of a year or more will not be imposed, leave the record of conviction vague between A3 and the other theft sections, or designate some section other than A3.

**Crime Involving Moral Turpitude:** Intent to permanently deprive is required for a CMT. Theft offenses that do not involve intent to permanently deprive the owner of the property are not classified as theft crimes involving moral turpitude. See e.g. Matter of P, 2 I&N Dec. 887 (BIA 1947); Matter of M, 2 I&N Dec. 686 (BIA 1946) (conviction for joyriding does not involve moral turpitude because defendant did not intent to effect a permanent taking). Theft offenses that require as an essential element the intent to permanently deprive the owner of his or her property have consistently been held to involve moral turpitude. *Gutierrez-Chavez v. INS*, 8 F.3d 26 (9th Cir. 1993).

Where a theft statute prohibits both temporary and permanent taking, the statute is considered divisible, allowing the record of conviction to be examined to determine whether the conviction was under the portion of the statute relating to permanent taking. ARS § 13-1802 is arguably a divisible statute. Subsections A1 and A3 contain an element to deprive the owner of property but not permanent deprivation. *In re Juvenile Action No. J-98065*, 141 Ariz. 404, 687 P.2d 412 (Ct. App. 1984) (theft does not require permanent deprivation; the statute requires control with the intent to deprive). Arguably, no subsection of theft is a crime involving moral turpitude because each subsection lacks an element of permanent deprivation. Subsections A2, A4, A5 and A6 do not have an element to deprive. A5 could be analogized to receiving stolen property which has been held to involve moral turpitude. *Wadman v. INS*, 329 F.2d 812 (9th Cir. 1964) (finding receiving stolen property to be a CMT where defendant knew property was stolen). A6 could be a CMT because an intent to permanently deprive may be inferred.

**Compare Theft Aggravated Felony and CMT:** The aggravated felony definition of theft excludes theft of services, but includes theft with less than permanent intent to deprive. To be a crime involving moral turpitude, there must be intent to permanently deprive, but whether the theft is of services or property is irrelevant.

**40. Unlawful use of means of transportation (joyriding), ARS §13-1803**

A. A person commits unlawful use of means of transportation if, without intent permanently to deprive, the person either:
1. Knowingly takes unauthorized control over another person's means of transportation (class 5 felony).
2. Knowingly is transported or physically located in a vehicle that the person knows or has reason to know is in the unlawful possession of another person pursuant to paragraph 1 or section 13-1814. (class 6 felony)

**Aggravated Felony.** No. A conviction for unlawful use of means of transportation is not an aggravated felony theft offense, as the intent to deprive the owner of use or possession is not an element of the offense. *United States v. Perez-Corona*, 295 F.3d 996 (9th Cir. 2002). Counsel should keep the record of conviction clear of evidence of an intent to deprive; if not, and if a sentence of a year or more is imposed, DHS will attempt to argue that the offense will meet the definition of an aggravated felony.
Crimes Involving Moral Turpitude (CMT). No. Theft offenses that do not involve intent to permanently deprive the owner of the property are NOT classified as theft crimes involving moral turpitude. See e.g. Matter of P, 2 I&N Dec. 887 (BIA 1947); Matter of M, 2 I&N Dec. 686 (BIA 1946) (conviction for joyriding does not involve moral turpitude because defendant did not intent to effect a permanent taking).

42. Theft by Extortion, ARS § 13-1804
A. A person commits theft by extortion by knowingly obtaining or seeking to obtain property or services by means of a threat to do in the future any of the following:
1. Cause physical injury to anyone by means of a deadly weapon or dangerous instrument.
2. Cause physical injury to anyone except as provided in paragraph 1 of this subsection.
3. Cause damage to property.
4. Engage in other conduct constituting an offense.
5. Accuse anyone of a crime or bring criminal charges against anyone.
6. Expose a secret or an asserted fact, whether true or false, tending to subject anyone to hatred, contempt or ridicule or to impair the person's credit or business.
7. Take or withhold action as a public servant or cause a public servant to take or withhold action.
8. Cause anyone to part with any property…
C. Theft by extortion as defined in subsection A, paragraph 1 is a class 2 felony. Otherwise, theft by extortion is a class 4 felony.

Crime Involving Moral Turpitude (CMT): Counsel should assume that immigration judges will hold that a conviction under § 13-1804 constitutes a crime involving moral turpitude. See, e.g., Matter of GT, 4 I&N Dec. 446 (BIA 1951) (sending threatening letters with intention to extort is a CMT). However, immigration attorneys at least may have good arguments that some subsections are not CMT’s. Extortion is defined in Black’s Law Dictionary, as “the act or practice of obtaining something or compelling some action by illegal means, as by force or coercion” (7th Ed) (emphasis added). Sections A5, A6, and A7 do not necessarily involve “illegal means”; however, an immigration judge may still conclude that such conduct is a CMT as “inherently base, vile, or depraved.” Matter of Danesh, 19 I&N Dec. 669, 670 (BIA 1988).

Aggravated Felony: Theft. Counsel should assume conservatively that theft by extortion will be held to constitute a taking without consent, and therefore may be an aggravated felony as theft if a sentence of a year or more is imposed. See discussion of Theft, above. To prevent this, counsel should leave the record of conviction vague between theft of property and services, or designate services. Theft is defined as “a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner or rights and benefits of ownership, even if such deprivation is less than total or permanent.” U.S. v. Corona-Sanchez, 291 F.3d 1201, 1205 (9th Cir. 2002) (emphasis added).

Crime of violence. The offense also may be an aggravated felony as a crime of violence if a sentence of at least a year is imposed. A “crime of violence” involves the use, attempted use, or threatened use of physical force against the person or property of another. 18 U.S.C. § 16(a). Counsel should assume that a conviction under A1, A2, or perhaps A3, or where the record shows use or threat of force, is likely to be an aggravated felony if a sentence of a year or more is imposed.

42. Shoplifting, ARS § 13-1805
A. A person commits shoplifting if, while in an establishment in which merchandise is displayed for sale, the person knowingly obtains such goods of another with the intent to deprive that person of such goods by:

1. Removing any of the goods from the immediate display or from any other place within the establishment without paying the purchase price; or
2. Charging the purchase price of the goods to a fictitious person or any person without that person's authority; or
3. Paying less than the purchase price of the goods by some trick or artifice such as altering, removing, substituting or otherwise disfiguring any label, price tag or marking; or
4. Transferring the goods from one container to another; or
5. Concealment.

B. A person is presumed to have the necessary culpable mental state pursuant to subsection A of this section if the person does either of the following:

1. Knowingly conceals on himself or another person unpurchased merchandise of any mercantile establishment while within the mercantile establishment.
2. Uses an artifice, instrument, container, device or other article to facilitate the shoplifting.

Shoplifting is a class 5 felony if the value was $2,000 or more, if undertaken during a “continuing criminal episode,” or if done to assist a criminal street gang or syndicate. Shoplifting is a class 6 felony if the value was $1000 or more but less than $2000, and a class 1 misdemeanor if property is less than $1000, except for a firearm. Certain priors can make it a class 4 felony.

Summary: Theft is a better means of avoiding an aggravated felony with a year’s sentence.

Crime Involving Moral Turpitude (CMT): Shoplifting is a CMT when it includes as an element intent to steal or deprive permanently. An IJ will likely find that result here.

Immigration counsel at least can argue against this, however, when the record of conviction leaves open the possibility that intent to deprive permanently was “presumed” only because the person knowingly concealed an object. See §13-1805(B). A person, for example shopping without a cart or basket, might “knowingly” conceal an object in a pocket and then sincerely forget to bring it out and pay for it with other objects. This ought not to be held to involve moral turpitude. Therefore, criminal defense counsel should try either to identify subsection (B) in the record of conviction, or to leave the record of conviction vague enough to support the possibility that subsection (B) applied.

Note that a first moral turpitude offense that is a misdemeanor cannot cause deportability because it has a maximum sentence of only six months. A class 6 felony can, only if the offense was committed within five years of admission to the United States. See Note: Crimes Involving Moral Turpitude.

Aggravated Felony: Shoplifting will be considered an aggravated felony if a sentence to imprisonment of 365 days or more is imposed. 8 USC § 1101(a)(43)(G). Counsel should avoid a sentence of 365 days or more. Time imposed under §13-1805(I) as a recidivist sentence enhancement will be included in this calculation.  U.S. v. Rodriguez, 128 S.Ct. 1783 (2008) (overruling U.S. v Corona-Sanchez, 291 F.3d 1201, 1210 (9th Cir. 2002) (en banc) to find that recidivist sentence enhancements are given effect). Shoplifting is an aggravated felony “theft” offense because it involves “a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent.” Corona-Sanchez at 1205.

43. Issuing a Bad Check, ARS § 13-1807
A. A person commits issuing a bad check if the person issues or passes a check knowing that the person does not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check as well as all other checks outstanding at the time of issuance.

B. Any of the following is a defense to prosecution under this section: 1. The payee or holder knows or has been expressly notified before the drawing of the check or has reason to believe that the drawer did not have on deposit or to the drawer's credit with the drawee sufficient funds to ensure payment on its presentation. 2. The check is postdated and sufficient funds are on deposit with the drawee on such later date for the payment in full of the check. 3. Insufficiency of funds results from an adjustment to the person's account by the credit institution without notice to the person...

D. Except as provided in subsection E of this section, issuing a bad check is a class 1 misdemeanor.

E. Issuing a bad check in an amount of five thousand dollars or more is a class 6 felony if the person fails to pay the full amount of the check, including accrued interest at the rate of twelve per cent per year and any other applicable fees pursuant to this chapter, within sixty days after receiving notice pursuant to section 13-1808.

**Summary.** While the law is not clear, this is a possible safe plea to avoid moral turpitude and the aggravated felony fraud.

**Crime Involving Moral Turpitude:** Possibly divisible; counsel should control record of conviction. Issuing bad checks is a CMT if intent to defraud is an essential element of the crime, either by specific language or cases interpreting it. *See, e.g., Burr v. INS*, 350 F.2d 87 (9th Cir. 1965). It is not a CMT if such intent is lacking. *See, e.g., Matter of Balao*, 20 I. & N. Dec. 440 (BIA 1992). ARS § 13-1807 requires merely that the person act “knowing that the person does not have sufficient funds.” While Arizona courts have not spoken on the issue of whether proof of fraudulent intent is necessary to sustain a conviction, it appears that it is not. For example, a person could be found guilty who wrote a non-postdated bad check but intended to place sufficient money in the account by the time the check cleared. However, if the record of conviction established fraudulent intent, it is possible that a court would consider that as an element of the offense, so counsel should keep the record clear of this.

**Aggravated Felony as Fraud or Deceit:** Possibly divisible. If §13-1807 is considered to have fraud or deceit as an element, it will be an aggravated felony regardless of the sentence imposed if the “loss to the victim or victims exceeds $10,000.” 8 USC § 1101(a)(43)(M) and (U). ARS § 13-1807 requires that the defendant pass a check “knowing” that he lacks sufficient funds. Again, immigration counsel will point out that intent to deceive is not an element, and the statute could be violated by a person who intended to place funds in the account immediately. However, a more secure plea can be obtained based on the difference between a crime of deceit and the crime of theft, which is a taking without consent. *See Matter of Garcia-Madruga*, 24I&N Dec. 436 (BIA 2008). As long as a sentence of a year or more will not be imposed, where there is a loss exceeding $10,000 a more secure plea would be to a straight theft offense. (While a sentence of a year or more will make a conviction of theft an aggravated felony, the fact that the loss to the victim/s exceeded $10,000 will not.) A plea to ARS § 13-1802 should avoid an aggravated felony even with a showing of a loss to the victim/s of over $10,000, as long as the record does not describe fraud or deceit and section A3 (theft by material misrepresentation) is not specifically designated. Regarding proof of $10,000 loss, see Note: Fraud.

44. **Theft of means of transportation, ARS §13-1814**
A. A person commits theft of means of transportation if, without lawful authority, the person knowingly does one of the following:
1. Controls another person's means of transportation with the intent to permanently deprive the person of the means of transportation.
2. Converts for an unauthorized term or use another person's means of transportation that is entrusted to or placed in the defendant's possession for a limited, authorized term or use.

3. Obtains another person's means of transportation by means of any material misrepresentation with intent to permanently deprive the person of the means of transportation.

4. Comes into control of another person's means of transportation that is lost or misdelivered under circumstances providing means of inquiry as to the true owner and appropriates the means of transportation to the person's own or another's use without reasonable efforts to notify the true owner.

5. Controls another person's means of transportation knowing or having reason to know that the property is stolen.

**Summary:** The statute is divisible; plead to the statute as a whole or to A2 or A4.

**Aggravated Felony.** Maybe. Avoid an aggravated felony by avoiding a sentence imposed of a year or more. Even if a sentence of a year or more is imposed, a conviction under ARS §13-1804 does not constitute an aggravated felony if the record of conviction does not eliminate the possibility that the conviction was for A2 or A4, with no indication of an intent to deprive the owner. In *Nevarez-Martinez v. INS*, 326 F.3d 1053 (9th Cir. 2003) the Court found that § 13-1814 is divisible because sections A2, A4 and A5 contain no element of deprivation and, thus, do not meet the generic definition of theft. However, counsel should avoid a plea to A5 in case it is held an aggravated felony as possession of stolen property. Sections A1 and A3 contain an element of intent to deprive and as such are aggravated felonies.

**CMT.** A2 and A4 should not be held to be CMT’s because they do not involve intent to permanently deprive the owner of the property. See e.g. *Matter of D*, 1 I&N Dec. 143 (BIA 1941) (driving an automobile without the consent of the owner is not a crime involving moral turpitude); *Matter of P*, 2 I&N Dec. 887 (BIA 1947); *Matter of M*, 2 I&N Dec. 686 (BIA 1946) (conviction for joyriding does not involve moral turpitude because defendant did not intent to effect a permanent taking).

A1 and A3 are CMTs because each contains the element of intent to permanently deprive. A5 may be held a CMT as akin to receipt of stolen property. *Wadman v. INS*, 329 F.2d 812 (9th Cir. 1964).

45. **Robbery Offenses**

**Robbery, ARS § 13-1902.**

A. A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.

**Crime Involving Moral Turpitude (CMT):** Yes.

**Aggravated Felony:** If a sentence of a year or more is imposed, robbery will be an aggravated felony as a theft crime or as a crime of violence. *State v. Hudson*, 152 Ariz.121, 730 P2d 830 (1986) (finding that robbery is, by definition, a crime involving violence).

**Aggravated robbery, ARS § 13-1903.**

See Robbery, § 13-1902.

**Armed robbery, ARS § 13-1904.**
A. A person commits armed robbery if, in the course of committing robbery as defined in section 13-1902, such person or an accomplice:
   1. Is armed with a deadly weapon or a simulated deadly weapon; or
   2. Uses or threatens to use a deadly weapon or dangerous instrument or a simulated deadly weapon.

Crime Involving Moral Turpitude (CMT): Yes.

Aggravated Felony: If sentenced to a year or more, aggravated robbery can be an aggravated felony as a crime of violence or a theft crime. See Robbery, § 13-1902.

Firearms Ground: Armed robbery may be a deportable offense under 8 U.S.C. 1227(a)(2)(C) as a firearms offense if the record of conviction indicates that a firearm was involved in the offense. Because not all deadly weapons are firearms, if the record of conviction does not indicate that a firearm was involved, the conviction does not trigger deportability under the firearms ground. Matter of Pichardo, Int. Dec. 3275 (BIA 1996)(where the record of conviction failed to identify the subdivision under which the alien was convicted or the weapon he was convicted of possessing, deportability is not proven even where the alien testified in immigration proceedings that the weapon he possessed was a gun).

46. Forgery, A.R.S. 13-2002

With intent to defraud, the person: 1. Falsely makes, completes or alters a written instrument; or 2. Knowingly possesses a forged instrument; or 3. Offers or presents, whether accepted or not, a forged instrument or one that contains false information.

Crime Involving Moral Turpitude: Yes.

Aggravated felony as Forgery: Counsel should conservatively assume that the offense will be held to constitute forgery, and therefore be an aggravated felony if a sentence of at least a year is imposed. 8 USC §1101(a)(43)(R). However, immigration counsel have a strong argument that the statute is divisible since a conviction under A3 can involve a real document that contains false information, such as a validly-issued driver’s license with a false name or date of birth. See Vizcarra-Ayala v. Mukasey, 514 F.3d 870 (9th Cir. 2008) (Cal. Penal Code § 475(c) encompasses conduct involving real, unaltered documents and thus is not categorically an offense "relating to forgery" under 8 U.S.C. § 1101(a)(43)(R)). Therefore counsel should either plead to A3 as offering or presenting a document that contains false information, or else leave the plea vague as to subsection.

Aggravated Felony as Fraud or Deceit: Yes, if it involved a loss to the victim or victims of more than $10,000. 8 USC §1101(a)(43)(M). Regarding proof of $10,000 loss, see Note: Fraud.

47. Possession of forgery device, A.R.S. § 13-2003A.

A. A person commits criminal possession of a forgery device if the person either:
   1. Makes or possesses with knowledge of its character and with intent to commit fraud any plate, die, or other device…. specifically designed or adapted for use in forging written instruments, or
   2. Makes or possesses any device, apparatus …. adaptable for use in forging written instruments with intent to use it or to aid or permit another to use it for purposes of forgery.

Crime Involving Moral Turpitude (CMT): Both sections are CMTs because both involve fraud.
**Aggravated Felony as Forgery.** To avoid an aggravated felony, avoid a sentence imposed of a year or more. Assume both will be deemed “an offense relating to forgery” and be an aggravated felony if a sentence of a year or more is imposed. See 8 USC §1101(a)(43)(R).

**Aggravated Felony as Fraud.** Yes, if the loss to the victim or victims exceeds $10,000. 8 USC § 1101(a)(43)(M). Regarding proving a loss exceeding $10,000, see Note: Fraud.

48. **Criminal simulation, ARS § 13-2004.**
A. A person commits criminal simulation if, with intent to defraud, such person makes, alters, or presents or offers, whether accepted or not, any object so that it appears to have an antiquity, rarity, source, authorship or value that it does not in fact possess.
B. Criminal simulation is a class 6 felony.

**Crime Involving Moral Turpitude (CMT):** Yes, because it requires an intent to defraud.

**Aggravated Felony as Fraud or Deceit.** Yes, if the loss to the victim or victims exceeds $10,000. INA 101(a)(43)(M). Regarding proving a loss exceeding $10,000, see Note: Fraud.

50. **Criminal impersonation, ARS § 13-2006**
A. A person commits criminal impersonation by:

1. Assuming a false identity with the intent to defraud another; or
2. Pretending to be a representative of some person or organization with the intent to defraud; or
3. Pretending to be, or assuming a false identity of, an employee or a representative of some person or organization with the intent to induce another person to provide or allow access to property. This paragraph does not apply to peace officers in the performance of their duties.
B. Criminal impersonation is a class 6 felony.

**Crime Involving Moral Turpitude (CMT):** May be divisible. A1 and A2 are CMT’s due to the fraud element. A3 ought not to be held a CMT because falsely identifying oneself with no intent to obtain something of value has been held not to constitute a CMT by the Ninth Circuit. See Blanco v. Mukasey, 518 F.3d 714 (9th Cir. 2008). Since providing or allowing access to property is not necessarily something of monetary value or otherwise “tangible,” a conviction under A3 should not be considered a CMT. However, in practice, many immigration judges will still find this to be a CMT.

**Aggravated Felony:** Yes, if the loss to the victim or victims exceeds $10,000. 8 USC § 1101(a)(43)(M). Regarding proving a loss exceeding $10,000, see Note: Fraud.

50. **Taking Identity of Another Person or Entity, ARS 13-2008**
A. A person commits taking the identity of another person or entity if the person knowingly takes, purchases, manufactures, records, possesses or uses any personal identifying information or entity identifying information of another person or entity, including a real or fictitious person or entity, without the consent of that other person or entity, with the intent to obtain or use the other person's or entity's identity for any unlawful purpose or to cause loss to a person or entity whether or not the person or entity actually suffers any economic loss as a result of the offense…
E. Taking the identity of another person or entity is a class 4 felony.
Summary. While there are strong arguments that a conviction for Taking Identity should not be a CMT, many immigration judges in Arizona are currently finding that it is a CMT. The Ninth Circuit recently held that falsely identifying oneself to a police officer is not a CMT; therefore, immigration counsel may have stronger arguments that § 13-2008 is not categorically a CMT since the elements of the California and Arizona statutes are similar. See Blanco v. Mukasey, 518 F.3d 714 (9th Cir. 2008). In terms of aggravated felony designations, the statute is divisible because it covers an extremely broad range of conduct. It doesn’t necessarily involve writing (required for the aggravated felony forgery), property (required for theft), or money (required for fraud). It seems to include offenses such as giving a false name to the police to avoid a warrant; using someone else’s social security number to get a job; person using a fake ID to prove he’s 25 to rent a car. (Use of fake ID for access to alcohol is specifically excluded by recent amendment; ARS § 13-2008(D)). If a person pleads to the language of the statute, the government will not be able to establish sufficient facts for an aggravated felony. Theft may be a more secure option, however, since there is established case law and practice in its favor.

Crime Involving Moral Turpitude (CMT): A very vague record of conviction may prevent this from being a CMT. The minimum conduct to violate the statute is that lawfully obtained information must be used without the other person’s consent with the intent to use the identity for an unlawful purpose. For example, an 18-year-old might use his older brother’s identification to get a job transporting liquor in violation of A.R.S. §4-244, someone who doesn’t have a social security number might use someone else’s to get a job, or a man might use a relative’s identification to purchase an appliance without having his credit rating checked, where he intends to timely complete payment for the appliance. Although immigration judges have often found this to be a CMT, immigration counsel have new arguments that it should not be so held. See Blanco v. Mukasey, 518 F.3d 714 (9th Cir. 2008).

Aggravated Felony: To prevent an aggravated felony conviction as theft, obtain a sentence imposed of less than a year. If there was a loss to the victim or victims of $10,000 or more, this will likely be removable as an aggravated felony for fraud. Regarding proving a loss exceeding $10,000, see Note: Fraud.

Theft: A theft offense is an aggravated felony if a one-year sentence is imposed. 8 USC §1101(a)(43)(G). A sufficiently vague record of conviction can prevent a finding that the offense of conviction constituted “theft” for this purpose. The information itself need not be stolen, and the unlawful purpose of the crime could be a non-theft offense. See discussion in “crimes involving moral turpitude” above. For example, a person might use identifying information to which he had lawful access, but without the person’s consent, in order to wrongly obtain someone else’s services (theft of services is not “theft” as an aggravated felony; see discussion at ARS §13-1802) or for some other criminal purpose not involving theft. In that case even a sentence imposed of a year or more would not make the conviction an aggravated felony.

Fraud or Deceit if the Loss to the Victim Exceeds $10,000: An offense involving fraud or deceit is an aggravated felony if there is a loss to the victim of more than $10,000. 8 USC §1101(a)(43)(M)(i). Regarding proof of $10,000 loss to the victim, see Note; Fraud.

Where loss to the victim/s exceeds $10,000, counsel could attempt to avoid a plea to this offense from being found a crime of “deceit” by keeping the record of conviction clear of evidence that the “criminal purpose” for which the information was to be used involved fraud or deceit. However, DHS still might charge that deceit is inherent in the commission of the offense. If possible to obtain, a safer plea would be to theft, without designating section A3, and with a sentence of less than a year.
52. **Smuggling, ARS § 13-2319**

A. It is unlawful for a person to intentionally engage in the smuggling of human beings for profit or commercial purpose.

B. A violation of this section is a class 4 felony.

C. Notwithstanding subsection B, a violation of this section is a class 2 felony if the human being smuggled is under eighteen years of age and not accompanied by a family member over the age of eighteen…

2. "Smuggling of human beings" means the transportation or procurement of transportation by a person or an entity that knows or has reason to know that the person or persons transported or to be transported are not United States citizens, permanent resident aliens or persons otherwise lawfully in this state.

**Summary:** In some Arizona counties, persons who are themselves being smuggled are regularly charged with conspiracy to commit smuggling under § 13-2319. Since many of these people may, in fact, be eligible to apply for immigration status, a conviction under this statute could have severe immigration consequences even if the person him or herself was not the “smuggler.”

**Crime Involving Moral Turpitude (CMT):** Defense counsel should conservatively assume that immigration judges will find transporting noncitizens for gain to be a CMT. Since conspiracy to commit an offense constitutes a CMT if the substantive offense constitutes a CMT, even conspiracy to commit § 13-2319 will likely be a CMT. See 9 U.S. Dep’t of State, (FAM) § 40.21(a), n.2.4(a)(4).

**Aggravated Felony:** Yes, as a smuggling offense pursuant to 8 U.S.C. § 1101(a)(43)(N). However, there is an exception if the person smuggled is a spouse, child, or parent of the smuggler. If the person smuggled fits into this exception, counsel should attempt to include this in the record of conviction; if not, leaving the record vague as to the identity of the person smuggled may give immigration counsel a slight chance at avoiding an aggravated felony.

**Other - Smuggling:** Smuggling is a ground of removability for all non-citizens. If a non-citizen has not been lawfully admitted to the U.S., smuggling committed “at any time” will make her inadmissible. 8 U.S.C. § 1182(a)(6)(E). If the non-citizen has been lawfully admitted, she will be deportable if the smuggling was committed “prior to the date of entry, at the time of any entry, or within five years of the date of any entry.” 8 U.S.C. § 1227(a)(1)(E). Therefore, smuggling that was committed by a lawfully-admitted person over five years ago may not be removable as long as the person does not leave the country. An exception may also exist for a lawfully-admitted person if the individual smuggled is the spouse, parent or child of the smuggler.

Smuggling does not require a conviction but only need be proven in immigration court by clear and convincing evidence that a person “knowingly has encouraged, induced, assisted, abetted, or aided any other alien to try to enter” the U.S. Because it requires the act to be committed against “any other alien,” it should arguably not apply for being convicted of a conspiracy to smuggle oneself.

53. **Compounding, ARS § 13-2405**

A. A person commits compounding if such person knowingly accepts or agrees to accept any pecuniary benefit as consideration for:

1. Refraining from seeking prosecution of an offense; or

2. Refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to the offense.

B. Subsection A shall apply in all cases except those which are compromised by leave of court as provided by law.
C. Compounding is a class 6 felony if the crime compounded is a felony. If the crime compounded is not a felony, compounding is a class 3 misdemeanor.

**Summary:** This may be a good alternative to a controlled substance offense, particularly for defendants who are involved in a drug trafficking scheme but must avoid a controlled substance conviction for immigration purposes. Immigration counsel can also make the argument that it is not a CMT.

**Crime Involving Moral Turpitude (CMT):** While this may be held a CMT, and at least one immigration judge has done so, immigration attorneys have strong arguments against this. The elements of this offense most closely match the elements of misprision or accessory after the fact after the fact, with the added element of a pecuniary benefit. In *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc), the Ninth Circuit found that a conviction for accessory after the fact was not a crime involving moral turpitude since it could include such conduct as a person providing food and shelter to a family member who has committed a crime. While ICE may argue that the element of a “pecuniary benefit” turns the offense into a CMT, there is not necessarily any legal authority for this position. There is no required intent to do harm, and a person might refrain from reporting a crime not only for the pecuniary gain, but out of desire to help a relative, or fear of reprisal from the perpetrator.

**Aggravated Felony:** It should not be, although counsel should attempt to avoid a sentence of 365 or more on any single count because of the danger that the government would assert that this constitutes obstruction of justice. A conviction relating to obstruction of justice is an aggravated felony if a sentence of one year or more is imposed. 8 U.S.C. § 1101(a)(43)(S). The BIA held that accessory after the fact under 18 USC § 3 (hiding and giving comfort to a person who committed a crime) is obstruction of justice. *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997). However, it held that Misprision of a felony under 18 USC § 4 (concealing that a crime was committed) is not obstruction of justice. *Matter of Espinoza*, 22 I&N Dec. 889 (BIA 1999). Compounding requires even less action than federal misprision, because it can be violated by merely refraining from reporting while misprision requires active concealment. Neither is compounding necessarily related to an ongoing prosecution or grand jury proceeding. The addition of pecuniary gain does not make the offense more closely related to obstruction. However, as always counsel should attempt to secure a sentence of 364 days or less.

54. **Tampering with a Public Record, ARS § 13-2407**

A. A person commits tampering with a public record if, with the intent to defraud or deceive, such person knowingly:

1. Makes or completes a written instrument, knowing that it has been falsely made, which purports to be a public record or true copy thereof or alters or makes a false entry in a written instrument which is a public record or a true copy of a public record; or
2. Presents or uses a written instrument which is or purports to be a public record or a copy of such public record, knowing that it has been falsely made, completed or altered or that a false entry has been made, with intent that it be taken as genuine; or
3. Records, registers or files or offers for recordation, registration or filing in a governmental office or agency a written statement which has been falsely made, completed or altered or in which a false entry has been made, with intent that it be taken as genuine; or
4. Destroys, mutilates, conceals, removes or otherwise impairs the availability of any public record; or
5. Refuses to deliver a public record in such person's possession upon proper request of a public servant entitled to receive such record for examination or other purposes.
B. In this section "public record" means all official books, papers, written instruments or records created, issued, received or kept by any governmental office or agency or required by law to be kept by others for the information of the government.

C. Tampering with a public record is a class 6 felony.

**Crime Involving Moral Turpitude (CMT):** Should be divisible. An intent to deceive is not necessarily a CMT unless elements of fraud and materiality are present. *Hirsch v. INS*, 308 F.2d 562 (9th Cir. 1962); *see also Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2007). Counsel should plead to language of an intent to deceive, rather than to defraud.

**Aggravated Felony – Fraud:** Yes, if the loss to the victim is more than $10,000. Regarding proof of $10,000 loss to the victim, see Note; Fraud. If the loss to the victim was over $10,000 but the sentence would be less than a year, consider a plea to theft, without designating theft by misrepresentation.

**Aggravated Felony – Forgery:** A conviction relating to a document that has been “falsely made” in which there is a sentence of 365 days or longer may constitute an aggravated felony as forgery under 8 U.S.C. § 1101(a)(43)(R). *See Vizcarra-Ayala v. Mukasey*, 514 F.3d 870 (9th Cir. 2008). Counsel should plead to language that the person made a “false entry” rather than that the document was “falsely made,” and try to secure a sentence of 364 days or less.

**55. Securing the Proceeds of an Offense, ARS § 13-2408**
A. A person commits securing the proceeds of an offense if, with intent to assist another in profiting or benefiting from the commission of an offense, such person aids the person in securing the proceeds of the offense.
B. Securing the proceeds of an offense is a class 6 felony if the person assisted committed a felony. Securing the proceeds of an offense is a class 2 misdemeanor if the person assisted committed a misdemeanor.

**Crime Involving Moral Turpitude (CMT):** This may be a good alternative for immigration purposes. While there is no case law on point, the statute is extremely broad and could encompass conduct that is not necessarily a CMT, including accessory after the fact. *See Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc). Although one immigration judge has found it to be categorically a CMT, the arguments are strong to the contrary. Counsel should plead to the straight statutory language of the offense.

**Aggravated Felony:** No.

**56. Escape, ARS §§ 13-2502 – 13-2504**

**Escape in the third degree, § 13-2502**
A. A person commits escape in the third degree if, having been arrested for, charged with or found guilty of a misdemeanor or petty offense, such person knowingly escapes or attempts to escape from custody…

**Escape in the second degree, § 13-2503**
A. A person commits escape in the second degree by knowingly:
1. Escaping or attempting to escape from a juvenile secure care facility, a juvenile detention facility or an adult correctional facility; or
2. Escaping or attempting to escape from custody imposed as a result of having been arrested for, charged with or found guilty of a felony; or
3. Escaping or attempting to escape from the Arizona state hospital if the person was committed to the hospital for treatment pursuant to section 8-291.09, 13-502, 13-3994, 13-4507, 13-4512 or 31-226, title 36, chapter 37 or rule 11 of the Arizona rules of criminal procedure.

**Escape in the first degree, § 13-2504**

A. A person commits escape in the first degree by knowingly escaping or attempting to escape from custody or a juvenile secure care facility, juvenile detention facility or an adult correctional facility by:
1. Using or threatening the use of physical force against another person; or
2. Using or threatening to use a deadly weapon or dangerous instrument against another person.

**Crime Involving Moral Turpitude (CMT):** While §§ 13-2502 and 13-2503 are likely not CMT’s, § 13-2504 is probably a CMT due to the use or threatened use of force. *See Matter of M,* 2 I&N Dec. 871 (BIA 1947) (conviction of breaking prison does not involve moral turpitude since it does not require the element of force or fraud); *Matter of Z,* 1 I&N Dec. 235 (BIA 1942) (prison breach does not involve moral turpitude since the offense did not require force or fraud as an essential element).

**Aggravated Felony:** Escape could potentially be charged as an aggravated felony under either 8 U.S.C. § 1101(a)(43)(S) as an offense relating to obstruction of justice for which the sentence imposed is one year or more or under 8 U.S.C. § 1101(a)(43)(F) as a crime of violence for which the sentence imposed is one year or more.

*As obstruction of justice:* If possible, obtain a sentence of 364 days or less. Even with a sentence imposed of a year, the offense is unlikely to be held obstruction of justice if the record indicates or leaves open the possibility that the escape occurred either before or after the commencement of proceedings before a tribunal. *Renteria-Morales v. Mukasey,* ___ F.3d ___, 2008 U.S. App. LEXIS 14649 (9th Cir. July 10, 2008). Therefore, an escape that occurs before charges have been filed, or while the defendant is serving her sentence after judicial proceedings have been concluded, should not be held an obstruction of justice.

*As a crime of violence:* Escape in the third or second degree would not meet the definition of a “crime of violence.” However, the element of “using or threatening to use” physical force, a deadly weapon, or a dangerous instrument would make conviction for first degree Escape a “crime of violence” pursuant to 18 U.S.C. §16 if a sentence of one year or more is imposed. Counsel should try to plead to second or third degree Escape and/or secure a sentence of 364 days or less.

**57. Failure to Appear, ARS §13-2506-7**

**FTA in the first degree, §13-2507,** occurs when a person, having been required by law to appear in connection with any felony, knowingly fails to appear as required. **FTA in the second degree, ARS §13-2506,** occurs when a misdemeanor or petty offense is involved.

**Summary:** While §13-2506 is harmless, §13-2507 can be very dangerous. Plead to something else and take additional time on the underlying offense.

**Crime Involving Moral Turpitude (CMT):** Probably not a CMT.

**Aggravated Felony:** An offense is an aggravated felony if it involves (a) failure to appear for service of sentence if the underlying offense carries a *possible* sentence of five years or more, or (b)
failure to appear before a court pursuant to a court order to answer to or dispose of a felony carrying a possible sentence of two years or more. 8 USC §§ 1101(a)(43)(Q), (T). Because § 13-2506 requires failure to appear for a misdemeanor or petty offense, it cannot be an aggravated felony. However, a conviction under § 13-2507 will be an aggravated felony if it satisfies either of the above grounds.

58 Resisting Arrest, ARS § 13-2508

A. A person commits resisting arrest by intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer, acting under color of such peace officer's official authority, from effecting an arrest by:
   1. Using or threatening to use physical force against the peace officer or another; or
   2. Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

B. Resisting arrest is a class 6 felony.

Physical force is defined in ARS 13-105(28) as “force used upon or directed toward the body of another person and includes confinement, but does not include deadly physical force.”

Summary: With a clear record of conviction this may not be a CMT. Obtain a sentence of 364 days or less to avoid an aggravated felony.

Crime Involving Moral Turpitude: Probably not, although it is possible. This is akin to simple assault against a police officer, in that only the added factor that the victim is an officer would make it a CMT. Certainly it is a better alternative than aggravated assault against an officer under ARS §13-1204. If possible plead to simple assault under §13-1203(A)(3) (offensive touching), or another less dangerous offense in Note: Safer Pleas. Or, to prevent inadmissibility or deportability for a single moral turpitude conviction, plead to attempt or another ancillary offense with a lesser potential sentence.

A1. While there may be some confusion on this issue, the better view is that only aggravated assault against a police officer (involving, e.g., felonious intent, use of physical force or violence, serious bodily harm, or use of deadly weapon) has been held to involve moral turpitude. See discussions in Matter of Logan, 17 I. & N. Dec. 367 (BIA 1980); Matter of Danesh, 19 I. & N. Dec. 669, 670 (BIA 1988); Matter of Short, 20 I. & N. 136, 139 (BIA 1989); Matter of B-, 5 I. & N. Dec. 538 (BIA 1953); Matter of Fualaau, 21 I. & N. Dec. 475, 478 (BIA 1996); Matter of Baker, 15 I. & N. Dec. 50 (BIA 1974); Matter of O-, 4 I. & N. Dec. 301 (BIA 1951).

A2. This should not be held to involve moral turpitude because there is no intent to injure, only to stop the arrest.

Aggravated Felony: Obtain a sentence of 364 days or less in order to avoid an aggravated felony as a crime of violence. In Estrada-Rodriguez v. Mukasey, 512 F.3d 517 (9th Cir. 2007) the Ninth Circuit found that a conviction for Resisting Arrest under § 13-2508 with a sentence of one year is categorically an aggravated felony as a crime of violence.

(It is possible but unlikely that a conviction with a one-year sentence imposed also would be an aggravated felony as obstruction of justice under 8 USC §1101(a)(43)(x). See In re Joseph, 22 I. & N. 799 (BIA 1999) (“we find that it is substantially unlikely that the offense of simply obstructing or hindering one's own arrest will be viewed as an obstruction of justice aggravated felony under section 101(a)(43)(S) of the Act for removal purposes”).)
59. Hindering, ARS § 13-2510-12
For purposes of sections 13-2511 and 13-2512 a person renders assistance to another person by knowingly:
1. Harboring or concealing the other person; or
2. Warning the other person of impending discovery, apprehension, prosecution or conviction. This does not apply to a warning given in connection with an effort to bring another into compliance with the law; or
3. Providing the other person with money, transportation, a weapon, a disguise or other similar means of avoiding discovery, apprehension, prosecution or conviction; or
4. Preventing or obstructing by means of force, deception or intimidation anyone from performing an act that might aid in the discovery, apprehension, prosecution or conviction of the other person; or
5. Suppressing by an act of concealment, alteration or destruction any physical evidence that might aid in the discovery, apprehension, prosecution or conviction of the other person; or
6. Concealing the identity of the other person.
Hindering a person for prosecution of a misdemeanor is a class 1 misdemeanor; for a felony, it is a class 5 felony.

Summary. Hindering should be found to have the same effect as the federal accessory after the fact statute. As such it is an extremely useful plea because it does not take on the character of the underlying offense; thus it is a good alternative to a drug plea, firearms, domestic violence or sex offense plea. However, it will become an aggravated misdemeanor if a sentence of a year or more is imposed. See Defending Immigrants in the Ninth Circuit, §§ 2.12, 9.24, for an extensive discussion of accessory and defense arguments.

Aggravated felony: Hindering, similar to the federal accessory after the fact statute, is a useful plea because it does not take on the character of the underlying offense. An immigrant’s conviction for helping someone who may have committed a drug offense, firearms offense, or sexual offense is not itself a drug, firearms, or sexual offense conviction. Some counsel have negotiated for a plea to accessory after the fact of a drug crime even when the facts suggested that the defendant was the principal. The person will not be an aggravated felon or have a deportable or inadmissible offense.

However, the BIA in a questionable opinion held that accessory does constitute “obstruction of justice,” and therefore is an aggravated felony under 8 USC 1101(a)(43)(S) if a sentence of a year or more is imposed. Matter of Batista-Hernandez, 21 I&N 955 (BIA 1997) (accessory after the fact is not an offense relating to controlled substances but is an aggravated felony as obstruction of justice if a one-year sentence is imposed). Although it is possible that the Ninth Circuit would reverse the BIA on this point in the future -- at least to hold that assistance that prevents the apprehension of a suspect is not obstruction of justice -- counsel must do whatever is possible to avoid a one-year sentence. See Note: Sentence Solutions. On the other hand, the BIA held that the federal misprision of felony statute is not obstruction of justice. Matter of Espinoza, 22 I&N 889 (BIA 1999) (misprision is not a controlled substance offense and also not an aggravated felony as obstruction of justice even if a one-year sentence is imposed.) That statute includes “concealing” knowledge; immigration counsel at least can argue that concealing under the hindering statute should be treated like misprision.

Crime Involving Moral Turpitude. The Ninth Circuit has held that accessory after the fact under California law is not a crime involving moral turpitude. Navarro-Lopez v. Gonzales, 503 F.3d 1063 (9th Cir. 2007) (en banc). Since California accessory after the fact is, if anything, broader than Hindering, a conviction under §§ 13-2510-12 should not be held a CMT.
Other Grounds: Drug conviction, firearms conviction, domestic violence, sexual abuse of a minor. As long as a sentence of a year is not imposed, hindering can be an excellent alternative to any of these offenses, since the conviction will not take on the character of the principal’s offense.

Reason to believe trafficking. If the principal committed a drug trafficking crime, the government may assert that a hindering conviction provides “reason to believe” that the defendant aided a drug trafficker and therefore the person is inadmissible under 8 USC § 1182(a)(2)(C). This will have a devastating effect on persons who must apply for lawful status in the future, although not such a harsh effect on a permanent resident unless she plans to travel outside the country. See discussion of “reason to believe” at Note: Controlled Substances.

60. Bribery of a public servant or party officer, ARS § 13-2602
A. A person commits bribery of a public servant or party officer if with corrupt intent:
1. Such person offers, confers or agrees to confer any benefit upon a public servant or party officer with the intent to influence the public servant's or party officer's vote, opinion, judgment, exercise of discretion or other action in his official capacity as a public servant or party officer; or
2. While a public servant or party officer, such person solicits, accepts or agrees to accept any benefit upon an agreement or understanding that his vote, opinion, judgment, exercise of discretion or other action as a public servant or party officer may thereby be influenced…
C. Bribery of a public servant or party officer is a class 4 felony.


Aggravated Felony: Bribery of a public servant under ARS § 13-1602 ought not to be held an aggravated felony, even with a year’s sentence. Besides commercial bribery, only “bribery of a witness” with a year’s sentence imposed is listed in the aggravated felony definition. See 8 USC §1101(a)(43)(S).

61. Commercial Bribery, ARS § 13-2605
A. A person commits commercial bribery if:
1. Such person confers any benefit on an employee without the consent of such employee's employer, corruptly intending that such benefit will influence the conduct of the employee in relation to the employer's commercial affairs, and the conduct of the employee causes economic loss to the employer.
2. While an employee of an employer such employee accepts any benefit from another person, corruptly intending that such benefit will influence his conduct in relation to the employer's commercial affairs, and such conduct causes economic loss to the employer or principal.
B. Commercial bribery is a class 5 felony if the value of the benefit is more than one thousand dollars. Commercial bribery is a class 6 felony if the value of the benefit is not more than one thousand dollars but not less than one hundred dollars. Commercial bribery is a class 1 misdemeanor if the value of the benefit is less than one hundred dollars.


Aggravated Felony: Commercial bribery will be held an aggravated felony if a sentence of a year or more is imposed. See 8 USC § 1101(a)(43)(R).

A. A person commits perjury by making either:
1. A false sworn statement in regard to a material issue, believing it to be false.
2. A false unsworn declaration, certificate, verification or statement in regard to a material issue that the person subscribes as true under penalty of perjury, believing it to be false. Perjury is a class 4 felony.

**Crime Involving Moral Turpitude (CMT):** Because materiality is an element of § 13-2702, perjury will be considered a CMT. *Matter of H*, 1 I. & N. 669 (BIA 1943) (Michigan statute included materiality as a required element of the crime of perjury and therefore necessarily involves moral turpitude). As an alternative see false swearing, ARS § 13-2703.

**Aggravated Felony:** Perjury is an aggravated felony where the court imposes a term of imprisonment of one year or more. 8 U.S.C. § 1101(a)(43)(S). If such a sentence cannot be avoided, consider false swearing, ARS § 13-2703.

**63. False swearing, ARS § 13-2703.**
A person commits false swearing by making a false sworn statement, believing it to be false. False swearing is a class 6 felony.

**Crime Involving Moral Turpitude (CMT):** False swearing should not be found to be a CMT because it does not involve materiality, or necessarily a fraudulent intent (*Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2007); *Hirsch v. INS*, 308 F.2d 562 (9th Cir. 1962); *Matter of C*, 1 I. & N. Dec. 14 (BIA, AG 1940) (false statements held not to involve moral turpitude where there is no indication that fraud was involved)). Nevertheless, counsel should keep evidence regarding materiality or fraudulent intent out of the record of conviction in case the immigration authorities (wrongly) attempt to use that in evaluating whether the offense is a CMT.

**Aggravated Felony as Perjury.** Even if a sentence of a year or more is imposed, false swearing should not be considered an aggravated felony as perjury, because there is no requirement of materiality. *See, e.g.*, discussion in *Matter of Marinez-Recinos*, 23 I&N Dec. 175 (BIA 2001) (Calif. statute requiring knowingly false sworn material statement is perjury). Still, as always counsel should obtain 364 days or less where possible.

**Aggravated Felony as Fraud or Deceit with a $10,000 Loss.** A crime of fraud or deceit that results in a loss of over $10,000 to the government (including tax revenue) or other victim is an aggravated felony. 8 USC §1101(a)(43)(M). Because “deceit” is not well-defined, it is possible that a conviction under §12-2703 would be held an aggravated felony under this category. Regarding proof of $10,000 loss to the victim, see Note; Fraud.

**64. Tampering, ARS § 13-2809.**
A. A person commits tampering with physical evidence if, with intent that it be used, introduced, rejected or unavailable in an official proceeding which is then pending or which such person knows is about to be instituted, such person:
1. Destroys, mutilates, alters, conceals or removes physical evidence with the intent to impair its verity or availability; or
2. Knowingly makes, produces or offers any false physical evidence; or
3. Prevents the production of physical evidence by an act of force, intimidation or deception against any person…
C. Tampering with physical evidence is a class 6 felony.
Summary. While there are no cases on point, tampering with the evidence probably shares the immigration benefits and disadvantages of hindering and accessory after the fact. Please read Annotation to ARS § 13-2510. Tampering with the evidence should not take on the character of the underlying offense, so for example tampering with evidence relating to a drug sale is not itself a drug aggravated felony. However, it will be held to be an aggravated felony as obstruction of justice if a sentence of a year or more is imposed. As a class 6 felony, tampering may present a better chance of avoiding such a sentence. However, tampering, as opposed to hindering, really should be classed as obstruction of justice, since it relates to an ongoing proceeding.

Aggravated Felony. Because this will likely be held obstruction of justice, counsel must avoid a sentence of 365 days.

Crime Involving Moral Turpitude. The BIA has held that obstruction of justice is a crime involving moral turpitude, so this should not be considered a safer plea to avoid a CMT.

Other Grounds: Drug conviction, firearms conviction, domestic violence, rape or sexual abuse of a minor. Tampering is a good alternative to any of these offenses, since the conviction will not take on the character of the principal’s offense.

Reason to believe trafficking. If the principal committed a drug trafficking crime, the government may assert that a tampering conviction provides “reason to believe” that the defendant aided a drug trafficker and therefore the person is inadmissible under 8 USC § 1182(a)(2)(C). This will have a devastating effect on persons who must apply for lawful status in the future, although not such a harsh effect on a permanent resident, unless s/he plans to travel outside the country. See discussion of “reason to believe” at Note: Controlled Substances.

65. Disorderly Conduct, ARS § 13-2904
A. A person commits disorderly conduct if, with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person:
1. Engages in fighting, violent or seriously disruptive behavior; or
2. Makes unreasonable noise; or
3. Uses abusive or offensive language or gestures to any person present in a manner likely to provoke immediate physical retaliation by such person; or
4. Makes any protracted commotion, utterance or display with the intent to prevent the transaction of the business of a lawful meeting, gathering or procession; or
5. Refuses to obey a lawful order to disperse issued to maintain public safety in dangerous proximity to a fire, a hazard or any other emergency; or
6. Recklessly handles, displays or discharges a deadly weapon or dangerous instrument.
B. Disorderly conduct under subsection A, paragraph 6 is a class 6 felony. Disorderly conduct under subsection A, paragraph 1, 2, 3, 4 or 5 is a class 1 misdemeanor.

Summary: A good plea for immigration, except for A6.

Crime Involving Moral Turpitude: Except for A6, this offense should not be held a CMT. However, to be safe it is advisable to leave the record of conviction vague as to the underlying facts. Normally petty offenses such as disturbing the peace are not CMTs. See e.g. Matter of P, 2 I. & N. Dec. 117, 122 (1944)(stating in dicta that “most states also have, in the exercise of their police powers, statutes
punishing the disturbance of the peace, sauntering and loitering, and like trivial breaches of the peace. It could be hardly contended that a violation of such statutes involves moral turpitude”.

Section A6, recklessly discharging a dangerous weapon, ought not to be held a CMT. Generally recklessness is a CMT only if coupled with serious physical injury. See, e.g., Matter of Fualaau, 21 I&N Dec. 475 (BIA 1996). However, where possible counsel should avoid specifically pleading to A6, and if a plea is made to A6, counsel should attempt to leave the record of conviction vague. An alternate plea would be to carrying a deadly weapon under ARS §13-3102(A)(1) (a class 1 misdemeanor), which has no immigration consequences as long as the weapon is not identified as a firearm or explosive device.

**Aggravated Felony:** *AF as Crime of Violence:* No. The Ninth Circuit has held that a *mens rea* of “recklessness” does not meet the definition of a “crime of violence” as defined by 18 U.S.C. § 16. See Fernandez-Ruiz v. Gonzales, 466 F.3d 1121 (9th Cir. 2006) (en banc)

**AF as Firearms Offense:** No, because this offense does not deal with trafficking and does not have a federal analogue.

**Firearms Ground of Deportation:** If defendant pleads to A6 and the record of conviction clearly identifies that defendant had a firearm or destructive device (i.e. explosive), then he/she is deportable under this ground. Defense counsel should keep the record of conviction vague as to the type of weapon used, i.e., plead defendant to the statutory language, “a deadly weapon or dangerous weapon.”

**DV Ground of Deportation:** If defendant pleads to A6 and the offense was committed against a child, he/she may be deportable under the child abuse ground. See Note: Domestic Violence

66. **False reporting to law enforcement agencies, ARS § 13-2907.01**
A. It is unlawful for a person to knowingly make to a law enforcement agency of either this state or a political subdivision of this state a false, fraudulent or unfounded report or statement or to knowingly misrepresent a fact for the purpose of interfering with the orderly operation of a law enforcement agency or misleading a peace officer.
B. Violation of this section is a class 1 misdemeanor.

**Summary.** This offense is not an aggravated felony and might fit the facts of the aftermath of a domestic violence or statutory rape event, i.e. when the perpetrator denies wrongdoing. If the prosecution is willing to plead to a class 1 misdemeanor, it is not a crime of violence or sexual offense.

**Crime Involving Moral Turpitude.** Maybe not, no requirement of materiality or bad intent.

**Other grounds:** This may be a good alternate plea where overly harsh immigration consequences would attach to a relatively minor offense, and where a false statement was made at some point.

67. **Criminal Nuisance, ARS § 13-2908**
A. A person commits criminal nuisance:
1. If, by conduct either unlawful in itself or unreasonable under the circumstances, such person recklessly creates or maintains a condition which endangers the safety or health of others.
2. By knowingly conducting or maintaining any premises, place or resort where persons gather for purposes of engaging in unlawful conduct.
B. Criminal nuisance is a class 3 misdemeanor.

**Summary:** This is a useful plea if the government is willing to plead to a class 3 misdemeanor, because it has few consequences and the facts can fit a variety of situations such as having people use controlled substances, engage in sex with a minor, etc.

**Aggravated felony.** No.

**Crime involving moral turpitude.** No, except possibly if the record of conviction reveals that the unlawful conduct involves moral turpitude. Even then, recklessness should not involve moral turpitude in this case.

**Other grounds.** No, The best resolution is to leave the record of conviction vague. However, even if the record revealed details of the unlawful activity that went on (possessing an unregistered weapon, using drugs, sexual encounters, etc.), this should not transform the offense into a firearms, drug, etc. offense.

68. **Use of telephone to annoy; ARS § 13-2916**

A. It is unlawful for any person, with intent to terrify, intimidate, threaten, harass, annoy or offend, to use a telephone and use any obscene, lewd or profane language or suggest any lewd or lascivious act, or threaten to inflict physical harm to the person or property of any person. It is also unlawful to otherwise disturb by repeated anonymous telephone calls the peace, quiet or right of privacy of any person at the place where the telephone call or calls were received. Class 1 misdemeanor.

**Summary:** This is an excellent substitute for harassment or stalking charge, if prosecutor is willing, to avoid deportability under the DV grounds. With a vague record of conviction it has no immigration consequences. It might also be a substitute charge in a sympathetic statutory rape case.

69. **Harassment, ARS § 13-2921**

A. A person commits harassment if, with intent to harass or with knowledge that the person is harassing another person, causing a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person, does the following:
   1. Anonymously or otherwise communicates or causes a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harasses.
   2. Continues to follow another person in or about a public place for no legitimate purpose after being asked to desist.
   3. Repeatedly commits an act or acts that harass another person.
   4. Surveils or causes another person to surveil a person for no legitimate purpose.
   5. On more than one occasion makes a false report to a law enforcement, credit or social service agency.
   6. Interferes with the delivery of any public or regulated utility to a person.

C. Harassment under subsection A is a class 1 misdemeanor. Harassment under subsection B (public employee) is a class 5 felony.

E. For purposes of this section, "harassment" means conduct directed at a specific person which would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person.

**Summary:** This is a possible alternative to stalking, to avoid immigration consequences.
Crime Involving Moral Turpitude (CMT): No, because it does not require the transmission of threats or intent to harm or the intent to commit a CMT.

Aggravated Felony: No, because as a class 1 misdemeanor simple harassment has a maximum six-month sentence. Additional time imposed for recidivist behavior will be counted toward the required one-year sentence. See Note: Sentences.

Domestic violence ground: If the record shows that the victim had a domestic relationship with the defendant (either by § 13-3601 or other evidence in the record), the offense might be held to cause deportability under the domestic violence ground at 8 USC §1227(a)(2)(E) as a crime of stalking. However, it is a better alternative than §13-2923, Stalking.

A conviction of “stalking” is a basis for deportation under 8 USC §1227(a)(2)(E). While stalking remains an undefined term in this context, it is unlikely that §13-2921 would categorically come within this because it involves no threats and can result only in annoying the person. See Malta-Espinoza v. Gonzales, 478 F.3d 1080 (9th Cir. 2000) (conviction under Cal. Penal Code § 646.9 is not categorically a crime of violence because it need not be proven that the defendant had the intent, or the ability to carry out, the threat). A plea that left open the possibility of conviction under A6 might especially avoid this possibility. Also, immigration counsel will argue that the existence of the more serious §13-2923 argues against this categorization, and stalking should be defined as more harmful than merely “annoying.”

Note that a civil or criminal finding that a noncitizen violated a domestic violence protection order is a basis for deportability. See 8 USC § 1227(a)(2)(E). To the extent the § 13-3601 conviction is part of a finding of a violation of such an order, it may cause deportability. See also ARS § 13-3601.01(A)(1).

This offense does not constitute a “crime of domestic violence,” because a misdemeanor is a “crime of violence” only if it has as an element the intent to use or threaten force. See Note: Domestic Violence.

70. Aggravated harassment, ARS § 13-2921.01
A. A person commits aggravated harassment if the person commits harassment as provided in section 13-2921 and any of the following applies:
1. A court has issued an order of protection or an injunction against harassment against the person and in favor of the victim of harassment and the order or injunction has been served and is still valid.
2. The person has previously been convicted of an offense included in section 13-3601.
B. The victim of any previous offense shall be the same as in the present offense.
C. A person who violates subsection A, paragraph 1 of this section is guilty of a Class 6 felony. A person who commits a second or subsequent violation of subsection A, paragraph 1 of this section is guilty of a Class 5 felony. A person who violates subsection A, paragraph 2 of this section is guilty of a Class 5 felony.
D. For the purposes of this section, "convicted" means a person who was convicted of an offense included in section 13-3601 or who was adjudicated delinquent for conduct that would constitute a historical prior felony conviction if the juvenile had been tried as an adult for an offense included in section 13-3601.

Summary: A conviction under A2 may avoid immigration consequences and certainly is safer than a conviction for stalking. A conviction under A1 offers few immigration benefits.
Crime Involving Moral Turpitude (CMT): If analogies to DUI hold, A1 is a CMT but A2 is not. A1 may be held a CMT because the inclusion of the element of an existing protection order is sufficient to establish the bad intent required for a CMT. See Matter of In re Lopez-Meza, 22 I&N. Dec. 1188, 1195 (BIA 1999) (the aggravated circumstances of being on a suspended license while DUI under predecessor to ARS 23-1383(A)(1) “establishes a culpable mental state adequate to support a finding of moral turpitude”). A2 should not be held to be a CMT, because multiple commissions of an offense do not cause the offense to become a CMT. See Matter of Torres-Varela, 23 I. & N. Dec. 78 (BIA 2001)(predecessor to ARS 28-1383(A)(2), aggravated driving with prior DUI convictions, is not a CMT because no culpable mental state is required).

Aggravated Felony: A “crime of violence” defined under 18 USC 16 is an aggravated felony if a sentence of a year or more is imposed. This calculation includes time imposed as a result of a recidivist enhancement.

A conviction under A1 might be held an aggravated felony if a sentence of a year or more is imposed. However, A1 does not require the making of any threat and can merely seriously annoy the other person. That would not necessarily be likely to result in violent force between the parties. See Malta-Espinoza v. Gonzalez, 478 F.3d 1080 (9th Cir. 2000), discussed supra at § 13-3601. Therefore, if counsel cannot avoid a sentence imposed of one year, and cannot keep the record vague between A1 and A2, a conviction under A1 still might avoid being an aggravated felony if the record is vague as to the underlying facts.

Domestic violence ground: Counsel should assume that a conviction under A1 will cause deportability at least under 8 USC § 1227(a)(2)(E)(ii), because it establishes a violation of a domestic violence protective order that prohibits repeated harassment.

Criminal defense counsel should assume that a conviction under A2 also will be charged as a deportable “crime of domestic violence” under 8 USC §1227(a)(2)(E)(i), although immigration counsel have arguments against this. Currently, the offense should not be considered a “felony,” since it is only made a felony by virtue of a recidivist sentence enhancement; however, this finding may soon be overturned by the U.S. Supreme Court in United States v. Rodriguez, 128 S.Ct. 1783 (2008). As a misdemeanor, it can only qualify as a “crime of violence” under 18 USC § 16(a), which requires the offense to have use or threat of force as an element. XXX Kara, we no longer have Corona-Sanchez, but what about two convictions for being annoying? It doesn’t require any threat or actual violence does it? (I know we are the ones who wrote this original finding, not you – what do you think of it?)

A conviction of “stalking” is a basis for deportation under 8 USC § 1227(a)(2)(E)(i). This would depend on whether § 13-2921 would be classed as stalking. Arguably, the offense is not stalking ‘categorically” and would not be so held if the record of conviction was sufficiently vague; see discussion of § 13-2921, above.

71. Stalking, ARS § 13-2923
A. A person commits stalking if the person intentionally or knowingly engages in a course of conduct that is directed toward another person and if that conduct either:
1. Would cause a reasonable person to fear for the person's safety or the safety of that person's immediate family member and that person in fact fears for their safety or the safety of that person's immediate family member.
2. Would cause a reasonable person to fear death of that person or that person's immediate family member and that person in fact fears death of that person or that person's immediate family member.
B. Stalking under subsection A, paragraph 1 of this section is a class 5 felony. Stalking under subsection A, paragraph 2 is a class 3 felony.
C. For the purposes of this section:
   1. "Course of conduct" means maintaining visual or physical proximity to a specific person or directing verbal, written or other threats, whether express or implied, to a specific person on two or more occasions over a period of time, however short, but does not include constitutionally protected activity.
   2. "Immediate family member" means a spouse, parent, child or sibling or any other person who regularly resides in a person's household or resided in a person's household within the past six months.

Summary: This is a CMT and a basis for deportability under the domestic violence ground. Avoid a sentence of 365 days to avoid an aggravated felony. Consider harassment, aggravated harassment, or other alternatives in Note: Safer Pleas.

Crime Involving Moral Turpitude (CMT): Stalking is a CMT. Jose Ricardo Zavaleta v. INS, 261 F.3d 951 (9th Cir. 2001); Matter of Ajami, 22 I. & N. Dec. 949 (BIA 1999).

Aggravated Felony: Counsel should assume that it will be held a crime of violence, and should avoid a sentence imposed of 365 days or more.

Domestic Violence Ground: A crime of “stalking” is a basis for deportability under the domestic violence ground. 8 U.S.C. § 1227(a)(2)(E)(i). So is a “crime of violence” directed against a person with a domestic relationship. Counsel should assume that any conviction under § 13-3601 will cause deportability under this ground.

Misconduct involving weapons under subsection A, paragraph 9, 14 or 15 of this section is a class 3 felony. Misconduct involving weapons under subsection A, paragraph 3, 4, 8 or 13 of this section is a class 4 felony. Misconduct involving weapons under subsection A, paragraph 12 of this section is a class 1 misdemeanor unless the violation occurs in connection with conduct which violates the provisions of section 13-2308, subsection A, paragraph 5, section 13-2312, subsection C, section 13-3409 or section 13-3411, in which case the offense is a class 6 felony. Misconduct involving weapons under subsection A, paragraph 5, 6 or 7 of this section is a class 6 felony. Misconduct involving weapons under subsection A, paragraph 1, 2, 10 or 11 of this section is a class 1 misdemeanor.

Summary: Conviction of almost any activity relating to a firearm or “destructive device” (explosive), including possession of an unregistered firearm, causes deportability under the firearms ground. 8 USC § 1227(a)(2)(C). Conviction of trafficking in firearms or destructive devices, or conviction of a state offense that is analogous to certain federal offenses such as felon in possession of a firearm, is an aggravated felony. 8 USC § 1101(a)(43)(C), (E). See Note: Firearms. Counsel can fashion a plea under § 13-3102 to avoid these consequences by avoiding identification of a qualifying weapon in the record of conviction, and/or avoiding a match-up with the analogous federal offense. This can be a valuable alternate plea.

Note on Sentence. Avoiding a sentence imposed of a year or more will not avoid the firearms deportation ground or the firearms aggravated felony classification. For example, sale of a firearm with a sentence imposed of six months is an aggravated felony, and also a basis for deportation under the firearms ground.
The one-year sentence threshold does remain relevant for any violent offense, whether or not a firearm is involved. For example, A8, using a deadly weapon during a felony, will be an aggravated felony as a crime of violence if a sentence of a year or more is imposed.

**Note: “deadly weapons,” “prohibited weapons,” and “prohibited possessors” and the firearms categories.** Section 13-3102 can be a valuable plea because it is a divisible statute. With a vague record of conviction, or a plea to certain subsections, the conviction will not be an aggravated felony as a firearms offense, or be an offense that causes deportability under the firearms ground.

**Deadly weapons and prohibited weapons.** An offense is an aggravated felony firearms offense, or causes deportability under the firearms ground, if it involves certain actions relating to a firearm or explosive device. Both “deadly weapon” and “prohibited weapon” are defined to include weapons that are not firearms or explosive devices. (“Deadly weapon” is any lethal weapon, and “prohibited weapon” includes a nunchaku. See § 13-3101.) In these cases, counsel can avoid conviction of a firearms aggravated felony or a deportable firearms offense by (a) specifically identifying a non-firearms/explosive device in the record, or (b) keeping the record vague enough to permit the possibility that this was the weapon, e.g. pleading to a “deadly weapon.”

**“Prohibited possessor.”** A state offense that has the same elements as certain federal firearms offenses will be held an aggravated felony, even if it doesn’t involve trafficking. See federal offenses referenced at 8 USC § 1101(a)(43)(E). The list of “prohibited possessors” at ARS § 13-3101(A)(7) does not exactly match the federal crimes designated as firearms aggravated felonies for immigration purposes. The following categories relating to prohibited possessors are safer pleas. In an offense involving a prohibited possessor using a firearm or explosive device, counsel should specifically identify one of the following categories, or leave the record of conviction vague as to which subset of ARS § 13-3101(A)(7) is implicated. **Note that possession of a firearm or destructive device by a felon or an undocumented immigrant is an aggravated felony,**

**Safer categories:**
- A person who has been found a danger to self or others, where the record of conviction does not establish commitment to a mental institution. While the analogous federal offense requires commitment to a mental institution (18 USC § 922(g)(4)), ARS §26-540 permits various options including outpatient care.
- A person who is imprisoned at the time of possession. There is no federal analogue.
- A person who is serving probation for a domestic violence conviction, under ARS § 13-3101(A)(7)(d). (Federal law has similar provisions at 18 USC § 922(g)(8), (9), but these are not included in the aggravated felony definition at 8 USC 1101(a)(43)(E)).

**A1 and A2: Carrying a concealed deadly weapon without a permit pursuant to ARS § 13-3112; carrying it without the permit within immediate control of any person in or on a means of transportation.**

**Crime Involving Moral Turpitude (CMT):** No. Carrying a concealed weapon without a license or permit has been held not to involve moral turpitude because an act licensed by the state is merely a regulatory offense and cannot properly be considered morally turpitudinous. *Ex parte Sarceno*, 182 F. 955, 957 (Cir. Ct. N.Y. 1910); *United States ex rel. Andreacchi v. Curran*, 38 F.2d 498 (S.D.N.Y. 1926); *Matter of Granados*, 16 I. & N. Dec. 726 (1979) (possession of sawed-off shotgun).

**Aggravated Felony:** Simple possession of a machine-gun may be found an aggravated felony because it is analogous to 18 USC §922(o). Otherwise not an aggravated felony.
Firearms Deportation Ground: Only if the record of conviction specifies that the weapon was a firearm or other destructive device. To avoid this ground, defense counsel should plead defendant to carrying a “deadly weapon” or to a specific weapon that is not a firearm or destructive device.

A3. Manufacturing, possessing, transporting, selling or transferring a prohibited weapon

Crime Involving Moral Turpitude (CMT): Probably not; at least divisible. While possession of a weapon is not a CMT, it is possible that a conservative judge would hold that the manufacture, transport, sale, or transfer of prohibited weapons is a CMT because of pecuniary gain. Matter of R, 6 I. & N. Dec. 444, 451 (1954) (element of pecuniary gain creates a distinction between fornication, not a CMT, and prostitution, a CMT). Against this is the fact that firearms can be legally sold, so this is merely a regulatory offense, and such offenses usually are held not to involve moral turpitude. Where possible, defense counsel should keep the record of conviction vague, by pleading either to “possessing” or “manufacturing, possessing, transporting, selling, or transferring.”

Aggravated Felony: AF as a Firearms Trafficking Offense: Trafficking in firearms or explosive devices is an aggravated felony. The record should not preclude the possibility that a nunchaku was the weapon, and/or should be vague as to whether trafficking versus possession was involved. Avoid reference to a machine-gun.

Firearms Deportation Ground: Deportable under this ground if the record of conviction specifies that the weapon was a firearm or other destructive device. To avoid this ground, defense counsel should plead defendant to a “deadly weapon.”

A4. Possessing a deadly weapon or prohibited weapon if such person is a prohibited possessor;

Crime Involving Moral Turpitude (CMT): Probably not, but this is not established. Carrying a concealed weapon without a license or permit has been held not to involve moral turpitude because an act licensed by the state cannot properly be considered morally turpitudinous. Ex parte Sarceno, 182 F. 955, 957 (Cir. Ct. N.Y. 1910); United States ex rel. Andreacchi v. Curran, 38 F.2d 498 (S.D.N.Y. 1926). The additional factor of the status of the person (e.g., undocumented immigrant, felon) should not make it a CMT.

Aggravated Felony: To avoid an aggravated felony, avoid identifying in the record that a firearm or destructive device was involved. Even if that is not possible, avoid an aggravated felony by avoiding identifying in the record that the defendant was a prohibited possessor due to being a felon or an illegal immigrant, as opposed to other category. See discussion above.

Firearms Deportation Ground: To avoid this ground, defense counsel should plead defendant to a “deadly weapon or prohibited weapon.”

A5. Selling or transferring a deadly weapon to a prohibited possessor


Aggravated Felony: Firearms Trafficking Offense: Yes, if the weapon is identified as a firearm or destructive device. Avoid identification of the weapon on the record of conviction.

Firearms Deportation Ground: To avoid this ground, defense counsel should plead defendant to a “deadly weapon.”
A6. A7. Defacing a deadly weapon; or possessing a defaced deadly weapon knowing the deadly weapon was defaced:

Counsel should try to plead to possession under a different subsection.

Crime Involving Moral Turpitude (CMT): Probably not, but no cases on point. See A1.

Aggravated Felony: Firearms Offense: Yes, if the offense is identified as a firearm (or if by law only a firearm could be recognized as being capable of being defaced). This could be held analogous to 26 U.S.C. § 5861(g), (h), which makes it a federal offense to alter the identification of a firearm or to possess such an altered firearm.

Firearms Deportation Ground: To avoid this ground, defense counsel should plead defendant to defacing or possessing a “deadly weapon,” if it is possible for deadly weapons that are not firearms or destructive devices to be “defaced” as the term is intended.

A8. Using or possessing a deadly weapon during the commission of any felony offense included in chapter 34 of this title (drug offenses).

Crime Involving Moral Turpitude (CMT): Yes. The actual use of a deadly weapon during the commission of a felony is a CMT. Mere possession of a deadly weapon or firearm is not a CMT, Matter of Granados, 16 I. & N. Dec. 726 (BIA 1979), but the possessing of deadly weapon during a felony offense may or may not be a CMT depending upon the type of drug offense involved. If there is mere possession in the commission of a drug trafficking offense, then it is a CMT. However, if counsel leaves the record of conviction vague as to whether the offense involved was possession or use of a deadly weapon and also vague as to the drug offense involved, i.e., leaving open possibility of use or possession, then immigration counsel can argue that it is not a CMT.

Aggravated Felony: Summary: Avoid a sentence of one year or more and leave the record vague as to deadly weapon involved, whether use or possession of the deadly weapon was involved, and/or whether use or possession of drugs was involved.

Crime of Violence: Counsel should assume it is a crime of violence and therefore, defense counsel should avoid a sentence of one year or more. Mere possession of a deadly weapon is not a COV because there is no substantial risk that an offender could use violence to perpetrate this offense. United States v. Medina-Anicacio, 325 F.3d 638 (5th Cir. 2003). On the other hand, possessing a deadly weapon during the commission of a felony offense is probably a COV since there is a substantial risk that defendant could use violence.

Firearms Trafficking: 18 USC § 922(g)(3) criminalizes anyone who is a (1) unlawful user of a controlled substance listed in 21 USC § 802 and (2) possesses a firearm or ammunition. It is therefore, possible that if defense counsel pleads their client to the specific offense of possession of a firearm or ammunition while in the course of using drugs listed in the Controlled Substances Act, this could be an aggravated felony. Counsel should leave the record of conviction vague as to the type of deadly weapon involved, whether use or possession of a deadly weapon was involved, whether the client was in possession or using drugs, and/or what kind of drugs were involved.

Firearms Offense: Not trafficking and no federal analogue.
Firearms Deportation Ground: To avoid this ground, defense counsel should keep the record of conviction vague as to what kind of deadly weapon was used.

A9. Discharging a firearm at an occupied structure to further the interests of a criminal street gang, a criminal syndicate or a racketeering enterprise

Crime Involving Moral Turpitude (CMT): Yes.

Aggravated Felony: Crime of Violence: Yes. Defense counsel should avoid a sentence of one year or more to this subsection.

Other Grounds: RICO offense: Nothing in the RICO statutes refers to use of a firearm to further interest in racketeering enterprise, but statute is written broadly enough to possibly include use of a firearm to further interests.

Firearms Ground of Deportation: Yes.

A10. Unless specifically authorized by law, entering any public establishment or attending any public event and carrying a deadly weapon on his person after a reasonable request by the operator or sponsor to remove his weapon;

A11-13. Unless specifically authorized by law, entering an election polling place on the day of any election carrying a deadly weapon; or possessing a deadly weapon on school grounds; or entering a nuclear or hydroelectric generating station carrying a deadly weapon on his person or within the immediate control of any person.


Aggravated felony. No, except that possession of an explosive in an airport is an aggravated felony. See 18 USC § 844(g).

Firearms Deportation Ground: To avoid this ground, defense counsel should plead defendant to the statutory language, “deadly weapon,” or identify a weapon that is not a firearm or destructive device.

A14. Supplying, selling or giving firearm to another person if the person knows or has reason to know that the other person would use the firearm in the commission of any felony.


Aggravated Felony: Firearms Offense: Probably. 18 U.S.C. § 924(h) criminalizes the transfer of a firearm with knowledge it will be used to commit a crime of violence or drug trafficking offense. An analogous state law is an aggravated felony. To attempt to avoid this aggravated felony ground, defense counsel should avoid any mention of the type of felony to be committed, i.e., plead defendant to the statutory language “commission of any felony.” It still might be so held, however, on the theory that a firearm could not be used in the commission of a non-violent felony. Avoiding a one-year sentence will not prevent a conviction from being an aggravated felony under this category.
Crime of Violence: Unclear. Counsel should plead to another offense or to less than a year. There is no substantial risk that physical force may be used in the course of committing this offense, which is supplying, selling, or giving possession of a firearm to another person, but the government may argue successfully that this is a crime of violence because the situation as a whole could lead to use of force.

Firearms Trafficking Offense: “Supplying” and “selling” can be construed as trafficking in firearms. “Giving possession or control of a firearm” probably is not trafficking. Either avoid pleading defendant to this subsection or keep the record of conviction vague by pleading defendant to “supplying, selling, or giving possession or control.”

Firearms Deportation Ground: Yes.

A15. Deadly weapon in furtherance of any act of terrorism as defined in section 13-2301 or possessing or exercising control over a deadly weapon knowing or having reason to know that it will be used to facilitate any act of terrorism as defined in section 13-2301. Avoid a plea to this ground.

Crime Involving Moral Turpitude (CMT): Assume that this is a CMT.

Aggravated Felony: Crime of Violence: Assume that this is a crime of violence and if possible obtain a sentence of under a year or plead to an alternate offense.

Terrorism Grounds: This offense will likely elicit a charge from the government accusing and possibly leading to deportation, inadmissibility, and other penalties.

Firearms Deportation Ground: To avoid this ground, defense counsel should plead defendant to the statutory language, “deadly weapon.”

73. **Unlawful discharge of firearms, ARS § 13-3107.**
A person who with criminal negligence discharges a firearm within or into the limits of any municipality is guilty of a Class 6 felony.

Crime Involving Moral Turpitude (CMT): Section 13-3107 should not be considered a CMT because negligence does not describe the requisite intent for a CMT and the nature of crime is not “inherently base, vile, or depraved.”

Aggravated Felony: Negligent discharge of a firearm will not be an aggravated felony as a “crime of violence” within 8 U.S.C. § 16 because an offense with a *mens rea* of negligence or less is not a crime of violence. *Leocal v. Ashcroft*, 125 S.Ct. 377 (2004). Where possible, however, counsel should get 364 or less, in case of future changes in the law.


74. **Possession, use, production, sale or transportation of marijuana, ARS §13-3405**
NOTE: Setting aside a conviction under ARS § 13-907 will eliminate a conviction for simple possession or use of marijuana, where there is no prior drug conviction or TASC disposition. However, counsel should not rely solely on setting aside a conviction to prevent removability since ICE may initiate removal proceedings before it can occur. Note also that a TASC disposition such as in Maricopa County, where the prosecutor rather than the court imposes counseling requirements, does not constitute a conviction for immigration purposes. See discussion of these options at Note: Controlled Substances.

A1. Possession or use
   a. Possession

   Crime Involving Moral Turpitude: No. The BIA reserved judgment on the question in Matter of Khourn, 21 I&N Dec. 1041 (BIA 1997), but it probably would not be so held. See also Hampton v. Wong Ging, 299 F. 289, 290 (9th Cir. 1924) (possession of opium is not a CMT).

   Aggravated felony: Where there is no prior drug conviction, a conviction for possession of marijuana is not an aggravated felony. Where there is a drug prior, the law is not established and counsel should be cautious. (Note that a plea to use, rather than possession, always will prevent an aggravated felony conviction; see below).

   The BIA held that where a prior controlled substance conviction is pleaded or proved as part of an “enhancement” of a subsequent possession offense, it will convert the subsequent offense into an aggravated felony. If the prior conviction was not pleaded or proved for enhancement purposes, the subsequent possession offense is not an aggravated felony. Matter of Carachuri-Rosendo, 24 I&N Dec. 382, 386 (BIA 2007). Therefore, counsel should avoid pleading to a controlled substance offense in which a prior drug offense is an element, is alleged or is otherwise included as an “enhancement” in the charging document or judgment. Note that the current rule in the Ninth Circuit is better; the court held that a possession conviction is not an aggravated felony despite a drug prior. Oliveira-Ferreira v. Ashcroft, 382 F.3d 1045 (9th Cir. 2004). However, the Ninth Circuit is likely to reconsider this holding, because it was based on the court’s general rule not to consider the effect of recidivist sentence enhancements, a rule that recently was overturned in United States v. Rodriguez, 128 S.Ct. 1783 (2008); see also comments in Lopez v. Gonzales, 127 S. Ct. 625, n. 3 (2006). Note also that a single conviction of possession of flunitrazepam or of more than five grams of crack cocaine is an aggravated felony, even if there is no prior drug conviction; see discussion of ARS § 13-3407/3408.

   Whenever possible, criminal defense counsel should plead to “use” or leave the record vague between possession and use. Criminal defense counsel should reduce a possession conviction to a misdemeanor wherever possible. This is because a felony may be treated as an aggravated felony in immigration proceedings outside the Ninth Circuit, and in federal criminal prosecutions for illegal re-entry. “Use,” and a first misdemeanor possession, will not be so treated. See Note: Controlled Substances, Part V.

   Controlled Substance Conviction Causing Deportability and Inadmissibility. Yes in general, but see exception below. The person will be inadmissible and will not be allowed to seek legal status in the United States. If the client is a lawful permanent resident, the conviction will render him deportable but eligible for a waiver of removal (immigration pardon) if the offense is not an aggravated felony and if he has had his lawful permanent residence for at least five years and has been living in the United States for at least seven years after any legal admission.
Exception for possession of 30 grams or less or for being under the influence of marijuana, hashish, THC-carboxylic acid. Generally a conviction for simple possession of a controlled substance is a deportable and inadmissible offense. The only statutory exceptions are that a single offense for 30 grams or less of marijuana will not cause deportability (8 USC § 1227(a)(2)(B)(i)), may be amenable to a discretionary waiver of inadmissibility (8 USC § 1182(h)) and is not a bar to good moral character (8 USC 1101(f)(3)). Where the possession exception applies, make sure it is reflected in the record of conviction and if the quantity was more than 30 grams make sure the record of conviction is sanitized of the quantity.

The INS extended these exceptions to apply to hashish. INS General Counsel Legal Opinion 96-3 (April 23, 1996). The Ninth Circuit extended the exception to cover being under the influence. Flores-Arellano v INS, 5 F.3d 360 (9th Cir. 1993). The Ninth Circuit also extended this to a conviction of attempt to be under the influence of tetrahydrocannabinol (THC)-carboxylic acid in violation of Nevada law. Medina v Ashcroft, 393 F.3d 1063 (9th Cir. 2005).

Eliminating the conviction. A first conviction for simple possession, use, or a less serious offense without a federal analogue can be eliminated by state “rehabilitative relief” such as ARS § 13-907.

b. Use

Crime Involving Moral Turpitude: No, see possession.

Aggravated felony. No. There is no analogous federal offense, so even a conviction of use where a prior drug conviction is admitted is not an aggravated felony.

Deportable and Inadmissible Drug Conviction. Yes, with an exception for a first offense involving certain drugs. The Ninth Circuit has held that a single conviction for being under the influence of marijuana should receive the benefit of the 30 grams or less of marijuana exception that is discussed in possession, supra. Flores-Arellano v. INS, 5 F.3d 360 (9th Cir. 1993). Use of marijuana ought to be held equivalent to being under the influence.

Eliminating the conviction. A first conviction can be eliminated by state “rehabilitative relief.” See possession, supra.

A2. Possession of marijuana for sale.


Aggravated felony: Yes, as a drug trafficking offense, regardless of sentence imposed.

Other Grounds: Deportable and inadmissible for conviction of an offense relating to a controlled substance. Gives the government “reason to believe” that the person has been or aided a drug trafficker, which is a separate ground of inadmissibility.

A3. Produce

Crime Involving Moral Turpitude: Yes, as trafficking, except that if the record left open the possibility that it was for personal use it might not be so held. Matter of Khourn, id.
**Aggravated felony.** Maybe. Attempt to plead to possession or, better, use. Produce means grow, plant, cultivate, harvest, dry, process or prepare for sale. ARS § 13-3401(25). For a state offense to be an aggravated felony, the state offense must contain the same elements as an offense in one of the identified federal sections and the offense must be a felony in federal court. The federal law prohibits manufacture of a controlled substance which could be analogized to production.

**Other Grounds:** Deportable and inadmissible for conviction of an offense relating to a controlled substance. Might or might not give the government “reason to believe” that the person has been or aided a drug trafficker, which is a separate ground of inadmissibility.

### A4. Transport for sale, import into state, sell, transfer, offer to transport/import/sell/transfer

#### a. Transport for sale, sell

**Crime Involving Moral Turpitude:** Yes, as drug trafficking.

**Aggravated Felony:** Yes. Straight transportation does not meet the general definition of trafficking. *United States v. Casarez-Bravo*, 181 F.3d 1074 (9th Cir. 1999); *Saleres v. INS*, 22 Fed. Appx. 831 (9th Cir. 2001)(Table). But because this offense is transport for sale it will be found to involve an element of trafficking.

**Controlled Substance Conviction Causing Deportability and Inadmissibility.** Yes.

#### b. Import into this state

**Crime Involving Moral Turpitude:** Yes, if the importation is necessarily for trafficking as opposed to personal use.

**Aggravated Felony:** Yes, to the extent that the importation is for trafficking. Or, to the extent that this offense is analogous to 21 U.S.C. § 952(a), which criminalizes the importation of controlled substances or, if they are listed in schedules III, IV, or V, dangerous drugs. However, an argument could be made that importation into the state is akin to transportation, which does not meet the general definition of trafficking. *United States v. Casarez-Bravo*, 181 F.3d 1074 (9th Cir. 1999).

**Controlled Substance Conviction Causing Deportability and Inadmissibility.** Yes, as a ground of inadmissibility and deportability as an offense relating to controlled substances.

#### c. Offer to transport for sale; Offer to sell; Offer to transfer.

**Crimes Involving Moral Turpitude:** Yes as trafficking, except that if the record leaves open the possibility that the offer was to transfer for free, this may not be a CMT.

**Aggravated felony:** It should not be so held, because Ninth Circuit precedent directly provides that an offense with the elements of “offering to sell” or “offering to transport” is not an aggravated felony. However, in practice many Arizona IJ’s have ignored this precedent and found the conviction to be an aggravated felony. Counsel should make every effort to plead to the generic solicitation statute of § 13-1002, which will be held not an aggravated felony or a deportable conviction. See discussion in “Other Grounds.”
If pleading to this statute, counsel should where possible establish that the offense was for giving away a small amount of marijuana, which will provide immigration counsel with an additional argument; see Part d, infra.

Other Grounds: Local immigration judges are still upholding “offering”-type drug crimes as grounds of removal and inadmissibility notwithstanding Ninth Circuit holding to the contrary. A conviction under Arizona’s “generic” solicitation statute, § 13-1002, is not a deportable controlled substance conviction or an aggravated felony. Coronado-Durazo v. INS, 123 F.3d 1322, 1324 (9th Cir. 1997); see also Leyva-Licea v. INS, 187 F.3d 1147 (9th Cir. 1999). Immigration judges and the Board of Immigration Appeals have found that offering to sell found within the statute is distinct from this holding because it is a specific solicitation statute. The courts’ rationale should be overturned by the Ninth Circuit because the Ninth Circuit en banc held that California’s specific solicitation statutes (i.e. offering to sell, offering to transport, offering to distribute) were the equivalent of solicitation. U.S. v. Rivera-Sanchez, 247 F.3d 905, 909 (9th Cir. 2001) (en banc) (Calif. Health & Safety § 11360). The Court made no distinction between generic solicitation and specific solicitation statutes. Id. at 909. Nonetheless, counsel should be aware that the specific solicitation statutes are not yet fool-proof and counsel should attempt to plead their client to the generic solicitation offense.

d. Transfer. “Transfer” means to furnish, deliver or give away.

Crimes Involving Moral Turpitude: Yes as trafficking, except that if the record leaves open the possibility that the offer was to transfer for free, this may not be a CMT.

Aggravated felony. Yes, except that the law is unclear regarding a conviction for giving away a “small amount” of marijuana for free. If this plea cannot be avoided, a record that conclusively establishes that the conviction was for giving away a small amount of marijuana at least will provide an argument to immigration attorneys. It also is possible that if such an offense is expunged under ARS § 13-907, this will be accepted for immigration purposes under Lujan-Armendariz. See discussion at Note: Controlled Substances.

The rationale is as follows. The offense should not be classed as an aggravated felony because under 21 USC §841(b)(4), giving away a small amount of marijuana for free is a federal misdemeanor, and non-trafficking offenses are aggravated felonies only if they are analogous to federal felonies. However, the BIA stated that it would not honor this exception, but did so in a case where the immigrant had not proved that only a “small amount” was involved. Matter of Aruna, 24 I&N Dec. 452 (BIA 2008). It’s not clear what the outcome would be if a small amount had been proved in the criminal case. Counsel should attempt to avoid pleading to this offense, but if that is not possible counsel should make a record that the conviction was for giving away a small amount of marijuana. (Case law does not supply a specific amount.) Better yet would be a conviction for offering to give away a small amount of marijuana, because this would supply immigration counsel with two possible arguments.

Other Grounds: Yes, as a ground of inadmissibility and deportability as an offense relating to controlled substances.

75. Possession, use, administration, acquisition, sale, manufacture or transportation of dangerous drugs, ARS § 13-3407, or narcotic drugs, ARS § 13-3408
Persons who knowingly
(1) Possess or use a dangerous or narcotic drug.
(2) Possess such a drug for sale.
(3) Possess equipment or chemicals, or both, for the purposes of manufacturing such a drug.
(4) Manufacture such a drug.
(5) Administer such a drug to another person.
(6) Obtain or procure the administration of such a drug by fraud, deceit, misrepresentation or subterfuge.
(7) Transport for sale import into this state or offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer such a drug.

**NOTE:** Setting aside a conviction under ARS § 13-907 will eliminate a conviction for simple possession or use of a dangerous or narcotic drug. See Note: Controlled Substances. However, counsel should not rely solely on setting aside a conviction to prevent removability since ICE may initiate removal proceedings before it can occur.

In general, where possible do not have the specific drug identified on the record. Criminal defense counsel can leave open a potential defense in immigration proceedings by creating a record of conviction that does not identify the specific dangerous (or narcotic) drug, e.g. by pleading to the language of the statute. If the record of conviction does not specifically identify what the controlled substance was, immigration authorities may not be able to establish that the substance was one of those listed as a controlled substance under federal law. Arguably “dangerous drugs” and “narcotic drugs” are terms that comprise more than controlled substances. For immigration purposes a controlled substance is defined by federal drug schedules at 21 USC §802. In Matter of Paulus the BIA held that if the state definition of controlled substance is broader than the federal definition and if the substance is not identified on the record, there is no way to prove that the substance actually was one of those on the federal list. 11 I&N Dec. 274 (BIA 1965); see also Ruiz-Vidal v. Gonzales, 473 F.3d 1072 (9th Cir. 2007). Therefore the conviction is not necessarily of an offense “relating to” controlled substances under the federal definition. If the offense does not involve a federal controlled substance, the conviction is not a basis for deportability, inadmissibility or aggravated felon status.

Generic solicitation under ARS § 13-1002, and potentially offering to commit a drug offense under A7, are good alternate pleas. For more information see Note: Controlled Substances.

**A1. Possession or use**

a. **Possession**

Crime Involving Moral Turpitude: No. The BIA reserved judgment on the question in Matter of Khourn, 21 I&N Dec. 1041 (BIA 1997), but it probably would not be so held. See also Hampton v. Wong Ging, 299 F. 289, 290 (9th Cir. 1924) (possession of opium is not a CMT).

Aggravated felony: No, with the exceptions discussed below involving crack and flunitrazepam. Neither a single conviction nor multiple convictions for felony possession of a controlled substance should be held an aggravated felony in immigration proceedings in the Ninth Circuit. Oliveira-Ferreira v. Ashcroft, 382 F.3d 1045 (9th Cir. 2004). However, the BIA in Matter of Carachuri-Rosendo, 24 I&N Dec. 382, 386 (BIA 2007) noted that Oliveira-Ferreira may be in tension with the Supreme Court’s decision in Lopez v. Gonzales, 127 S. Ct. 625 (2006), which suggests that a prior controlled substance offense that is pleaded to as part of an “enhancement” of a subsequent offense may convert the subsequent offense into an aggravated felony. Therefore, counsel should avoid pleading to a controlled substance offense in which a prior drug offense is an element, is alleged or is otherwise included as an “enhancement” in the charging document or judgment.
A single conviction of possession of flunitrazepam or of more than five grams of crack cocaine is an aggravated felony, because a first such conviction is punished as a felony under federal law.

*Whenever possible, criminal defense counsel should plead to “use” or leave the record vague between possession and use. Criminal defense counsel should reduce a possession conviction to a misdemeanor wherever possible.* This is because a felony may be treated as an aggravated felony in immigration proceedings outside the Ninth Circuit, and in federal criminal prosecutions for illegal re-entry. “Use,” and a first misdemeanor possession, will not be so treated. See Note: Controlled Substances, Part V.

**Controlled Substance Conviction Causing Deportability and Inadmissibility.** Yes. The person will be inadmissible and will not be allowed to seek legal status in the United States. If the client is a lawful permanent resident, the conviction will render him deportable but eligible for a waiver of removal (immigration pardon) if the offense is not an aggravated felony and if he has had his lawful permanent residence for at least five years and has been living in the United States for at least seven years after any legal admission.

**Eliminating the conviction.** A first conviction for simple possession, use, or a less serious offense without a federal analogue can be easily eliminated by state “rehabilitative relief” such as ARS § 13-907. See Note: Drug Offenses.

b. Use

**Crime Involving Moral Turpitude:** No, see possession.

**Aggravated felony.** No. Because it does not involve trafficking and there is no analogous federal offense, even felony use, or use with a prior drug conviction, is not an aggravated felony.

**Deportable and Inadmissible Drug Conviction.** Yes.

**Eliminating the conviction.** See possession, *supra*.

A2. Possession for sale.

**Crime Involving Moral Turpitude:** Yes. *Matter of Khourn, supra.*

**Aggravated Felony:** Yes. Possession for sale involves trafficking.

**Controlled substance conviction causing deportability and inadmissibility.** Yes, if the record shows a federally recognized controlled substance.

A3. Possess equipment or chemicals, or both, for the purpose of manufacture

See “Manufacture.”

A4. Manufacture

**Crime Involving Moral Turpitude:** Probably. This offense might be seen as akin to drug trafficking, which is a CMT. *Matter of Khourn, 21 I. & N. Dec. 1041 (BIA 1997).* NOTE: Based on the
statute’s annotations, it is unclear whether these subsections can include manufacture for personal use. This might create an argument that the offense does not involve trafficking absent evidence on the record showing that it was not for personal use.

**Aggravated Felony:** Yes. A3 is likely to be held an aggravated felony as analogous to 21 U.S.C. § 841(c), unauthorized possession of listed chemicals with intent to manufacture a controlled substance, if the AZ conviction involves a federally listed controlled substance. Subsection (4) likely to be held an aggravated felony as analogous to 21 USC § 841(a)(1), manufacture a controlled substance, if the AZ conviction involves a federally listed controlled substance.

**Controlled Substance Conviction Causing Deportability and Inadmissibility.** Yes, if the record shows a federally recognized controlled substance.

A5. Administer the drug to another person.

**Crime Involving Moral Turpitude:** Probably not. There is no authority establishing that administering a dangerous drug necessarily involves an evil intent.

**Aggravated Felony:** No, because no trafficking element and no federal analogue.

**Controlled Substance Conviction Causing Deportability and Inadmissibility.** Yes, if the record shows a federally recognized controlled substance.

A6. Obtain or procure the administration of the drug by fraud, deceit, misrepresentation or subterfuge.

**Crime Involving Moral Turpitude:** Yes, in the case of fraud. Fraud is by definition a CMT, including where fraud is involved in a drug offense. *Matter of A, 5 I. & N. Dec. 52* (BIA 1953) (holding that defrauding the U.S. government by falsely issuing dangerous prescription involves both forgery and fraud and is therefore, a CMT).

**Aggravated Felony:** Yes, as analogous to 21 USC § 843(a)(3) (acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge). Try to plead to straight possession or straight fraud.

**Controlled Substance Conviction Causing Deportability and Inadmissibility.** Yes, if the record shows a federally recognized controlled substance.

A7. Transport for sale, import into this state, offer to transport for sale or import into this state, sell, transfer or offer to sell or transport the drug.

These mainly are divided into trafficking offenses, and offering to commit a trafficking offense (solicitation). Offering to commit a trafficking offense should not be held an aggravated felony, although many immigration judges are currently finding so. It is arguable that it is not a deportable drug conviction. Defense counsel should try to plead to generic solicitation under § 13-1002, or if this is not possible, plead defendant to the entire subsection, or specifically to offering, to avoid an aggravated felony conviction. Where possible keep out of the record of conviction any mention of a federally listed controlled substance.

a. **Transport for sale, sell**
Crime Involving Moral Turpitude: Yes, as drug trafficking.

Aggravated Felony: Yes. Straight transportation does not meet the general definition of trafficking. United States v. Casarez-Bravo, 181 F.3d 1074 (9th Cir. 1999); Saleres v. INS, 22 Fed. Appx. 831 (9th Cir. 2001)(Table). But because this offense is transport for sale it will be found to involve an element of trafficking.

Controlled Substance Conviction Causing Deportability and Inadmissibility. Yes, if the record shows a federally recognized controlled substance.

b. Import into this state

Crime Involving Moral Turpitude: Yes, if the importation is necessarily for trafficking as opposed to personal use.

Aggravated Felony: Yes, to the extent that the importation is for trafficking. Or, to the extent that this offense is analogous to 21 U.S.C. § 952(a), which criminalizes the importation of controlled substances or, if they are listed in schedules III, IV, or V, dangerous drugs. However, an argument could be made that importation into the state is akin to transportation, which does not meet the general definition of trafficking. United States v. Casarez-Bravo, 181 F.3d 1074 (9th Cir. 1999)

Controlled Substance Conviction Causing Deportability and Inadmissibility. Yes, if the record shows a federally recognized controlled substance.

b. Transfer

Crime Involving Moral Turpitude: Probably. Transfer means “furnish, deliver, or give away” and therefore might be viewed as a drug trafficking offense. If the record leaves open the possibility that no money was involved, immigration counsel can argue against this.

Aggravated Felony: Yes. Federal drug laws punish “giving away” a federally listed controlled substance without remuneration as a felony (except giving away a small amount of marijuana, which is a misdemeanor). This makes an analogous state offense an aggravated felony for immigration purposes.

Controlled Substance Conviction Causing Deportability and Inadmissibility. Yes, if the record shows a federally recognized controlled substance.

d. Offer to transport for sale, sell, transfer, or import into the state

Crime Involving Moral Turpitude: Yes

Aggravated Felony: An “offering” offense constitutes solicitation, which is not an aggravated felony. United States v. Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2001) (California offense prohibiting sale or offer to sell a controlled substance is not an aggravated felony where the record of conviction leaves open the possibility that the offense involved offering for sale.) However, despite this precedent, many immigration judges will find it an aggravated felony. A better plea is to generic solicitation under § 13-1002, even if the record reveals that the offense solicited involves controlled substances.
Controlled Substance Grounds. Immigration attorneys have an argument that this should not be a drug conviction causing deportability or inadmissibility, and some immigration judges in California have accepted this argument. However, Arizona judges so far have denied it. Counsel should advise clients that this is possible, but it would take protracted litigation up to the Ninth Circuit. A conviction of generic solicitation, however, will be held not to be a deportable or inadmissible offense. See ARS § 13-1002 and Note: Safer Pleas (A). This conviction will cause inadmissibility by giving the government “reason to believe” the person is or assists a trafficker.

76. Possession, manufacture, delivery, advertisement of drug paraphernalia, ARS §13-3415

A. It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate…conceal, inject, ingest, inhale or otherwise introduce into the human body a drug in violation of this chapter. Class 6 felony.

Crime Involving Moral Turpitude (CMT): Divisible. Possession to use in order to ingest or inhale should not be held a CMT. Possession of drug paraphernalia to plant, manufacture, etc. etc. might be considered akin to a drug trafficking offense, which is a CMT. Plead to “introduce into the body” or the language of the statute to avoid any inference of drug trafficking.

Aggravated Felony: Probably not. Although possession of paraphernalia with intent to commit a drug trafficking offense (such as manufacturing) could be held an aggravated felony, the vast majority of Arizona cases include only possession of paraphernalia for personal use and will not be held an aggravated felony.

Aggravated Felony as a Trafficking Offense: Divisible. Unless the charging document specifically refers to possession of paraphernalia that could be used for trafficking offenses, immigration judges will not find this to be an aggravated felony.

Aggravated Felony as a Federal Analogue: Appears not to be. The only statute dealing with drug paraphernalia is 21 U.S.C. § 863(a) (sale, offer for sale, use of mails or interstate commerce to transport, or to import or export drug paraphernalia) and it is not sufficiently analogous to ARS 13-3415 to make it an aggravated felony.

Controlled Substance Ground: Yes. ARS § 13-3415 has been held an offense relating to a controlled substance because the statute requires proof that the paraphernalia be linked to controlled substances. Luu-Le v. INS, 224 F.3d 911 (9th Cir. 2000).

B. It is unlawful for any person to deliver, possess with intent to deliver or manufacture with intent to deliver drug paraphernalia knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, manufacture …conceal, inject, ingest, inhale or otherwise introduce into the human body a drug in violation of this chapter. Class 6 felony.

Crime Involving Moral Turpitude (CMT): Probably divisible, see A. A failure to “reasonably know” the use something will be put to should not be held to involve moral turpitude.

Aggravated Felony: Not clear.

As a Drug Trafficking Offense: This might be a drug trafficking offense if the record of conviction establishes that there was an intent to deliver or manufacture drug paraphernalia knowing that it would be used to “plant, propagate…contain” etc. To avoid this result, defense counsel should plead to the generic language of the statute.
As a Federal Analogue: Probably not, as this should not be held sufficiently close to 21 U.S.C. § 863(a) (see Part A, supra) to make it an aggravated felony. Better plea is to possession under A, or leave the record of conviction vague as to whether Part A or B was the offense of conviction.

**Controlled Substance Ground:** Yes. ARS § 13-3415 has been held an offense relating to a controlled substance because the statute requires proof that the paraphernalia be linked to controlled substances. **Luu-Le v. INS,** 224 F.3d 911 (9th Cir. 2000).

C. It is unlawful for a person to place in a newspaper …. knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Class 6 felony.

**Crime Involving Moral Turpitude (CMT):** Probably not.

**Aggravated Felony:** Maybe.

As a Drug Trafficking Offense: This might be construed as trafficking, although it is attenuated.

As a Federal Analogue: This may be held an aggravated felony as analogous with 21 U.S.C. § 863(a); see Part A, supra. Better plea is to possession under A, or leave the record of conviction vague as to whether Part A or C was the offense of conviction.

**Controlled Substance Ground:** Yes. ARS § 13-3415 has been held an offense relating to a controlled substance because the statute requires proof that the paraphernalia be linked to controlled substances. **Luu-Le v. INS,** 224 F.3d 911 (9th Cir. 2000).

77. **Unlawful Flight,** ARS § 28-622.01
A driver of a motor vehicle who wilfully flees or attempts to elude a pursuing official law enforcement vehicle that is being operated in the manner described in section 28-624, subsection C is guilty of a class 5 felony.

**Crime Involving Moral Turpitude (CMT):** Maybe. While there is no direct case law on point, immigration counsel can argue that a decision to flee law enforcement made in a moment of panic does not reflect the inherently base, vile, or depraved conduct required for a CMT.

**Aggravated Felony:** This should not be held an aggravated felony as a crime of violence, since there is no use, attempted use, or threatened use of physical force as required by 18 U.S.C. § 16.

78. **Driving or actual physical control while under the influence,** ARS § 28-1381.

**Crime Involving Moral Turpitude (CMT):** A simple DUI does not constitute a CMT. **Matter of Torres-Varela,** 23 I. & N. Dec 78 (BIA 2001)(en banc).

**Aggravated Felony:** A simple DUI will not be considered an aggravated felony as a crime of violence, even if a sentence of 365 days or more is imposed, because it can be committed with a mere negligence mens rea. See, e.g., **Leocal v. Ashcroft,** 125 S.Ct. 377 (2004) (felony driving under the influence under Florida law, with no mens rea requirement, is not an aggravated felony as a crime of violence); **U.S. v. Trinidad-Aquino,** 259 F.3d 1140 (9th Cir. 2001) (Cal. conviction for DUI with injury
Cal. Veh. Code § 23153 is not a COV); U.S. v. Portillo-Mendoza, 273 F.3d 1224, 1226 (9th Cir. 2001) (DUI conviction with priors in violation of Cal. Veh. Code §§ 23152 and 23550 was not an aggravated felony).

Legislation passed the Senate, but did not become law, that would make a third DUI a crime of violence and hence an aggravated felony if a sentence of a year or more is imposed. Because of this risk, counsel should attempt to avoid a sentence of a year for a third DUI.

79. Driving or actual physical control while under the extreme influence of intoxicating liquor, ARS § 28-1382.

Crime Involving Moral Turpitude (CMT): No, see ARS § 28-1381.

Aggravated Felony: Not under current law, but counsel should try to obtain 364 days or less because of a risk of future legislation. See § 28-1381.

80. Aggravated DUI, ARS § 28-1383.

A. A person is guilty of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs if the person does any of the following:

1. Commits a violation of section 28-1381, section 28-1382 or this section while the person's driver license or privilege to drive is suspended, canceled, revoked or refused or while a restriction is placed on the person's driver license or privilege to drive as a result of violating section 28-1381 or 28-1382 or under section 28-1385.

2. Within a period of sixty months commits a third or subsequent violation of section 28-1381, section 28-1382 or this section or is convicted of a violation of section 28-1381, section 28-1382 or this section and has previously been convicted of any combination of convictions of section 28-1381, section 28-1382 or this section or acts in another jurisdiction that if committed in this state would be a violation of section 28-1381, section 28-1382 or this section.

3. While a person under fifteen years of age is in the vehicle, commits a violation of either: (a) Section 28-1381 or (b) Section 28-1382.

Crime Involving Moral Turpitude (CMT):

A1. The offense is not a CMT if the record indicates or leaves open the possibility that the defendant was merely in physical control of the vehicle (e.g., sitting in a parked car), as opposed to driving it. Hernandez-Martinez v. Ashcroft, 329 F.3d 1117, 1118 (9th Cir. 2003). Therefore counsel should attempt to have the record indicate, or leave open the possibility, that this was the case. The Ninth Circuit will consider en banc whether actually driving under the influence on a suspended license involves moral turpitude. The court will reconsider Marmolejo-Campos v. Gonzales, 503 F.3d 922 (9th Cir. 2007), which had upheld Matter of Lopez-Meza, 22 I. & N. Dec. 1188, 1195 (BIA 1999) (“the aggravated circumstances … establishes a culpable mental state adequate to support a finding of moral turpitude”).

A2. Not a CMT. Matter of Torres-Varela, 23 I. & N. Dec. 78 (BIA 2001)(conviction under A2, aggravated driving with prior DUI convictions, is not a CMT because no culpable mental state is required; repeated commission of a non-CMT does not constitute a CMT).

A3. Not a CMT.

Aggravated Felony: Not under current law, but counsel should attempt to get a sentence of 364 days or less. See § 28-1382, supra.
Other Grounds. It is a ground of inadmissibility, to be a current alcoholic, which is classed as a mental disorder that poses a threat to self or others. 8 USC §1182(a)(1)(A)(ii). Being a “habitual drunkard” is a bar to establishing good moral character, necessary for naturalization to U.S. citizenship, cancellation for non-permanent residents, VAWA and some other applications. 8 USC § 1101(f)(1). Multiple DUI convictions might provide evidence of either of these conditions.
NOTES ACCOMPANYING THE
QUICK REFERENCE CHART FOR DETERMINING
THE IMMIGRATION CONSEQUENCES OF
SELECTED ARIZONA OFFENSES

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the JEHT Foundation for funding the national project; and to the Florence Immigrant and Refugee Rights Project for its contributions to this work. Copyright 2008 Immigrant Legal Resource Center. Permission to reproduce is granted to criminal and immigration defense attorneys and advocates only. If you use these materials in a training, please notify AZehart@ilrc.org, for our reporting purposes.
**Note: Definition of Conviction: Drug Programs, Delinquency Dispositions, Appeal, ARS § 13-907**

For further discussion see Defending Immigrants in the Ninth Circuit, Chapter 2, www.ilrc.org/criminal.php

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

However, counsel also must be aware of the immigration penalties based on mere conduct, even absent a conviction. Engaging in prostitution, making a false claim to citizenship, using false documents, smuggling aliens, being a drug addict or abuser, admitting certain drug or moral turpitude offenses, or if the government has “reason to believe” the person ever has been a drug trafficker all can be damaging. See relevant Notes; for a discussion of the controlled substance conduct grounds, see Note: Controlled Substances, Part IV.

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**A. Overview**

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

Under the immigration statute\(^1\) a conviction occurs:

- Where there is “a formal judgment of guilt of the alien entered by a court” or,

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

Thus a guilty plea plus imposition of probation, fee, jail or counseling requirement will equal a conviction for immigration purposes, even if the plea is later withdrawn upon successful completion of these requirements.\(^2\) The one exception is for a first conviction of certain minor drug offenses, described in Part B, below.

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\(^1\) INA § 101(a)(48)(A), 8 USC § 1101(a)(48)(A).

\(^2\) *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001).
An acquittal, a deferred prosecution, verdict, or sentence, and dismissal under a pre-plea diversion scheme are not convictions. In addition, juvenile delinquency dispositions, infractions, cases on direct appeal, and judgments vacated for cause are not convictions.

B. TASC/Diversion/Drug Programs as a Conviction

In Arizona, there are a variety of options that defenders use to avoid a traditional conviction for a controlled substance offense. These options vary from county to county and may include diversion, pre-conviction drug courts, post-conviction drug courts, deferred adjudication, and other rehabilitative programs. Several counties offer more than one option. However, the procedures in Arizona counties differ so substantially that, while completion of a drug court in one county may have immigration consequences, completion of a drug court in a different county may not. Unfortunately, for this reason there is no general rule about the immigration consequences of Arizona drug programs.

However, there are three considerations that defenders can take into account when determining whether an alternative offered by their particular county will have immigration consequences:

1. **Will this program, if successfully completed, be considered a “conviction” for immigration purposes?**

   As discussed in Part A above, immigration law uses its own federal standard at 8 USC § 1101(a)(48)(A) to determine whether a conviction has occurred. Under this definition, a conviction occurs even if adjudication of guilt has been withheld, where --

   (i) a judge or jury has found the alien guilty, or the alien has entered a plea of guilty or nolo contendere, or has admitted sufficient facts to warrant a finding of guilt, and

   (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.”

   Therefore, in the context of a drug program, a “conviction” occurs when a defendant makes a plea or admission of guilt to a judge, and the judge orders the defendant to complete a drug program. For this reason, the completion of many Arizona drug programs, although not a formal conviction under criminal law, will still constitute a “conviction” for immigration purposes.

   However, in some Arizona counties, the completion of a drug program (or other rehabilitation) occurs through an informal agreement with the prosecutor. In this scenario, no formal plea or admission of guilt is submitted to the court, but rather remains with the prosecutor. Since the judge does not make a finding of guilt, accept a plea, or impose a “punishment,” there is no “conviction” for immigration purposes per 8 USC § 1101(a)(48)(A). However, if the defendant does not successfully complete the program,
the resulting prosecution will likely result in an immigration “conviction.” This “deferred adjudication” is also a successful means of avoiding an immigration conviction for other, non-drug-related offenses.

For questions about whether a particular drug program in Arizona meets the definition of a “conviction” for immigration purposes, contact Kara Hartzler, Arizona Defending Immigrants Partnership, at (520) 868-0191 ext. 103 or khartzler@firrp.org.

2. Should I try to get my client into a drug program even if it’s considered a “conviction” for immigration purposes?

Yes, if your client has no prior controlled substance convictions. Compliance with state “rehabilitative relief” will eliminate the immigration effect of a first conviction for simple possession of a controlled substance. _Lujan-Armendariz v. INS_, 222 F.3d 728 (9th Cir. 2000). This also applies to a “less serious” offense such as under the influence or possession of paraphernalia. _Cardenas-Uriarte v. INS_, 227 F.3d 1132 (9th Cir. 2000). Therefore, if the defendant successfully completes a drug program and has no prior controlled substance convictions, the immigration consequences of the offense should be eliminated. See Section E: Setting Aside Convictions.

However, it is important to consider whether a client will be permitted to complete a drug program. If, during the course of the prosecution, ICE becomes aware that the defendant is deportable, ICE will likely detain the defendant and commence removal proceedings – regardless of whether the client has had the opportunity to complete the program. This will in turn result in a conviction for immigration purposes. Therefore, acceptance into a diversion program for a first-time controlled substance offense is NOT a safe plea since there is no guarantee that the defendant will have the opportunity to complete the program. Counsel should use this option only if no other safe pleas are available.

Even if the defendant successfully completes a diversion-type program, it is important to advise the client that this rule only applies in the Ninth Circuit. If a client is examined by an immigration officer in a state outside the Ninth Circuit, he or she will likely be found removable. This is particularly important for clients who are traveling abroad and passing through an airport or port of entry outside the Ninth Circuit.

3. Can setting aside a first-time controlled substance conviction eliminate the immigration consequences?

Yes. Under A.R.S. § 13-907, a person convicted of a criminal offense who fulfills the conditions of probation or sentence and discharge by the court may apply to have the judgment of guilt set aside. If the judgment of guilt is set aside, a conviction for first-time simple possession, use, or possession of paraphernalia should not result in adverse immigration consequences. _Lujan-Armendariz v. INS_, 222 F.3d 728 (9th Cir. 2000).
However, it is important to remember that this principle ONLY applies to a first-time controlled substance offense. In other words, setting aside a domestic violence or a second-time paraphernalia conviction through the completion of probation will NOT erase its immigration consequences. See Section E, Setting Aside Convictions. It is also important to remember that, as with drug programs, ICE may initiate removal proceedings before the person has completed the necessary rehabilitative steps. Therefore, defense counsel should not plead in reliance on the fact that defendant will be able to have the conviction set aside. Rather, this option should be considered as a last resort and not a “safe” plea.

C. Juvenile Delinquency Dispositions

Adjudication in juvenile delinquency proceedings does not constitute a conviction for any immigration purpose, regardless of the nature of the offense. If the record of proceedings indicates that proceedings were in juvenile court, counsel can be assured that there is no conviction.

Because delinquency proceedings offer the tremendous advantage of not resulting in a conviction for immigration purposes, it is even more crucial for noncitizens than for other minors that their case be held in delinquency rather than adult proceedings. Counsel should do everything possible to ensure this. Immigration counsel can argue, however, that an adult conviction for certain offenses that were committed while a minor should not have immigration effect because it should be considered analogous to a delinquency disposition. See Defending Immigrants in the Ninth Circuit, §2A.3

Juvenile court proceedings still can create problems for juvenile immigrants under the so-called “conduct grounds,” such as engaging in prostitution, being a drug addict or abuser, or if the government has “reason to believe” the person ever has been a drug trafficker. For a discussion of the controlled substance conduct grounds, see Note: Controlled Substances, Part IV.

Undocumented youth in delinquency proceedings may be able to immigrate through special provisions based on their having been subjects of parental abuse, neglect or abandonment, or being crime victims. Also, defenders should know that they can help a permanent resident youth automatically become a U.S. citizen, regardless of juvenile record. If one parent having custody of a permanent resident youth becomes a U.S. citizen before the youth’s 18th birthday, the youth automatically becomes a citizen. See free materials about children and youth issues at www.ilrc.org/sijs.php.

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D. Appeal and Issues of Finality

It has been long held that a conviction currently on direct appeal of right does not have sufficient finality to constitute a "conviction" for any immigration purpose. However, the Fifth Circuit has held that the statutory definition of conviction erodes the requirement of finality, in a complex procedural situation.

In practice, convictions clearly on direct appeal of right still are being held not to constitute a conviction for immigration purposes in the Ninth Circuit. Although some government attorneys have argued that an appealed conviction will support deportation under the new definition, it seems unlikely that the BIA would rule that conviction on a direct appeal of right is final for immigration purposes, or that the Ninth Circuit would support such a ruling.

Counsel should file late appeals to criminal convictions where appropriate. The Board of Immigration Appeals held that a conviction under New Jersey law remained final in a case where the respondent and the government stated that the court of appeal had "accepted" the appeal for filing, but the respondent presented no copy of the appeal stamped by the Appellate Division and no evidence or allegation that the court entered an order granting the respondent permission to file the late appeal.

E. Setting Aside Convictions under ARS § 13-907

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

The one exception is for a first offense of certain drug offenses: simple possession or an offense less serious than simple possession that does not have a federal analogue, such as possession of paraphernalia or use. There is a small possibility that a conviction for “transfer” of a very small amount of marijuana under A.R.S. § 13-3405(A)(4) may also avoid immigration consequences if set aside. In that case “rehabilitative relief” such as withdrawal of plea under § 13-907 will eliminate the conviction entirely for immigration purposes. However, this will only be recognized in

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4 Pino v. Landon, 349 U.S. 901, 75 S.Ct. 576 (1955) (holding that an “on file” system in Massachusetts did not constitute sufficient finality to be a basis for deportation under the Act).
5 Moosa v. INS, 171 F.3d 994 (5th Cir. 1999), ruling on Texas deferred adjudication statute that held limited appeal rights. See similarly Matter of Puno, Int. Dec. 3364 (BIA 1998) (en banc); and separate opinion of Boardmember Rosenberg pointing out that this violates a number of well-established rules of statutory construction.
7 Murillo-Espinosa v INS, 261 F.3d 771 (9th Cir. 2001).
8 See discussion of Lujan-Armendariz v INS, 222 F.3d 728 (9th Cir. 2000) and other cases in Note: Controlled Substances.
9 But see Matter of Aruna, 24 I&N Dec. 452 (BIA 2008) (finding that the elements of a state conviction for conspiracy to distribute marijuana correspond to the elements of the Federal felony offense).
Ninth Circuit states. If the immigrant is arrested in, e.g., New York, the § 13-907 treatment will not prevent the disposition from being a conviction. See Note: Controlled Substance Offenses.
Note: Record of Conviction And Divisible Statutes

For further discussion see Defending Immigrants in the Ninth Circuit, § 2.11, www.ilrc.org/criminal.php

Big Picture: If you can’t avoid a plea to a “bad” immigration offense, an almost equally good result is to plead to a statute that includes multiple offenses, at least one of which does not have bad immigration consequences. If the record of conviction is vague enough so that the “good” offense might have been the offense of conviction, the immigrant wins.

When an immigration authority or a judge in a federal prosecution reviews a prior conviction, she will consult only a limited number of documents to identify the elements of the offense of conviction. If criminal defense counsel keeps the record of conviction vague as to whether the noncitizen defendant was convicted of an offense carrying an adverse immigration consequence, the consequence does not attach.

Example: “Deadly weapon” includes both firearms and non-firearms. If the record of conviction does not conclusively identify a weapon as a firearm, the conviction will not make the immigrant deportable under the firearms ground.

Example: Assault includes a mere “insulting” touching (ARS § 13-1203(a)(3)), which is not a crime of violence for immigration purposes. If the record of conviction does not conclusively establish that mere insulting touching was not the offense of conviction, the conviction is not a crime of violence.

Because so many criminal statutes include multiple offenses, only some of which have immigration consequences, this is one of the most important defense strategies left to criminal and immigration defense counsel. In many situations an informed use of this analysis will permit a noncitizen to plead to an offense that is acceptable to the prosecution but does not cause adverse immigration consequences.

A. Overview: The Categorical and Modified Categorical Analysis

An immigration judge or other reviewing authority will use the federal “categorical analysis” (including the “modified” categorical analysis) in examining a prior conviction. Among other things, the categorical analysis is used to determine whether the prior conviction triggers an immigration law-related penalty, e.g. is an aggravated felony, firearms offense, or crime involving moral turpitude. This is used in
immigration proceedings and in federal prosecutions for illegal re-entry into the United States after being convicted of certain offenses.\textsuperscript{10}

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

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

- The most minimal conduct that could still be held to constitute the offense must carry the immigration penalty in order for the offense to do so;

- Where the statute includes multiple offenses, only some of which carry immigration consequences, the immigration judge or other reviewing authority may look only to a strictly limited official record of conviction to determine the elements of the offense of conviction; and

- If the above principles are employed and the conviction has not been conclusively proved to carry adverse immigration penalties, the noncitizen will be held not to suffer the penalties. Lack of information or ambiguity is always resolved in favor of the noncitizen.\textsuperscript{11}

- In a very beneficial decision, the Supreme Court recently reaffirmed the above principles and established more clearly what documents can be consulted in reviewing a prior conviction. \textit{Shepard v. United States}, 125 S.Ct. 1254 (2005).

B. The Categorical Analysis: The Elements of the Offense

To identify the elements of an offense that was the subject of a prior conviction, the categorical analysis looks only to the statutory definition of the offense and not to the underlying circumstances. If the person actually committed assault but was able to plead to trespass, the analysis will focus on the elements of the offense of trespass. Beginning by looking only at the elements of the crime as set forth in the statute and the case law of the jurisdiction applying the statute (i.e., not information in the record of conviction), the \textit{minimum or least offensive conduct that can violate the statute} must involve the adverse immigration consequence – e.g., be a moral turpitude offense or aggravated felony – in order for a conviction under the statute to have that consequence. In other words, the

\textsuperscript{10} See discussion of 8 USC §1326(b) prosecutions in Note “Aggravated Felony” and \textit{Calif. Criminal Law and Immigration} §9.50.

\textsuperscript{11} See, e.g., discussion in \textit{United States v. Rivera-Sanchez}, 247 F.3d 905, 907-8 (9th Cir. 2001)(en banc); \textit{United States v Corona-Sanchez}, 291 F.3d 1201, 1203-4 (9th Cir. 2002) (en banc).
offense categorically qualifies as an aggravated felony, etc. “if and only if the ‘full range of conduct’ covered by [the criminal statute] falls within the meaning of that term.”

**Example:** Mr. Ye was convicted of burglarizing a car under Calif. P.C. §460(b). To determine whether the conviction was of an aggravated felony as a “crime of violence,” the court considered the most minimal conduct that could violate the statute. Because the statute could be violated by simply reaching into a car through an open window and removing an article, the court found that the offense was not a crime of violence. See *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000).

C. The Modified Categorical Analysis: Divisible Statutes and the Record of Conviction.

1. Identifying a Divisible Statute

The discussion in Part A centered on the “pure” categorical analysis for determining whether a specific offense has adverse immigration consequences based on the minimum behavior required to be guilty of the offense. Where a statute is broad enough to include various offenses, some of which carry immigration penalties while others do not (referred to in immigration proceedings as a “divisible” statute), the “modified” categorical analysis permits the reviewing authority to examine a limited set of documents that clearly establish that the conviction was of an offense that would trigger the immigration penalty. If this limited review of documents fails to unequivocally identify the offense of conviction as one that carries an immigration penalty, then the penalty does not apply.

There are several ways that a single criminal code section can be divisible in terms of immigration consequences. For example, a code section may contain multiple subsections, some of which involve theft offenses and therefore trigger the theft/aggravated felony deportation ground (if the sentence is a year or more) and some of which do not. See e.g. A.R.S. §13-1802 (theft is overbroad in the statute and includes theft of services). It may define the crime in the disjunctive, such as criminal damage which can include damaging property by force (arguably an aggravated felony/crime of violence if the sentence is over a year) or can include blocking a livestock watering hole (no use of force necessary and not likely a crime of violence).

2. What Documents Can Be Consulted to Determine the Elements of the Offense of Conviction?

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When an immigration authority or a judge in a federal prosecution reviews a prior conviction, she will consult only a limited number of documents to identify the elements of the offense of conviction. *If criminal defense counsel keeps the record of conviction vague* as to whether the noncitizen defendant was convicted of an offense carrying an adverse immigration consequence, the consequence does not attach. Because so many criminal statutes include multiple offenses, only some of which have immigration consequences, this is one of the very most important defense strategies left to criminal and immigration defense counsel. In many situations an informed use of this analysis will permit a noncitizen to plead to an offense that is acceptable to the prosecution but does not cause adverse immigration consequences.

The Supreme Court has stated that the permissible documents for review in a conviction by plea are only “the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Shepard v. United States*, 125 S.Ct. 1254, 1257 (2005).

The Ninth Circuit and Board of Immigration Appeals have long imposed similar restrictions on what an immigration judge can review. The reviewing authority may only consult information in the charging papers (and then only the Count that has been pled to or proved), the judgment of conviction, jury instructions, a signed guilty plea, the transcript from the plea proceedings, and the sentence and transcript from sentence hearing. See discussion of how to manage charging papers, pleas and stipulating to a factual document in Part B, below.

Sources of information that are not allowed include: *prosecutor’s remarks during the hearing, police reports, probation or “pre-sentence” report, or statements by the noncitizen outside of the judgment and sentence transcript (e.g., to police or immigration authorities or the immigration judge).* Information from a co-defendant’s case similarly cannot be consulted. Thus where a wife was convicted of assault with intent to commit “any felony,” the immigration authorities could not look to her husband’s record of conviction to define the felony. In immigration proceedings this group of permitted documents often is referred to as “the record of conviction.”

However, if counsel *stipulates that a document provides a factual basis for the plea, the contents may well become part of the reviewable record.* See discussion in Part B, below.

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If there is insufficient information in the record of conviction to identify the offense of conviction in a divisible statute, the reviewing authority must rule in favor of the immigrant.

**Example:** Mr. Fernandez-Ruiz was convicted under A.R.S. § 13-1203(A)(1), which punishes both intentional and reckless causation of injury. Here intentional conduct is a “crime of violence,” and therefore potentially an aggravated felony, while reckless conduct is not. A court reviewing his prior record can look only to limited documents in the record of conviction to determine whether he was convicted of intentional versus reckless conduct. If information in the record of conviction fails to establish that he was convicted of intentional causation of injury, the reviewing authority is required to find that he was not convicted of a crime of violence. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc).

**B. Handling Charging Papers, Plea Agreements and Stipulations to a Factual Basis**

1. **Goals**

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

   As defense counsel, your first step is to understand what you can and cannot permit the record to reveal. To take a straightforward example, assume that your client is a permanent resident who is charged with Misconduct Involving Weapons under ARS § 13-3102. You look the offense up in the Arizona Quick Reference Chart (and/or consult with an immigration attorney) and see that the offense is “divisible” for purposes of the firearms offense deportation ground. The advice is either (a) plead to possession of a specific non-firearm weapon (e.g., nunchaku), or (b) keep the record vague as to what type of weapon was possessed, so as to avoid establishing that the offense was a firearm.

   Between these two options, a plea to the “good” section of a statute—here, possession of nunchaku—always is the best solution, but often is not possible. A solution that is nearly as good is to keep the record vague so as to avoid establishing that the person pled guilty to the “bad” section of the statute, e.g., to possession of a firearm.

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

17 See, e.g., *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc); *United States v. Velasco-Medina*, 305 F.3d 839, 852 (9th Cir. 2002).
This section presents suggestions for keeping the record vague regarding “bad” facts, while still meeting the demands of the court and prosecution.

Again, the obvious first step is to understand as specifically as possible what the record can and cannot establish if protecting immigration goals is a priority. You may be able to offer certain facts that will satisfy the court’s desire for specificity but not hurt immigration status. To get these specific evidentiary goals counsel may use the chart or consult with immigration attorneys.

2. Strategies: Charging Papers and Pleas, Avoiding Stipulation to a Factual Basis

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

Example: Pema, a permanent resident, will become deportable under the firearms ground if she is convicted of using, possessing or carrying a firearm.\(^\text{18}\) She is charged in Count 1 with Misconduct Involving Weapons under ARS § 13-3102. This is a divisible statute for this purpose, since it includes offenses that involve firearms as well as offenses that involve deadly weapons. How might you structure a plea to § 13-3102 to avoid making her deportable?

Dealing with the Substantive Charge

1) The best strategy is to make a record of pleading to the statute, not to the facts in the complaint. A charging paper charging the Arizona offense in the language of the statute is proper\(^\text{19}\) and often beneficial to the noncitizen. A plea to an original or amended charging paper quoting only the language of the statute can prevent immigration consequences under a divisible statute.

To do this, plead to an orally amended complaint to “the exact language of the statute.” Or, plead to an amended complaint that tracks the language of the statute. Because the statute is so wordy, the defendant can plead to, e.g., “possession of a deadly weapon.” Or, plead to, e.g., ARS § 13-3102—not the complaint. Or plead to a written plea agreement in the language of the statute.

2) If the above are not possible, and as a last resort, plead to “Count 1 ARS § 13-3102,” specifically avoiding pleading guilty “as charged” in Count 1. In United States v. Vidal\(^\text{20}\) the Ninth Circuit en banc held that a plea and waiver form showing the notation “Count 1 10851 Veh. Code” did not admit the allegations in the complaint.

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\(^{18}\) INA § 237(a)(2)(C), 8 USC § 1227(a)(2)(C).

\(^{19}\) “[The charge] may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused.” Penal Code § 952.

\(^{20}\) United States v. Vidal, 504 F.3d 1072, 1087 (9th Cir. 2007)(en banc).
because it did not include the words “as charged” in the complaint. Under *United States v. Vidal*, immigration and federal criminal authorities will hold that the plea is not to the allegations that appear in the written Count 1, but to the elements of the statute. If the waiver form had included the words “plead as charged to Count 1,” it would have established the allegations in the count. Since most Judgments in Arizona courts do not contain the phrase “as charged,” immigration attorneys often have an argument that information contained in the charging document cannot be used to prove removability if the statute is divisible.

**Warning:** Where possible counsel should directly plead to the statute or language that tracks the statute as discussed above, because of the possibility that courts will create exceptions to *Vidal*. In a recent decision, which may be open to challenge, a court held that where a signed magistrate’s certificate stated that the charge had been read aloud to the defendant before plea, the critical phrase “as charged” was not needed for the record to establish a plea to the allegations in the count.21

3) **Drafting a plea agreement gives criminal defense counsel the opportunity to create the record of conviction that will be determinative in immigration proceedings.** Important information should be affirmatively set out in the plea agreement or colloquy. Damaging information from the charge can be deleted.

**Examples:** “Defendant pleads guilty to following or harassing,”22 “Defendant pleads guilty to offering to transport,”23 “Defendant pleads guilty to possession of a controlled substance on the state list of controlled substances” where the charging paper alleged a specific substance such as heroin.24

4) If the charge is phrased in the conjunctive (“and”) while the statute is in the disjunctive (“or”), the defendant should specifically make a plea agreement in the disjunctive, for example “I admit to entry with intent to commit larceny or any felony.” (However, if the defendant did not do this, in immigration proceedings a plea to a charge in the conjunctive does not necessarily prove the multiple acts.25)

5) **Do not permit the defendant to admit extraneous facts that might have a negative immigration effect, and that are not required for conviction.** Immigration authorities sometimes consider admission of facts not required for a conviction, even though this appears to violate rules governing the categorical analysis.26 Counsel

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21 *United States v. Aguila-Montes de Oca*, __ F.3d __ (9th Cir. April 28, 2008).
22 This is not a crime of violence under *Malta-Espinoza*, *supra*. See § 9.13.
23 This is not an aggravated felony, and arguably not a deportable drug offense. See § 13.7, Controlled Substances.
24 See discussion of *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1079 (9th Cir. 2007). This is not a deportable drug offense. See § 13.7.
25 *Malta-Espinoza v. Gonzales*, *supra*; see also *In re Bushman*, (1970) 1 Cal.3d 767, 775 (overruled on other grounds).
should assume conservatively that any fact admitted by the defendant may be considered by immigration authorities or a court. For example, if you arrange a plea to simple assault, which has no element of age, do not plead to a charge that indicates the age of the victim if the victim is a minor. A conviction of simple assault is not by itself removable; however, if the age of a minor victim is included in the complaint ICE will charge the offense as child abuse.

6) **Information from dismissed charges cannot be considered in this inquiry**, since this would violate the fundamental rule that there must be proof that the allegations in the charge were pled to. In case of doubt, bargain for a new count.

**Examples:** The Ninth Circuit held that although a dropped charge to a domestic violence offense identified the wife as a victim, this information could not be used to hold that the new straight battery charge, with an unnamed victim, was a crime of domestic violence. (This was held true even though the court ordered anger management and issued a stay-away order in relation to the person named in the domestic violence offense.) See discussion in Note: Domestic Violence.

**Example:** The Ninth Circuit held that although a dropped charge to a drug trafficking offense identified methamphetamine as the controlled substance, this information could not be used to hold that the new charge of possession of a “controlled substance” involved methamphetamine. Since the substance could not be identified, it was not possible to prove that it appeared on federal controlled substance lists, and the noncitizen was held not deportable. See Note, Controlled Substance Offenses.

**Stipulating to a Factual Basis**

1) **The optimal strategy is to arrange to plead pursuant to North Carolina v. Alford and decline to stipulate to a factual basis.** Since an Alford plea is entered without any factual admission of guilt, the court and prosecution may allow entry of the plea without establishing any factual basis for the plea. This occurred in the California conviction considered in *Vidal, supra.*

2) If the court requires a factual basis, defense counsel can ask to enter the specific disclaimer: “We are not admitting the truth of the facts contained in the police report, but simply allowing the court to review it to determine whether the prosecution could present some evidence of every element of the offense.”

3) If the court will not accept the disclaimer, counsel generally should see other suggestions in the following section for controlling the factual basis, such as by creating a carefully crafted written plea agreement.

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27 *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1079 (9th Cir. 2007). See generally *Martinez-Perez v. Gonzales*, 417 F.3d 1022 (9th Cir. 2005).
**Practice Pointer:** After crafting a plea geared to immigration defense, obtain certified copies of the written complaint or amended complaint, the minute orders of the plea, the written waiver form or plea agreement, and, if helpful, obtain the transcript of the plea colloquy. Tell the defendant to keep a copy of these documents and give them to his immigration attorney if he is ever put in removal proceedings or has an immigration problem.

**Practice Pointer:** If the defendant is put in removal proceedings, most of the time the government relies on written documents (the complaint, minute orders, Judgment, and written waiver form). Check the minute orders and any interlineations the clerk puts on any amended complaint to see if they conform to the plea. If not, have them corrected before you leave court. If the plea colloquy is helpful, assist the defendant to obtain a copy of the plea transcript. If the plea colloquy is not helpful, do not obtain a copy of this because the original will be available for the government in the court file.

3. Additional Strategies for Meeting the Factual Basis Requirement; Stipulation to a Police Report or Other Documents

   a. Overview

   One of the many challenges facing criminal defense counsel who represent noncitizens is to meet two potentially conflicting mandates: to make a sparse or vague record for immigration purposes, and to state a factual basis for the plea under criminal law requirements. Because DHS bears the burden of proving deportability based on a conviction record, a crucial criminal defense strategy to avoid immigration consequences is first, to direct a plea to a divisible statute that covers at least one offense that would not trigger the feared immigration consequence. The problem is that providing a factual basis for the plea, if not done with great care, may make the record so specific that it identifies the adverse section as the offense of conviction and destroys the immigration benefit.

   As discussed above in Part 2, the optimal solution is to plead pursuant to *North Carolina v. Alford*, in an effort to avoid or ameliorate the factual basis requirement. Since an *Alford* plea is entered without any factual admission of guilt, the court and prosecution may allow entry of the plea without establishing any factual basis for the plea. This occurred in the conviction considered by the Ninth Circuit *en banc* in *United States v. Vidal*, supra. If the court requires a factual basis for the *Alford* plea, defense counsel can ask to enter a specific disclaimer: “We are not admitting the truth of the facts contained in the [document], but simply allowing the court to review it to determine whether the prosecution could present some evidence of every element of the offense.” This ought to prevent a finding that the defendant admitted to the facts. However, an *Alford* plea coupled with admissions of fact will establish the admissions of immigration purposes.

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28 Thanks to James F. Smith for this analysis.
The use of an *Alford* plea creates many planning possibilities to avoid aggravated felonies or deportable offenses. Take the following example:

Juan, a lawful permanent resident, is charged in Count 1 with ARS § 13-3407 (possession of a dangerous drug) and the complaint alleges that the drug is methamphetamine. While the safest disposition would be to plead to an unidentified controlled substance or a non-drug offense, this is not always possible. In that event, a good alternative is to plead no contest to § 13-3407, or if that is not possible to “Count 1” under an *Alford* plea. It is important not to admit to the allegations “as charged” in the complaint and do not admit the drug or stipulate to a police report or preliminary hearing transcript for the factual basis. A plea pursuant to *Alford*, without more, does not establish the nature of the drug. Therefore, if the government has the burden of proof to prove that the drug is on the Federal Controlled Substances List, they will not be able to carry their burden on the basis of the record of the plea proceedings. See *Ruiz-Vidal v. Gonzales* (9th Cir. 2007) 473 F.3d 1072 (9th Cir. 2007) (holding that many state controlled substance offenses are not on list of Federal Controlled Substances Act and that unless government proves from the record of conviction that the controlled substance involved was on the Federal list, it is not a deportable controlled substance offense.)

If the court will not allow an *Alford* plea with the above conditions, counsel must provide a factual basis of the plea without identifying immigration-adverse elements. This is quite possible, although it may take some creative and aggressive defense work. Counsel should try to provide a minimal factual basis, should retain as much control as possible over the contents of the factual basis, and should assume conservatively that if the defense stipulates to a police report or some other document as providing a factual basis, its contents will become part of the record of conviction for immigration purposes. Therefore if the police report contains factual details that would establish that the client was convicted of, e.g., an aggravated felony, do not stipulate to it—or at least warn the defendant of the likely consequences.

As a last resort defense counsel can avoid including information on the record that specifically identifies the police report involved, for example include a reference to “the police report” without providing the date, etc. Because there can be more than one police report involved in a charge, this will permit immigration defense attorneys at least to argue that the report is not sufficiently identified.

**State the factual basis for the plea in the disjunctive.** Where a statute is divisible, counsel should only plead the defendant to the statute in the disjunctive (using “or” rather than “and”). Counsel should ensure that the factual basis for the plea also is in the disjunctive, or otherwise vaguely stated, for example “On x date I did sell or transport …” (to avoid an aggravated felony drug conviction) or “On x date I used a dangerous weapon” (without identifying the weapon as a firearm, if that is what must be avoided).
Note: Sentence Solutions

For further discussion see Defending Immigrants in the Ninth Circuit, Chapter 5, www.ilrc.org/criminal.php

A Definition of Sentence, Getting to 364 Days
B The Effect of Sentence Enhancements

Big Picture. Some, but not all offenses become aggravated felonies only if a sentence of a year or more is imposed. The definition of sentence includes a suspended sentence, but there are several creative defense strategies to avoid getting to the one-year point.

A Definition of Sentence: Aggravated Felony and the 364 Days

Offenses that are aggravated felonies based on a one-year sentence. The following offenses are aggravated felonies if and only if a sentence to imprisonment of one year was imposed. Obtaining a sentence of 364 days or less will prevent them from being aggravated felonies.30

- Crime of violence, defined under 18 USC § 16
- Theft (including receipt of stolen property)
- Burglary
- Bribery of a witness
- Commercial bribery
- Counterfeiting
- Forgery
- Trafficking in vehicles which have had their VIN numbers altered
- Obstruction of justice
- Perjury, subornation of perjury
- Falsifying documents or trafficking in false documents (with an exception for a first offense for which the alien affirmatively shows that the offense was committed for the purpose of assisting, abetting, or aiding only the alien’s spouse, child or parent)

Note that many other offenses are aggravated felonies regardless of sentence imposed, such as offenses relating to drug trafficking, firearms, sexual abuse of a minor, or rape. For example, conviction of possession for sale is an aggravated felony regardless of sentence. Obtaining a sentence of 364 days in these cases will not prevent the conviction from being an aggravated felony.

Definition of “sentence imposed” for immigration purposes. The immigration statute defines sentence imposed as the “period of incarceration or confinement ordered

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30 See 8 USC § 1101(a)(43), subsections (F), (G), (P), (R), and (S).
by a court of law, regardless of suspension of the imposition or execution of that imprisonment in whole or in part.\textsuperscript{31}

- This language refers to the sentence actually imposed, not to potential sentence.
- It does not include the period of probation or parole.
- It includes the entire sentence imposed even if all or part of the execution of the sentence has been suspended. Where imposition of suspension is suspended, it includes any period of jail time ordered by a judge as a condition of probation.
- Time imposed by recidivist sentence enhancement will be counted as part of the sentence imposed. See Part B below.
- Additional time imposed on the original conviction based on a probation or parole violation is included within the “sentence imposed.”\textsuperscript{32}

Example: The judge suspends imposition of sentence on a Class 6 felony, orders three years probation, and requires jail time of four months as a condition of probation. The defendant is released from jail after three months with time off for good behavior. For immigration purposes the “sentence imposed” was four months. However, if this defendant then violates probation and an additional 8 months is added to the sentence, she will have a total “sentence imposed” of 12 months. If this is the kind of offense that will be made an aggravated felony by a one-year sentence imposed, she should bargain so that the aggregate sentence on the original offense is 364 days or less, rather than twelve months.

How to get to 364 days or less. Often counsel can avoid having an offense classed as an aggravated felony by creative plea bargaining. The key is to avoid any one count from being punished by a one-year sentence, if the offense is the type that will be made an aggravated felony by sentence. If needed, counsel can still require significant jail time for the defendant. If immigration concerns are important, counsel might:

- bargain for 364 days on a single conviction;
- plead to two or more counts, with less than a one year sentence imposed for each, to be served consecutively;
- plead to an additional or substitute offense that does not become an aggravated felony due to sentence, and take the jail time on that;
- waive credit for time already served or prospective “good time” credits and persuade the judge to take this into consideration in imposing a shorter official

\textsuperscript{31} Definition of “term of imprisonment” at 8 USC § 1101(a)(48)(B).
\textsuperscript{32} See, e.g., United States v. Jimenez, 258 F.3d 1120 (9th Cir. 2001) (a defendant sentenced to 365 days probation who then violated the terms of his probation and was sentenced to two years imprisonment had been sentenced to more than one year for purposes of the definition of an aggravated felony).
sentence, that will result in the same amount of time actually incarcerated as under the originally proposed sentence;

- bargain at a probation violation to obtain a total sentence imposed of 364 days or less, even if this means taking additional time on a new conviction – as long as the new conviction does not become an aggravated felony.

Vacating a sentence *nunc pro tunc* and imposing a revised sentence of less than 365 days will prevent the conviction from being considered an aggravated felony.\(^{33}\)

**The petty offense exception.** The above definition of “sentence imposed” also applies to persons attempting to qualify for the petty offense exception to the moral turpitude ground of inadmissibility, which holds that a person who has committed only one crime involving moral turpitude is not inadmissible if the offense has a maximum possible one-year sentence and a sentence imposed of *six months or less*.\(^{34}\) See Note “Crime Involving Moral Turpitude.”

**B. The Effect of Recidivist and Other Sentence Enhancements**

The Supreme Court recently overturned Ninth Circuit precedent to hold that a sentencing enhancement imposed as a result of a recidivist offense shall count towards the length of sentence imposed. *U.S. v. Rodriguez*, 128 S. Ct. 1783 (2008). In Arizona this issue may arise with Shoplifting or Aggravated Domestic Violence pursuant to A.R.S. §§ 13-1805 and 13-3601.02. If for example, someone is convicted of an Aggravated Domestic Violence because of two prior misdemeanor domestic violence offenses and is sentenced to one year or more, this could arguably be found an aggravated felony for conviction of a crime of violence with a sentence of one year or more.

While the *actual sentence imposed* is usually determinative for removability, the *potential sentence* may control for certain grounds.\(^{35}\) For instance, 8 USC § 1227(a)(2)(A)(i) provides that a person is deportable for conviction of a crime involving moral turpitude committed within five years after the date of admission for which a sentence of one year or longer may be imposed. An Arizona class 6 undesignated felony that has been deemed a misdemeanor after completion of probation would not meet this ground of deportability since the maximum sentence is six months. *INS v. LaFarga*, 170 F.3d 1213 (9th Cir. 1999). However, immigration authorities will find that a class 6 undesignated in which the defendant has not yet completed probation would have a potential sentence of one and a half years and would therefore trigger removability.

As described above, the completion of probation and designation of the offense as a misdemeanor may have immigration benefits. However, it is important to remember that this will *only* apply when the length of the actual or potential sentence is an element of the ground of removability. For instance, the controlled substance ground of removability is not dependent on the length of the sentence; therefore, a class 6

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\(^{34}\) See 8 USC § 1182(a)(2)(A)(ii)(II).

undesignated conviction for possession of paraphernalia under ARS § 13-3415 will trigger removability regardless of whether it is ultimately designated a felony or a misdemeanor.
Using the Chart to Establish Defense Goals: Aggravated Felonies, Deportability, Inadmissibility, and Waivers

For further discussion see Defending Immigrants in the Ninth Circuit, Chapter 1, www.ilrc.org/criminal.php

A. Overview of Immigration Consequences, Getting Expert Advice

B. Establishing Defense Goals: Is Avoiding Deportability or Inadmissibility the Highest Priority?

C. Aggravated felonies

Big Picture: A plea that would be terrible for one immigrant might be nearly harmless for another. To effectively evaluate a proposed plea, counsel must understand some basic facts about each person’s immigration status and goals.

A. Overview of Immigration Consequences, Getting Expert Advice

The Quick Reference Chart details which Arizona offenses may make a non-citizen inadmissible, deportable or an aggravated felon. This Note discusses how criminal defense counsel can use this information to establish defense goals for individual noncitizen clients.

Defense counsel might consult three different lists of offenses to determine what convictions must be avoided in order to minimize immigration penalties for noncitizen clients. These are:

- the grounds of deportability, at 8 USC § 1227(a). A noncitizen who has been admitted, i.e., given permission to enter, the United States but is convicted of an offense that makes her deportable can lose lawful status and be deported (“removed”) (see Part B);

- the grounds of inadmissibility, at 8 USC § 1182(a). A noncitizen who is inadmissible for crimes may be unable to obtain lawful status such as permanent residency, and may be barred from entry into the United States if outside the country. The crimes-based grounds of inadmissibility also are incorporated as a bar to establishing “good moral character” under 8 USC § 1101(f), which is a requirement for naturalization to U.S. citizenship, relief for abused spouses and children under VAWA, and some other relief (see Part B); and
• the definition of *aggravated felony*, at 8 USC § 1101(a)(43). Aggravated felony convictions bring the most severe immigration consequences. See Part C.

These three categories comprise the most common, but not all, of the adverse immigration consequences that flow from convictions.\(^{36}\)

To make an adequate analysis of a noncitizen’s defense priorities, defense counsel must have a complete record of all past convictions as well as key information about the person’s immigration status and possibilities. Counsel should photocopy all immigration documents. In some cases a deportable or inadmissible noncitizen will be eligible to apply for a waiver of a particular ground, or a general waiver. A full discussion of waivers and relief is beyond the scope of this note, but see discussion of cancellation of removal for permanent residents and the “section 212(h) waiver” in Part B.3. below.

Defense counsel need to understand exactly what waivers or other forms of relief may be available to an individual client who is deportable or inadmissible. Completing the form found in Note “Client Immigration Questionnaire” is a start. Ultimately defense counsel should look at other works or consult with an expert immigration attorney; see Note “Resources.” See especially consultation services offered by the Florence Immigrant & Refugee Rights Project (free consultation), the National Immigration Project of the National Lawyers Guild (free to members), and the Immigrant Legal Resource Center (on a contract basis).

B. Establishing Defense Goals: Is Avoiding Deportability or Inadmissibility the Highest Priority?

All noncitizens need to avoid conviction of an aggravated felony. See Part C below. But noncitizen defendants differ in whether it is more important for them to avoid a conviction that makes them deportable versus one that makes them inadmissible.

1. *Who needs primarily to avoid deportability, and who needs primarily to avoid inadmissibility?*

As discussed below, some convictions will make a noncitizen deportable but not inadmissible, or vice versa. While it is best to avoid both of these categories, this is not always realistic. Through informed and aggressive pleading, however, counsel may be able to avoid *either* deportability or inadmissibility. How does one prioritize which goal is more important? While an individual determination must be made for each defendant, understanding the following rules of thumb is a good first step toward that analysis.

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\(^{36}\) Other consequences beyond being deportable, inadmissible or an aggravated felon can adversely affect persons applying for asylum (if convicted of a “particularly serious crime”), temporary protected status (if convicted of two misdemeanors or a felony), or a few other types of immigration status. See discussion in *Calif. Criminal Law and Immigration*, Chapter 11.
• A permanent resident’s highest defense goal is to avoid deportability for an aggravated felony; then to avoid deportability for any other reason; and only then to avoid inadmissibility.

• An undocumented person (a noncitizen with no lawful status) usually is more concerned with avoiding the grounds of inadmissibility than the grounds of deportability. (Undocumented persons are already deportable for being unlawfully present in the U.S., but their priority is to avoid the grounds of inadmissibility so they are not barred from applying for legal status, either as an immediate defense against deportation, or sometime in the future.) To establish precise defense goals for an undocumented person, criminal defense counsel must understand what immigration relief, waivers or defenses the person might be eligible for and try to obtain a criminal court disposition that does not destroy eligibility.

• If a permanent resident already is deportable or is about to become deportable, once again criminal defense counsel must understand what defenses to removal the person might be able to assert, and try not to destroy eligibility for the defense. In some cases this may mean avoiding the grounds of inadmissibility. Or, cancellation of removal is an important defense for some permanent residents who do not have an aggravated felony conviction; see Part 3 below.

• In the worst-case scenario, a deportable noncitizen (e.g., an undocumented person or a deportable permanent resident) who could be put in removal proceedings with no hope of applying for any defense might decide that his biggest priority is to get out of jail before immigration authorities discover him, even if this means the person must accept a quick plea that carries adverse immigration consequences.

The following is further discussion of these rules of thumb.

**The Effect of Becoming Deportable**

Generally, the highest priority for permanent residents and others with on-going status is to avoid the crimes-based grounds of deportability. Becoming deportable for crimes mainly hurts persons who already have secure status that they could lose, such as lawful permanent residents and others with ongoing lawful status (e.g., asylees or refugees waiting to become lawful permanent residents, persons with secure temporary status such as Temporary Protected Status, or persons on professional worker or scholar visas). A lawful permanent resident’s highest defense goal is to avoid becoming deportable for an aggravated felony. This will not only subject them to removal proceedings, but probably eliminate any defense they could mount. Their second highest priority is to avoid becoming deportable under some other ground (and in particular under a ground relating to controlled substances). A permanent resident who becomes deportable can be brought under removal proceedings, where an immigration judge can take away the person’s status and order her deported (“removed”) from the United States. If the deportable permanent resident has not been convicted of an aggravated felony, however, she might be able to apply for some relief. A common form of relief for
deportable permanent residents who have not been convicted of an aggravated felony is “cancellation of removal.” See Part 3 below. Or, if not deportable for a drug offense, the resident might be able to “re-immigrate” through a close citizen or permanent resident family member.

In contrast, undocumented persons usually are not hurt by coming within the grounds of deportability. Undocumented persons are those who entered the United States without inspection (i.e., slipped surreptitiously across the border) or entered with a visa and overstayed. They already are deportable, because they have no current documents, and to become deportable for crimes would just make them twice as deportable. Instead, the undocumented person’s immigration strategy will be to mount a defense against being removed by asserting eligibility to apply for immigration status or get some form of relief. This often will require him to be admissible (see below).

There is an exception to the rule that undocumented persons are not affected by the grounds of deportability. All varieties of cancellation of removal for non-permanent residents are barred by conviction of an offense referred to in the grounds of deportability. See 8 USC § 1229b(b). This includes “regular” cancellation and cancellation under VAWA and NACARA. Undocumented persons who might apply for that relief want to avoid conviction of offenses listed in the grounds of deportability. (Note: Cancellation of removal for permanent residents has very different bars and requirements, and is discussed in Part 3 below.)

The Effect of Becoming Inadmissible

Becoming inadmissible for crimes most severely hurts people who need to apply for some status or benefit from the government, e.g. undocumented persons. A person who currently is undocumented but hopes to apply for lawful permanent residency or other status will confront the grounds of inadmissibility in almost any application. Perhaps the person is married to a U.S. citizen, or might get married someday, or has an asylum claim, or is eligible for some special program: at some point he or she either must be admissible, or if inadmissible must be eligible for some discretionary waiver of the inadmissibility ground. The need to remain admissible may also apply to persons with status who are deportable, for example a permanent resident who is deportable for a conviction but could defend against deportation by “re-immigrating” through a family member, if he can remain admissible.

Example: Maurice overstayed his tourist visa years ago and so is undocumented. However he is married to a U.S. citizen who can file a family visa petition for him. He does not care about convictions that make him deportable – he’s already deportable. He cares about avoiding the grounds of inadmissibility, because he intends to assert his family visa as a defense to removal and a way to become a permanent resident. Cecile, a permanent resident who became deportable because of a conviction, is in the same situation. Unless she becomes inadmissible she can defend against being removed by “re-immigrating” through her U.S. citizen
husband. (Or perhaps she can apply for cancellation of removal even if she is
deportable or inadmissible; see Part 3.)

Some forms of relief for undocumented persons have requirements beyond being
admissible. For example, an applicant for Temporary Protected Status must not be
convicted of two misdemeanors, and an applicant for asylum must not be convicted of a
“particularly serious crime.” An individual analysis must be done in each case. See
Notes “Resources” and “Client Immigration Questionnaire.”

A permanent resident who becomes inadmissible but not deportable is safe, as long
as she does not leave the United States. If a permanent resident who is inadmissible for
crimes leaves the U.S. even for a short period, she can be barred from re-entry into the
U.S. Even if she manages to re-enter, she can be found deportable for having been
inadmissible at last admission. Also, an inadmissible permanent resident must delay
applying for naturalization to U.S. citizenship for five years, or less in some cases.

The Absolutely Removable Client

Finally, undocumented persons and persons with status who have become deportable, and
who don’t have any way to defend against removal or apply for lawful status, have a
second and sometimes competing defense priority: to avoid contact with immigration
authorities at any cost. The way to avoid contact with immigration authorities is to avoid
being in jail, where an immigration hold is likely to be placed on the person. After
informed consideration, a deportable defendant with no defenses may decide that it is in
her best interest to accept a plea that gets her out of jail before she encounters
immigration officials, even if the plea has adverse immigration consequences. This is a
decision that the person must make after understanding the long- and short-term life
consequences.

After a person enters a plea, a presentence report writer comes to see the defendant in jail.
The writer generally asks the defendant’s place of birth, the names of both parents and
their birthplaces. Counsel should advise the noncitizen client not to answer these
questions because it could alert the District Attorney to refer them to Immigration and
Customs Enforcement (ICE) for deportation. The person should have a Fifth
Amendment right to refuse to answer. Counsel should also be aware that the information
that an undocumented client provides could be used against them in criminal court
because unlawful presence is a statutory aggravating factor under ARS §13-702.

Example: Esteban is an undocumented person who has no defense against being
removed. If immigration authorities locate him they will place him in removal
proceedings. Esteban may decide to accept a guilty plea that will make him
inadmissible if that is the only way to get out of jail quickly to avoid an
immigration hold or detainer. (In the best of all worlds, however, Esteban would
plead to an offense that both got him out of jail quickly and that did not make him
inadmissible – because it always is possible that he would become eligible to
apply for status someday in the future.)
Example: Emma is an undocumented person who may be eligible to immigrate through a family member within a year or so. Although she has no immediate defense or application, it still might well be worth risking exposure to immigration authorities if that is what’s needed to get to a plea that preserves her eligibility for family immigration. Counsel should discuss the case with an immigration expert to weigh competing interests.

2. Comparing the grounds of deportability and inadmissibility

The lists of offenses in the grounds of deportability and inadmissibility are not identical. Certain convictions will make a noncitizen deportable but not inadmissible, or vice versa. As stated above, in general a permanent resident defendant most wants to avoid a deportable conviction, while an undocumented defendant most wants to avoid an inadmissible conviction. The following is a comparison of the types of convictions or evidence of criminal activity that come up in state court proceedings that make a noncitizen deportable or inadmissible.

Deportability Grounds (8 USC § 1227(a)(2))

1. Conviction of any offense “relating to” controlled substances;
2. Conviction of a crime involving moral turpitude (CMT) if
   • There are two CMT convictions after admission (exception for a “single scheme” of criminal misconduct” or “purely political” offense), or
   • There is one CMT conviction if the offense carries a potential sentence of a year or more and the defendant committed it within five years of last admission;
3. Conviction of an aggravated felony since admission;
4. Conviction of a firearms offense since admission;
5. Conviction since admission and since 9/30/96 of a domestic violence offense, stalking, or child abuse, abandonment or neglect (or a civil or criminal court finding of a violation of a domestic violence protection order);
6. Conviction of managing a prostitution business;
7. Person was a drug abuser or addict at any time since admission.
8. Person who prior to the date of entry, at the time of any entry, or within five years of the date of any entry, knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the U.S. in violation of law.

Inadmissibility Grounds (8 USC § 1182(a)(2), or (a)(1) for drug abuse)

1. Conviction of any offense “relating to” controlled substances
2. Conviction of a single moral turpitude offense unless the offense comes within an exception:
   • Petty offense exception applies if the noncitizen committed only one CMT that carries a potential sentence of a year or less and a sentence of six months or less was actually imposed; or
• Youthful offender exception applies if the noncitizen committed only one CMT while under the age of 18, and five years has passed since conviction (in adult court) or release from resulting imprisonment;
3. Formal admission of controlled substance or moral turpitude offense (no conviction is required, but where the charge was resolved in criminal court as less than a conviction the ground does not apply; this ground does not often come up);
4. Person is a current drug abuser or addict (conviction not required);
5. Government has “reason to believe” the person has ever been or assisted a drug trafficker (conviction not required);
6. Government has “reason to believe” that person has ever been or assisted a trafficker in persons (conviction not required);
7. Person has engaged in prostitution or commercialized vice (conviction not required);
8. Two or more convictions of any kind where an aggregate sentence of five years or more was imposed.
9. Person who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the U.S. in violation of law.

Some of the differences between the two lists are especially worth noting.

First, there is no inadmissibility ground relating to domestic violence or firearms. If a defendant’s primary goal is to avoid deportability, she must avoid conviction even for minor offenses that come within these grounds, such as possession of an unregistered firearm, or a misdemeanor battery conviction where the spouse was the victim. In contrast, if a defendant only needs to avoid inadmissibility, these convictions are not harmful. (Note, however, that if the firearms or domestic violence offense also is a crime involving moral turpitude – e.g., if it is assault with a firearm or certain types of spousal abuse – the defendant also must analyze the offense according to the moral turpitude grounds).

Example: Sam is offered a choice between pleading to possessing an unregistered firearm or to theft. If he must avoid becoming deportable, he has to refuse the firearm plea. If he only must avoid becoming inadmissible, he can safely accept the firearm plea.

Second, there are different rules for when a moral turpitude conviction makes a noncitizen deportable or inadmissible. Check the person’s entire criminal record against the formulae discussed above and in Note “Crimes Involving Moral Turpitude.”

Third, key “conduct-based” grounds make a noncitizen inadmissible, but not deportable. These include engaging in prostitution, and where the government has “reason to believe” (but no conviction) that the person aided in drug trafficking or trafficking in persons. Finally, an aggravated felony is not a per se ground of inadmissibility. In limited situations, and where the conviction also does not come within the controlled substance or perhaps moral turpitude grounds, this can aid a defendant who is eligible to immigrate through a relative.
3. Cancellation of Removal and the “Section 212(h) Waiver”

Cancellation of Removal. A key defense for deportable permanent residents is “cancellation of removal” under 8 USC § 1229b(a). Any ground of inadmissibility or deportability can be waived, but conviction of an aggravated felony is a bar. To be eligible the person (a) must have resided in the U.S. for seven years after admission in any status (e.g., even on a tourist visa that expired years ago); (b) must have been a permanent resident for five years; and (c) must not have been convicted of an aggravated felony. The requirement of seven years residence since admission in any status has a clock-stopping provision. Time ceases to accrue as soon as either of the following occurs: (a) a Notice to Appear for removal proceedings is served or (b) the person commits certain offenses listed in the grounds of inadmissibility, that actually make him or her deportable or inadmissible. Conviction of an offense that only incurs deportability under the firearms or domestic violence ground will not “stop the clock” on the seven years. 8 USC § 1229b(d). A permanent resident who previously had received cancellation of removal or relief under the former “suspension of deportation” or “section 212(c) relief” is ineligible for cancellation. (Note: Do not confuse this cancellation with cancellation for non-permanent residents, for which a person is disqualified if found inadmissible or deportable for crimes. See 8 USC § 1229b(b)).

Section 212(h) Waiver. Some grounds of deportability and inadmissibility can be “waived” or forgiven at the discretion of an immigration judge or official. A frequently used general waiver for certain crimes is the so-called “section 212(h) waiver,” found at 8 USC § 1182(h), INA § 212(h). This will waive crimes involving moral turpitude, prostitution, and a few other grounds only; it will not waive conviction of a drug offense other than first possess of 30 grams or less of marijuana or hashish. To apply, the person must have or be applying for permanent residency, and must do one of the following: show hardship to a qualifying citizen or permanent resident relative; be an applicant for relief under VAWA as an abused spouse or child of a citizen or permanent resident; only be inadmissible for prostitution; or have 15 years since becoming inadmissible. Special restrictions apply to permanent residents that do not apply to other noncitizens: they must have seven years between becoming a permanent resident and the issuance of a Notice to Appear for removal proceedings, and conviction of an aggravated felony is an absolute bar. In contrast, the § 212(h) waiver is one of the few forms of relief open to non-permanent residents who have an aggravated felony conviction (as long as it does not involve drugs).

Example: Martina is undocumented and immigrating through her U.S. citizen stepmother. She is convicted of grand theft with a one-year sentence imposed, which makes her inadmissible under the moral turpitude ground and also is an aggravated felony. She can file an application for the “212(h) waiver” along with her application to immigrate. If she had been a permanent resident when she was convicted, the aggravated felony conviction would have barred her from applying for the waiver. If the offense had been a drug conviction, the waiver would not be available because it is only for the moral turpitude and prostitution grounds. (And, if Martina had been brought under the administrative “expedited removal
proceedings” instead of regular removal proceedings, the officer in charge would have denied her right to file the waiver inside the United States.)

C. Aggravated felonies. Conviction of an aggravated felony is terrible for any noncitizen, regardless of status. Conviction of an aggravated felony after admission is a ground of deportability, but that is just the beginning. With a few important exceptions (see discussion in Note “Aggravated Felonies,” and the § 212(h) waiver for non-permanent residents discussed in Part B.3 above), the conviction ensures deportation, bars obtaining new lawful status, and blocks any hope of waiver or defense. In contrast, a person who is “merely” inadmissible or deportable still might be able at least to apply for some discretionary waivers, application or defense that will let them continue in status. In addition a noncitizen who is convicted of an aggravated felony and then deported (“removed”) is subject to a greatly enhanced federal sentence if she attempts to re-enter the U.S. illegally. See 18 USC § 1326(b)(2) and Note “Aggravated Felonies.”
Note: Aggravated Felonies

For further discussion see
Defending Immigrants in the Ninth Circuit, Chapter 2, www.ilrc.org/criminal.php and
Tooby, Aggravated Felonies, www.criminalandimmigrationlaw.com

A. Definition of Aggravated Felony.

Aggravated felonies are defined at 8 USC § 1101(a)(43), which is a list of dozens of common-law terms and references to federal statutes. Federal and state offenses can be aggravated felonies, as can foreign offenses unless the resulting imprisonment ended more than 15 years earlier. See alphabetical listing of aggravated felonies and citations at Part D of this Note.

Where a federal criminal statute is cited in the aggravated felony definition, a state offense is an aggravated felony only if all of the elements of the state offense are included in the federal offense. It is not necessary for the state offense to contain the federal jurisdictional element of the federal statute (crossing state lines, affecting inter-state commerce) to be a sufficient match. See, e.g., U.S. v. Castillo-Rivera, 244 F.3d 1020 (9th Cir. 2001) (Calif. P.C. § 12021(a)(1) is an aggravated felony as an analogue 18 USC § 922(b)(1)). Where the aggravated felony is identified by a general or common law term – such as theft, burglary, or sexual abuse of a minor – courts will create a standard “generic” definition setting out the elements of the offense. To be an aggravated felony, a state offense must be entirely covered by the generic definition. See, e.g., discussion of burglary and theft in Note “Burglary, Theft and Fraud.” It is especially difficult to determine whether a specific state offense will be held an aggravated felony when a court has not yet created the “generic” standard.

B. Penalties for Conviction: Barred from Immigration Applications.

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

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

There are some immigration remedies for persons convicted of an aggravated felony, but they are limited and determining eligibility is highly complex. The following are some
important options. Persons convicted of an aggravated felony who have the equivalent of a very strong asylum claim can apply to stop a deportation under 8 USC § 1231(b)(3) and the U.N. Convention Against Torture. Persons who were not permanent residents at the time of conviction, and whose aggravated felony does not involve controlled substances, might be able to adjust status (become a permanent resident) through a close U.S. citizen or permanent resident family member with a waiver under 8 USC § 1182(h). An aggravated felony conviction is not a bar to applying for the “S” visa for persons who are in possession of critical information concerning a criminal organization or enterprise. See 8 USC § 1101(a)(15)(S). Permanent residents who before April 24, 1996 pled guilty to an aggravated felony that didn’t involve firearms might be able to obtain a waiver under the former § 212(c) relief, although at this writing the Ninth Circuit is considering whether this is only available to aggravated felony convictions that involved controlled substances. See INS v St. Cyr, 121 S.Ct. 2271 (2001) and Defending Immigrants in the Ninth Circuit, § 11.1, and practice guides at www.ilrc.org, www.ailf.org.

C. Penalties for Conviction: Federal Offense of Illegal Re-entry.

A noncitizen who is convicted of an aggravated felony, deported or removed, and then returns to the U.S. without permission will receive an eight-level increase in sentence under the U.S. Sentencing Guidelines, under 8 USC § 1326(b)(2). This applies even to persons whose aggravated felonies were relatively minor offenses, such as possession for sale of marijuana. In Arizona, illegal re-entry cases represent a significant percent of federal public defenders’ caseloads. Criminal defense counsel must warn their clients of the severe penalty for re-entry.

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

Aggravated felons face additional penalties such as mandatory immigration detention, limitations on the right to federal appeal, and, if the person is not a permanent resident, possible removal by decision of a non-attorney immigration officer without even a hearing before an immigration judge.

D. List of Aggravated Felonies

Every offense should be suspiciously examined until it is determined that it is not an aggravated felony. While some offenses only become aggravated felonies by virtue of a sentence imposed of a year or more (see Note “Sentences”), others are regardless of sentence. Even misdemeanor offenses can be held to be aggravated felonies.
The following is a list of the offenses referenced in 8 USC § 1101(a)(43) arranged in alphabetical order. The capital letter following the offense refers to the subsection of § 1101(a)(43) where the offense appears.

**Aggravated Felonies under 8 USC § 1101(a)(43)**
*(displayed alphabetically)*

- **alien smuggling**- smuggling, harboring, or transporting of aliens except for a first offense in which the person smuggled was the parent, spouse or child. (N)
- **attempt** to commit an aggravated felony (U)
- **bribery** of a witness- if the term of imprisonment is at least one year. (S)
- **burglary**- if the term of imprisonment is at least one year. (G)
- **child pornography**- (I)
- **commercial bribery**- if the term of imprisonment is at least one year. (R)
- **conspiracy** to commit an aggravated felony (U)
- **counterfeiting**- if the term of imprisonment is at least one year. (R)
- **crime of violence** as defined under 18 USC 16 resulting in a term of at least one year imprisonment, if it was not a “purely political offense.” (F)
- **destructive devices**- trafficking in destructive devices such as bombs or grenades. (C)
- **drug offenses**- any offense generally considered to be “drug trafficking,” plus cited federal drug offenses and analogous felony state offenses. (B)
- **failure to appear**- to serve a sentence if the underlying offense is punishable by a term of 5 years, or to face charges if the underlying sentence is punishable by 2 years. (Q and T)
- **false documents**- using or creating false documents, if the term of imprisonment is at least twelve months, except for the first offense which was committed for the purpose of aiding the person’s spouse, child or parent. (P)
- **firearms**- trafficking in firearms, plus several federal crimes relating to firearms and state analogues. (C)
- **forgery**- if the term of imprisonment is at least one year. (R)
fraud or deceit offense if the loss to the victim exceeds $10,000. (M)

illegal re-entry after deportation or removal for conviction of an aggravated felony (O)

money laundering- money laundering and monetary transactions from illegally derived funds if the amount of funds exceeds $10,000, and offenses such as fraud and tax evasion if the amount exceeds $10,000. (D)

murder- (A)

national defense- offenses relating to the national defense, such as gathering or transmitting national defense information or disclosure of classified information. (L)(i)

obstruction of justice if the term of imprisonment is at least one year. (S)

perjury or subornation of perjury- if the term of imprisonment is at least one year. (S)

prostitution- offenses such as running a prostitution business. (K)

ransom demand- offense relating to the demand for or receipt of ransom. (H)

rape- (A)

receipt of stolen property if the term of imprisonment is at least one year (G)

revealing identity of undercover agent- (L)(ii)

RICO offenses- if the offense is punishable with a one-year sentence. (J)

sabotage- (L)(i)

sexual abuse of a minor- (A)

slavery- offenses relating to peonage, slavery and involuntary servitude. (K)(iii)

tax evasion if the loss to the government exceeds $10,000 (M)

theft- if the term of imprisonment is at least one year. (G)

trafficking in vehicles with altered identification numbers if the term of imprisonment is at least one year. (R)
• **treason** - federal offenses relating to national defense, treason (L)
Overview. A moral turpitude analysis requires two steps. First counsel must identify whether the offense is a crime involving moral turpitude (CMT) for immigration purposes. If it is, counsel must analyze whether the CMT conviction will make this particular defendant deportable and/or inadmissible under the CMT ground. This will depend on the person’s prior CMT convictions, potential or imposed sentence, and date offense was committed. Convictions of offenses that do not involve moral turpitude – e.g., drunk driving, simple assault – do not affect this analysis.

A. What is a Crime Involving Moral Turpitude for Immigration Purposes?

Definition. The term "moral turpitude" lacks a precise definition. It includes "conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." Matter of Torres-Varela, 23 I. & N. Dec. 78, 83-84 (BIA 2001). Immigration law is not bound by whether a state court has characterized an offense as involving moral turpitude, for example for impeachment purposes. Because the definition of moral turpitude is nebulous there often is uncertainty as to whether an offense will be held to be a CMT. For more discussion of specific offenses, see Tooby, Crimes Involving Moral Turpitude and other works in Note “Resources.”

Mental state. Generally an offense involves moral turpitude if it contains elements of fraud, theft with intent to permanently deprive, intent to cause great bodily harm, lewd or other evil intent, or in some cases reckless disregard for safety of others If the minimal mental state for the offense is “criminal negligence,” the crime is not a CMT. On the other hand, a criminal intent of recklessness may or may not be a CMT.

Categorical approach: Classification as a crime involving moral turpitude (“CMT”) is based on the elements of the offense, not the facts of the case. Matter of Short, 20 I. & N. Dec. 136, 137 (BIA 1989). Only if moral turpitude “necessarily inheres” in the offense as defined by statute is the crime a CMT. Matter of Khourn, 21 I. & N. Dec. 1041 (BIA 1997). Felony/misdemeanor classification is not determinative unless the felony and misdemeanor have different elements.

If a statute is divisible for moral turpitude – meaning it punishes some offenses that are CMT’s and others that are not – the reviewing authority can look only to the record of conviction to determine whether the conviction was for the turpitudinous section. Thus an important defense strategy is to plead to a statute that includes both CMT and non-CMT offenses, and either plead to the non-CMT offense or keep the record of conviction vague on that point. See “Note: Record of Conviction.”
B. **When Does a CMT Conviction Make an Immigrant Deportable under 8 USC § 1227(a)(2)(A)(i), (ii)?**

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

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

**Example:** Stan was admitted to the U.S. as a permanent resident in 1992. He was convicted of assault with a deadly weapon in 1998 and passing a bad check in 2003, both of which are CMT’s. Regardless of the potential or actual imposed sentences, he is deportable for conviction of two moral turpitude offenses since his admission.

Dan was convicted of one moral turpitude offense before being admitted as a permanent resident in 1992. Then he committed a second moral turpitude offense in 1999, for which he was convicted in 2000. Is he deportable?

Oddly, Dan is not deportable; he threaded the needle. He is not deportable for two CMT convictions because only one occurred after admission. He is not deportable for the one CMT conviction after admission, because he did not commit the offense within five years of admission (admission was 1992 and commission of the offense was 1999).

C. **When Does a CMT Conviction or Admission Make an Immigrant Inadmissible under 8 USC § 1182(a)(2)(A)(i)?**

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

**Petty offense exception.**37 If a noncitizen (a) has committed only one moral turpitude offense ever, (b) the offense carries a potential sentence of a year or less, and (c) the “sentence imposed” was less than six months, the person is automatically not inadmissible for moral turpitude. In Arizona, only misdemeanors fit the exception or arguably a class 6 felony post-Blakely since the maximum sentence should only be one year. For more information about calculating sentence imposed, see Note “Sentence.”

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Example: In the example involving Dan above, you may have wondered how he was able to be admitted as a permanent resident when he already had a moral turpitude conviction. He may have come within the petty offense exception: he had only one CMT offense that carried a potential sentence of a year or less and a sentence imposed of six months or less.

Youthful Offender exception.\(^{38}\) A disposition in juvenile delinquency proceedings is not a conviction and has no relevance to moral turpitude determinations. But persons who were convicted as adults for acts they committed while under the age of 18 can benefit from the youthful offender exception. A noncitizen who committed only one CMT ever, and while under the age of 18, ceases to be inadmissible as soon as five years have passed since the conviction or release from resulting imprisonment.

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

Inadmissible for making a formal admission of a crime involving moral turpitude. This ground does not often come up in practice. A noncitizen who makes a formal admission to officials of all of the elements of a CMT is inadmissible even if there is no conviction.

This does not apply if the case was brought to criminal court but resolved in a disposition that is less than a conviction (e.g., charges dropped, conviction vacated).\(^{39}\) Counsel should avoid having clients formally admit to offenses they are not charged with.

D. To decrease the maximum possible sentence, plead to attempt, facilitation or solicitation.

Attempt, facilitation and solicitation probably will be held to involve moral turpitude if the underlying offense does. However, they may avoid immigration consequences based on a single moral turpitude conviction due to the fact that they lower the maximum potential sentence, so that the person may qualify for the petty offense exception (maximum one year) or avoid deportability for a single CMT (maximum less than a year).

We conservatively assume that immigration authorities will hold a class 6 felony to have a potential sentence of more than a year due to Guidelines, so the goal is to get to a misdemeanor. For example, a conviction for attempt will cause a class 6 felony to become a class 1 misdemeanor. (However, post-\textit{Blakely} immigration counsel can argue that where no aggravating factors are present, a class 6 felony carries a top of one year, 38 INA § 212(a)(2)(A)(ii)(I), 8 USC § 1182(a)(2)(A)(ii)(I).
low enough to qualify for the petty offense exception – so that is worth obtaining if it is the best available.)
Note: Controlled Substances

For further discussion see Defending Immigrants in the Ninth Circuit, Chapter 3, www.ilrc.org/criminal.php

Part I: Overview of Immigration Consequences
Part II: Safer Alternate Pleas in Drug Cases
Part III: Summary of Current Rules; Case Examples
Part IV: Conduct-Based Grounds: Admissions, Abuse and Addiction, Reason to Believe

Big Picture. Even a minor drug conviction can bring terrible immigration consequences. But with informed advocacy it often is possible to avoid or ameliorate the immigration effect of even a relatively serious offense.

Part I: Overview of Immigration Consequences of Drug Offenses

Aggravated felony. Under 8 USC § 1101(a)(43)(B), a controlled substance offense can be an aggravated felony in either of two ways:

(1) if it is an offense that meets the general definition of trafficking, such as sale or possession for sale, or

(2) if it is a state non-trafficking offense that is analogous to certain federal drug offenses, such as simple possession, cultivation, or some prescription offenses, and would be a felony under federal law.

Deportability grounds. Two deportation grounds deal with controlled substances.

(1) Conviction of any offense “relating to” controlled substances (including use, possession of paraphernalia, etc.), or attempt or conspiracy to commit such an offense, causes deportability under 8 USC § 1227(a)(2)(B)(i).

(2) A noncitizen who has been a drug addict or abuser since admission to the United States is deportable under 8 USC § 1227(a)(2)(B)(ii), regardless of whether there is a conviction.

Inadmissibility grounds. There are four grounds of inadmissibility relating to controlled substances. A person inadmissible for drugs is likely to be permanently barred from obtaining lawful status. Note that in three cases, evidence of conduct alone can cause inadmissibility, even absent a conviction; see Part IV for further discussion.
(1) Conviction of any offense “relating to” controlled substances or attempt or
conspiracy to commit such an offense (including use, possession of paraphernalia, etc.)

(2) A less frequently used section provides that a noncitizen is inadmissible if she
formally admits all of the elements of a controlled substance conviction. 8 USC §

(3) A noncitizen who is a “current” drug addict or abuser is inadmissible. 8 USC §
1182(a)(1)(A)(iv).

(4) A noncitizen is inadmissible if immigration authorities have probative and substantial
“reason to believe” that she ever has been or assisted a drug trafficker in trafficking
activities, or if she is the spouse or child of a trafficker who benefited from the trafficking
within the last five years. 8 USC § 1182(a)(2)(C).

Part II: Safer Alternate Pleas in Drug Cases

Remember the “conduct grounds.” This Part is a discussion of which dispositions can
avoid immigration consequences as convictions. Be aware of conduct-based immigration
consequences that may apply even absent a drug conviction. If there is evidence that the
defendant is or has been a drug addict or abuser, or has ever been or aided a drug
trafficker, immigration penalties may attach even if there is no conviction or one that is
not an aggravated felony. See Part IV.

A. Dispositions That Do Not Result In a Conviction Relating to a Controlled
Substance Offense. These most-favored dispositions are not aggravated felonies, and
further do not even cause deportability or inadmissibility as a “conviction relating to a
controlled substance offense.”

1. Successfully Completed Drug Program (not all Arizona counties). While there is
no case on point, a successfully completed TASC program in some Arizona counties
(including Maricopa, but not Pima) ought not to be considered a conviction at all for
immigration purposes. To be a “conviction” under 8 USC § 1101(a)(43)(A), there
must be a formal finding by, or admission of guilt to, a court, and it is the court that
must impose some punishment or restraint. However, in some counties, there is no
formal admission of guilt, and the prosecutor, rather than the judge, imposes
conditions such as completion of counseling. Therefore, if the proceedings take place
in a county where there is no finding of guilt or penalty imposed by a judge as part of
a drug program, a successfully completed program should not be considered a
“conviction relating to a controlled substance.” Counsel should confirm the exact
procedures of the county in which the program is located before assuming this will be
a safe disposition. See Note: Definition of Conviction.
2. **Hindering Prosecution, Tampering with Evidence.** It has long been held that convictions such as federal accessory after the fact and misprision of felony do not take on the character of the underlying offense. Therefore assisting another to evade prosecution is not a drug offense even if the principal committed a drug offense. See, e.g., *Matter of Bautista-Hernandez*, 21 I&N 955 (BIA 1997). Hindering prosecution in particular is analogous to accessory after the fact, and the same principle should apply to tampering. However, counsel must avoid a sentence imposed of a year or more, or the conviction will be charged as an aggravated felony as obstruction of justice. See Chart Annotations for ARS §§ 13-1510-12 and 13-2809. In some cases counsel have bargained for an accessory or hindering type conviction when the initial charge was that the defendant was the principal. Also, where the principal is a drug trafficker, the government may assert that the conviction gives it “reason to believe” that the immigrant assisted a trafficker in trafficking.

3. **Where controlled substance is not identified.** If a state conviction record does not specifically identify the controlled substance involved, the conviction is not one relating to a controlled substance as defined under federal law. *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007) (record must prove that substance was a controlled substance under federal law; federal and state definitions of controlled substance vary). In Arizona, ARS § 13-3407 Possession of a Dangerous Drug contains controlled substances such as boldenone and methandroI that are not included on the federal list of controlled substances. Therefore, a conviction of an unidentified substance under § 13-3407 would avoid some immigration consequences.

   **Example:** A noncitizen is charged with § 13-3407 and the defender bargains for a substitute complaint that does not identify the specific controlled substance involved. Even if the offense involved sale, the conviction itself would not be an aggravated felony or a deportable or inadmissible offense or give the government “reason to believe” trafficking in controlled substances. However, the government may be able to obtain other documents, such as police reports, to prove the specific drug and give them “reason to believe” that the person was involved in trafficking.

   A possession of paraphernalia has been held a controlled substance conviction even where the substance is not identified... *Luu-Le v INS*, 224 F.3d 911 (9th Cir. 2000).

4. **Alcohol versus Drugs.** Some offenses are divisible between controlled substances and alcohol, for example driving under the influence of drug or alcohol under ARS 28-1383 and unlawful administration of drug or alcohol under ARS § 13-1205. To avoid a controlled substance conviction, counsel should leave the record vague between alcohol and controlled substances, or if that is not possible, leave the record vague as to what controlled substance was involved. Note that felony § 13-1205 could be charged as an aggravated felony crime of violence, so counsel should avoid a sentence of one year or more. See Chart Annotations.
5. **First Minor Conviction That Is Expunged Under Rehabilitative Relief.** A first conviction for simple possession or for a less serious offense such as possession of paraphernalia or use can be entirely eliminated for immigration purposes by “rehabilitative relief” such as withdrawal of plea under ARS § 13-907. *Lujan-Armendariz v INS*, 222 F.3d 728 (9th Cir. 2000), *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000). Successful completion of TASC ought not to be held a conviction in some counties (see above), but if an errant judge were to hold that it were, the withdrawal of charges under TASC in a first offense would get this benefit. **Note:** This benefit only applies in immigration proceedings taking place in Ninth Circuit states. (Apart from these first minor drug offenses, withdrawal under ARS § 13-907 has no immigration benefit or effect.)

6. **Straight Solicitation Under ARS § 13-1002, even for a sale offense.** The Ninth Circuit specifically has held that solicitation under § 13-1002 is not an aggravated felony and is not a deportable or inadmissible drug offense, even where the crime solicited was possession or possession for sale. *Coronado-Durazo v INS*, 123 F.3d 1322, 1326 (9th Cir. 1997) (not a deportable offense); *Leyva-Licea v INS*, 187 F.3d 1147 (9th Cir. 1999) (not an aggravated felony). This plea presents some risk, however, in that federal legislation may be introduced in the future to eliminate the solicitation defense. It is possible that such a law could pass and could apply retroactively to past convictions. For that reason, solicitation is a valuable alternate plea but may be less safe than others. See also discussion of “offering” to commit a drug offense under ARS § 13-3405 et seq. next section. **Note:** This benefit only applies in immigration proceedings taking place in Ninth Circuit states.

Although Solicitation to Possess for Sale is not a removable conviction under the controlled substance or aggravated felony ground, it is nevertheless a crime involving moral turpitude (CMT). *Barragan-Lopez v. Mukasey*, 508 F.3d 899 (9th Cir. 2007). While a CMT may be preferable to a controlled substance or aggravated felony conviction, it may still trigger immigration consequences. See Note: Crimes Involving Moral Turpitude.

7. **Vacation of judgment for cause** will eliminate any conviction for immigration purposes, in the Ninth Circuit and most other circuits, so that the person no longer will have an aggravated felony or be deportable based on the conviction. See writings by Norton Tooby on obtaining post-conviction relief in Note “Resources.” The person still might face consequences under the conduct grounds, which do not require a conviction. See Part IV.

### B. Convictions That Are Not Aggravated Felonies But That Are, Or Might Be, Held To Cause Deportability Or Inadmissibility.

"Remember: How much these convictions harm an immigrant is an individual determination." A permanent resident who is deportable for a drug conviction but does not have an aggravated felony conviction might be able to apply for a waiver; therefore
one of the below dispositions may not be so serious. In contrast, an immigrant who hopes to apply for a green card through a family member will be forever barred if she receives a drug conviction that makes her inadmissible. See “Note: Determining Defense Goals” for more information.

1. **Use versus Possession.** Conviction for use or possession of a controlled substance is a deportable or inadmissible offense; the question is whether it can avoid being an aggravated felony. *To be sure of avoiding an aggravated felony, counsel should plead to “use” or leave the record of conviction vague between use and possession; felony or misdemeanor “use” is not an aggravated felony.* Counsel can plead to the language of the statute (“possession or use”) under section (a)(1) of ARS §§ 13-3405, 3407 or 3408, or specifically to use.

   As long as there were no prior drug convictions, a first state possession conviction is not an aggravated felony, unless the possession was of flunitrazepam (a date rape drug) or more than five grams of crack cocaine. If there were drug priors, a possession conviction requires careful analysis; see further discussion of possession at Part III.

2. **Possession of Paraphernalia.** This has the same effect as a plea to use. It is not an aggravated felony, but is a controlled substance offense that causes deportability and inadmissibility. (For paraphernalia, this is true even if the record does not reveal the controlled substance.)

3. **Offering to Commit a Drug Offense (including Sale) under ARS §§ 13-4305, 3407, 3408.** *Offering* to sell a controlled substance under these statutes is not an aggravated felony drug trafficking offense, while sale is. If the record of conviction leaves open the possibility that the conviction was for offering/solicitation, then the conviction should not be held an aggravated felony. *U.S. v. Rivera-Sanchez,* 247 F.3d 905 (9th Cir. 2001) (en banc). However, some Arizona judges have held that unlike § 13-1002, offering to sell under ARS §§ 13-4305, 3407, 3408 is a deportable and inadmissible offense. Therefore § 13-1002 is the better plea, where it can be obtained. For more information, see discussion at California Criminal Law and Immigration, § 3.4(G).

4. **Possession of 30 grams or less, use, of marijuana and hashish exception.** A single conviction for simple possession of 30 grams or less of marijuana or hashish or being under the influence of these drugs or THC-carboxylic acid, is not a basis for deportation. It is a ground of inadmissibility, but a waiver exists for many persons including family immigrants. 8 USC § 1182(h). If possible have the record reflect that the quantity was 30 grams or less; if the amount was greater, make sure the record of conviction is sanitized of the quantity. See Chart, ARS § 13-3405.

C. **Worst Pleas (see also Chart on specific offenses)**
1. Conviction for possession for sale, sale, transportation for sale, or any other plea relating to trafficking is an aggravated felony. However, if the noncitizen is charged with certain Arizona drug offenses and the specific offense is not identified on the record, the conviction still may escape being an aggravated felony or a controlled substance offense.

2. Conviction for obtaining a controlled substance through fraud might be held an aggravated felony. Although it does not involve trafficking, an Arizona conviction for obtaining a controlled substance by a forged or fraudulent prescription may be an aggravated felony if it is held analogous to the federal felony offense of obtaining a controlled substance by fraud under 21 USC § 843(a)(3) (acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge). A far better plea is simple possession or a straight fraud or forgery or taking identify of another offense. A conviction for any forgery offense where a one-year sentence is imposed is an aggravated felony under 8 USC § 1101(a)(43)(R).

3. The Supreme Court might hold that a possession conviction is an aggravated felony where there is a prior drug conviction, especially if the prior conviction is pleaded or proved in the possession prosecution. However, if the record indicates that the offense is use, not possession, the offense is not an aggravated felony. If the noncitizen is convicted under certain Arizona statutes and the record fails to identify a specific controlled substance, the offense may be held not to be a federal controlled substance offense. See further discussion at Part III.

III. Summary of Current Rules; Case Examples

A. Rules Governing Possession and Less Serious Offenses

The following is the standard regarding the immigration effect of one or more convictions for simple possession, in immigration and federal criminal proceedings in the Ninth Circuit, under the U.S. Supreme Court’s 2006 ruling in *Lopez v. Gonzales*40 and other precedent. The *Lopez* ruling upholds some but not necessarily all Ninth Circuit law.

1. A conviction for even a minor offense relating to a controlled substance—such as simple possession, use, or possession of paraphernalia—will make a noncitizen deportable and inadmissible, even if it is not an aggravated felony. See 8 USC §§ 1182(a)(2)(A), 1227(a)(2)(B)(ii). There is an exception for one conviction of simple possession of 30 grams or less of marijuana or hashish, or being under the influence of those drugs: the person is not deportable and a waiver of inadmissibility under 8 USC § 1182(h) might be available.

However, if the record does not identify a specific controlled substance, a conviction under some Arizona statutes should not have immigration consequences as a controlled substance offense. This is because the Arizona drug schedule contains substances not on the federal schedule. Possession of paraphernalia, however, has been held to be a controlled substance offense even where the offense is not identified. See Part B, supra.

2. If there are no prior drug convictions, a state conviction for simple possession is not an aggravated felony, under the U.S. Supreme Court decision in Lopez v. Gonzales. This applies to state felonies and misdemeanors. The only exception is if the substance possessed was more than five grams of cocaine base (crack) or any amount of flunitrazepam (a date-rape drug), which is an aggravated felony. However, conviction for use of such a drug is not an aggravated felony; see next section.

3. Possession and Use as Aggravated Felonies. If there is a prior drug conviction, it is possible that courts will hold that a subsequent conviction for possession (as opposed to use) is an aggravated felony. The current Ninth Circuit rule is that a second possession conviction is not an aggravated felony in immigration proceedings, but the case upon which this ruling was based has been overruled by the Supreme Court.

If you must plead to possession where there is a drug prior, do not formally concede the prior. It is very possible that the Supreme Court or Ninth Circuit will hold that a possession conviction following a drug prior is an aggravated felony only if the prior conviction was pleaded and proved at the possession prosecution. This is the Board of Immigration Appeals’ position as well, so this provides current protection in immigration proceedings. Again, a plea to “use” or “possession or use” will avoid these issues, because it is not an aggravated felony even if a prior drug conviction is pleaded or proved.

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

42 See Oliveira-Ferreira v. Ashcroft, 382 F.3d 1045 (9th Cir. 2004), which like Lopez applied the “federal felony” rule. A second conviction for simple possession is punishable as a felony under federal law, because a sentence enhancement is imposed for recidivism. But following its rule in United States v. Corona-Sanchez, 29 F.3d 1201 (9th Cir. 2002) (en banc) that a recidivist sentence enhancement will not be considered in calculating the maximum possible sentence for a prior conviction in a categorical analysis, the Ninth Circuit in Oliveira-Ferreira held generally that a second possession conviction is not a “felony” under federal standards — because it is only the recidivist enhancement that brings the potential sentence to over a year — and therefore is not an aggravated felony. Now, however, the Supreme Court has reversed Corona-Sanchez (see next footnote), so that this part of Oliveira-Ferreira also could be viewed as reversed.

43 United States v. Rodriguez, 128 S.Ct. 1783 (US 2008), reversing the rule on recidivist enhancements in Corona-Sanchez, supra.

44 See Matter of Carachuri, 24 I&N Dec. 382 (BIA 2007) (where the prior drug conviction was not pleaded and proved in the subsequent possession prosecution, the possession conviction was not an aggravated felony).
A conviction for use of a controlled substance never is an aggravated felony, regardless of drug priors. This is because there is no federal drug offense based on simple use. Therefore, to avoid a possible aggravated felony counsel should attempt to plead to “use,” or if necessary “use or possession,” rather than “possession” of a controlled substance.

If a first conviction for use or simple possession is eliminated by rehabilitative relief under Lujan-Armendariz (see Part 5), then a subsequent possession conviction should become the “first” such conviction and will not be an aggravated felony. A third conviction should become the worrisome “second,” and is at risk of being classed as an aggravated felony, as discussed above. Again, avoid this issue by pleading to “use” or “use or possession.”

4. TASC as a Conviction. Different TASC dispositions are treated differently in immigration proceedings. In some Arizona counties, such as Maricopa, the prosecution rather than the court imposes counseling and other requirements. There, a successful TASC disposition will not count as a “conviction” at all for immigration purposes. The defendant never is at risk of deportation for the offense. (A delinquency determination, a conviction on direct appeal of right, and a conviction vacated for cause also will not count as a “conviction” for immigration purposes.) However, note that undocumented defendants may be detained and removed before they are able to complete the program, based on their lack of immigration statuts.

In other counties, such as Pima, under TASC the court accepts an admission of guilt and imposes counseling or probation conditions. This does constitute a conviction for immigration purposes (see 8 USC §1101(a)(43)(A)). If it is a very first drug offense, a subsequent expungement or withdrawal of plea will eliminate the conviction for immigration purposes under Lujan-Armendariz, discussed next.

5. A very first drug conviction involving simple possession that is eliminated under rehabilitative provisions such as § 13-907 or TASC also is eliminated for immigration purposes. Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000). This also works if the first conviction is for an offense less serious than simple possession that does not have a federal analogue, such as use or possessing paraphernalia (Cardenas-Uriarte v. INS, 227 F.3d 1132 (9th Cir. 2000)). This may also be true for a conviction for giving away a small amount of marijuana for free (see 21 USC § 841(b)(4)), but see Annotated Chart.

The Ninth Circuit held that the existence of a prior pre-plea diversion under California law prevented a first possession conviction from benefiting from Lujan-Armendariz. It is possible that IJ’s will hold that even a TASC disposition such as exists in Maricopa County, where there is no finding of guilt

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45 De Jesus Melendez v. Gonzales, 503 F.3d 1019, 1026-27 (9th Cir. 2007).
and counseling is done at the request of the prosecution, will bar the Lujan-Armendariz benefit for a subsequent conviction.

6. Except for a first conviction for the minor offenses discussed above, any “rehabilitative relief” (i.e., TASC, other drug programs, or setting aside a conviction after completion of probation under § 13-907) has no effect for immigration purposes, even though state law may consider the conviction to be utterly eliminated. And to get the special benefit the defendant must actually complete the process and have the plea withdrawn or the conviction set aside.

7. Drug addiction and abuse. A person is inadmissible if she is a “current” drug addict or abuser, and deportable if she has been one at any time since admission to the United States. Although unlikely, dispositions such as drug court that require admission of drug abuse or addiction may trigger these grounds. While in various immigration contexts more relief might be available to someone deportable for this than for a straight conviction, this still can have serious consequences, depending on the individual’s particular situation. Counsel should contact khartzler@firrp.org for free consultation.

Case examples. These examples illustrate the rules under Lopez v. Gonzales and Oliveira Ferreira, and assume that the proceedings described take place within states under the jurisdiction of the Ninth Circuit.

Example 1: Sam is convicted of felony simple possession of heroin, his first drug offense.

Aggravated felony? This is not an aggravated felony in immigration proceedings or as a federal sentence enhancement, under Lopez v. Gonzales. (No first simple possession conviction is, other than possession of flunetrazepam or more than 5 grams of crack cocaine.) Deportable? As a conviction of an offense relating to a controlled substance, it makes Sam deportable and inadmissible. Rehabilitative Relief? If it was a very first offense of simple possession, Sam can eliminate the conviction for immigration purposes by “rehabilitative relief” such as withdrawing the plea under TASC, or § 13-907.

Example 2: Sam receives a second conviction for simple possession of heroin. He formally admits the first conviction at this prosecution.

Aggravated felony? Likely so. Under current Board of Immigration Appeals rulings the conviction is an aggravated felony as long as the prior drug conviction was pleaded or proved in the possession prosecution. Sam could have avoided this result by (a) avoiding the pleading or proof of the prior at the subsequent prosecution, or (b) by pleading to use rather than possession, or to “use or possession.” A conviction for use never is an aggravated felony. (Under current Ninth Circuit law a possession conviction is not an aggravated felony even if the

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46 Matter of Carachuri, supra.
prior was pleaded or proved, but this rule may be held to be overturned by subsequent Supreme Court ruling.\textsuperscript{47} It appears that if his first simple possession were eliminated for rehabilitative relief, under \textit{Lujan-Armendariz} this second conviction would count only as his “first” simple possession conviction and would not be held an aggravated felony. \textbf{Deportable?} This conviction, like his first one, makes Sam inadmissible and deportable. \textbf{Rehabilitative relief?} Because it is the second conviction, it will not be eliminated by “rehabilitative relief” under \textit{Lujan-Armendariz}.

\textbf{Example 3:} Assume that in the above example Sam pled to use rather than possession, in his second prosecution.

\textit{Aggravated Felony?} No, a use conviction is not an aggravated felony, regardless of priors. \textbf{Deportable?} Yes; see above. \textbf{Rehabilitative relief?} No, see above.

\textbf{Example 4:} Esteban was charged with possession of methamphetamines in Phoenix and, under requirements imposed by the prosecutor in a TASC program, successfully completed counseling so that the charges were dropped. This is not a conviction. A year later, he was charged and convicted of possession of heroin. He withdrew that plea and expunged the conviction pursuant to ARS § 13-907. These are his only controlled substance dispositions. What is the effect of the conviction for possession of heroin?

\textit{Aggravated felony?} The heroin conviction is the first conviction for this purposes (since the methamphetamine charge did not result in a conviction), and therefore is not an aggravated felony. \textbf{Deportable?} It is likely that IJ’s will hold that he has a conviction for possession of heroin. While normally expungement under § 13-907 would eliminate a first conviction under \textit{Lujan-Armendariz}, in this case IJ’s may hold that the prior TASC disposition bars him from this relief. \textbf{Rehabilitative relief?} As stated above, IJ’s may hold that his § 13-907 will not be given immigration effect, because he burned his \textit{Lujan-Armendariz} benefit with the prior TASC disposition, even though it did not amount to a conviction.

\textbf{Example 5:} Lani is convicted of simple possession of more than 5 grams of crack cocaine in state court.

\textit{Aggravated felony?} This is an aggravated felony for immigration purposes and in federal prosecution for illegal re-entry. (She could have avoided this consequence by pleading to “use,” or “possession or use.”) \textbf{Deportable?} It would make her deportable and inadmissible for a drug conviction. \textbf{Rehabilitative relief?} If it was a very first conviction of simple possession, Lani can eliminate it for immigration purposes by “rehabilitative relief.”

\textbf{Example 6:} Linda is convicted of using a controlled substance, her first drug conviction ever.

\footnote{\textsuperscript{47} See discussion of \textit{Oliveira-Ferreira, Rodriguez}, and \textit{Carachuri} in footnotes, \textit{supra}.}
Aggravated felony? No. This does not involve trafficking (see Part II) and there is no federal analogous offense. Deportable? Yes if the government proves that a federally recognized controlled substance was involved. Rehabilitative relief? As her first conviction of an offense “less serious” than simple possession and with no federal analogue, this will be eliminated for immigration purposes by rehabilitative relief.

Example 7: Francois is convicted of possession for sale. This is an aggravated felony in all contexts and cannot be eliminated under rehabilitative relief. Francois should try to plead to Solicitation to possession for sale, which is not removable as either an aggravated felony or a controlled substance offense. However, it will be considered a crime involving moral turpitude.

B. Summary of Rules Governing Sale and Other Offenses beyond Possession

1. Conviction of an offense that meets the general definition of trafficking, such as sale, transport for sale, or possession for sale, is an aggravated felony as well as a deportable and inadmissible crime.

2. However, where neither the statute nor the record of conviction identifies a specific controlled substance under certain Arizona statutes, the offense is not an aggravated felony or a deportable or inadmissible drug conviction. See discussion in Part A, supra, of Ruiz-Vidal and Matter of Paulus.

3. A plea to Solicitation, ARS § 13-1002 is not a drug trafficking aggravated felony offense, or a ground of deportability as a drug conviction, even where the offense solicited was drug trafficking. The Ninth Circuit has ruled directly on this issue. Coronado-Durazo v. INS, 123 F.3d 1322 (9th Cir 1997); Leyva-Licea v. INS, 187 F.3d 1147 (9th Cir. 1999).

Warning: Legislative Alert on Solicitation/Offering Defense. In 2006 the Senate passed a provision making solicitation an aggravated felony, if the offense solicited was. While this provision did not become law, it is likely to be re-introduced in the future, and if passed there is a small possibility that it would be applied retroactively to past convictions. For this reason, where possible criminal defense counsel should fashion a plea that includes some other defense strategy along with, or instead of, solicitation or offering.

Warning: Provides “Reason to Believe” Trafficking. A noncitizen is inadmissible if the government has “reason to believe” the person is or has assisted a drug trafficker. A plea to solicitation where the underlying offense involves trafficking will provide this to the government. While this is not good for a permanent resident (the person will be unable to leave the U.S. and return, and will be barred from establishing good moral character for a period for citizenship), it is fatal for an undocumented person, as it operates as a bar to almost any means of getting status.
Consider hindering or tampering with evidence as an alternative in a sympathetic case.

**Warning: Solicitation to Possession for Sale is a crime involving moral turpitude.** Although Solicitation to Possess for Sale is not a removable conviction under the controlled substance or aggravated felony ground, it is nevertheless a crime involving moral turpitude (CMT). Barragan-Lopez v. Mukasey, 508 F.3d 899 (9th Cir. 2007). While a CMT may be preferable to a controlled substance or aggravated felony conviction, it may still trigger immigration consequences. See Note: Crimes Involving Moral Turpitude.

4. **“Offering” to commit a drug trafficking offense is likely to be held to be an aggravated felony despite precedent to the contrary,** and therefore it should be used as a last resort or in conjunction with other defense strategies. The Ninth Circuit found that offering to sell a controlled substance constitutes solicitation, and thus is not an aggravated felony drug trafficking offense, while sale is. United States v. Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2001) (en banc) (Calif. H&S § 11379(a)). Therefore conviction under offenses such as ARS §§ 13-3405, 13-3407, and 13-3408, where the record identifies offering or includes offering as one of the possible offenses pled to, should be held not to be an aggravated felony. However, despite this precedent, in practice the immigration courts and the BIA will nearly always hold offering to commit a drug trafficking offense under the statutory language to be an aggravated felony. For this reason, **a plea to straight Solicitation under ARS § 13-1002, even where the record shows that the offense was to commit a drug trafficking offense, is a much safer plea,** although offering under these statutes still will leave the noncitizen an argument of last resort.

   **Warning: Provides “Reason to Believe” Trafficking.** Another disadvantage of a plea to offering to sell is that it will make the defendant inadmissible by providing the government with “reason to believe” that the person is or has assisted a drug trafficker. This is especially bad for undocumented persons. See note in Solicitation comment, above.

5. **Consider other “safer pleas,” such as Hindering § 13-2510-12, Compounding § 13-2405, or Securing the Proceeds of an Offense § 13-2408.**

6. **Vacation of judgment for cause** will eliminate a trafficking, or any other, conviction for immigration purposes, so that the person no longer will have an aggravated felony or be deportable based on the conviction. The person still might remain inadmissible, however, if the record in the case gives immigration authorities “reason to believe” that the person may ever have been or assisted a drug trafficker. See “Inadmissible” below. Relief that eliminates a conviction not based on legal error—such as “rehabilitative” withdrawal of plea under TASC or § 13-907—will not eliminate any of the above convictions for immigration purposes (the only exception to this is in certain counties where TASC does not meet the definition of a “conviction” for immigration purposes in the first place).
**Case Examples involving sale or more serious offenses.**

- Dan is arrested after a hand-to-hand sale. His defender pleads him to Solicitation for Possession for Sale and has him plead guilty and accept the sentence with no further comments or admissions. He has avoided an aggravated felony and even avoided becoming deportable or inadmissible for a drug conviction. However, he will still have a CMT and will likely be inadmissible based on the separate ground of the government having “reason to believe” that he is a drug trafficker.

- Dave is arrested after a hand-to-hand sale of methamphetamine. His defender works with rules governing the reviewable record of conviction and creates a record that does not identify the specific substance, e.g. he pleads to the language of ARS § 13-3407 to sell a “dangerous drug.” He has avoided an aggravated felony and avoided becoming deportable or inadmissible for a drug conviction. Also, there is not the danger that legislation will remove this defense, as there is with solicitation. However, he may have a CMT, and depending upon the evidence the government can gather about the offense, he may be inadmissible based on the government having “reason to believe” that he is a drug trafficker.

- Nicole is undocumented and charged with sale. Because she is undocumented her first concern is to avoid being inadmissible. To do that she must plead to an offense not related to trafficking. A first conviction of simple possession would not make her inadmissible or deportable once the plea is withdrawn under TASC, § 13-907, etc. However, it is very likely that Nicole may be put in ICE custody and removed before she can complete either of these. It would be far better if she could plead to an offense not related to controlled substances. She should know that if she ever does apply for lawful status, immigration authorities will ask her if she has participated in drug trafficking and will consider all evidence that comes to their attention, including police reports.

**Part IV. Controlled Substance Conduct Grounds**

As with the issue of whether there is a “reason to believe” that a person is a trafficker in drugs (see Part III, above), some grounds of deportability and inadmissibility for crimes do not require a conviction. In these cases, a “reason to believe that someone is or has been a trafficker in drugs or persons, a juvenile delinquency disposition, a pre-plea arrangement or a vacated conviction still may have adverse immigration consequences of which counsel must be aware. The “conduct-based” grounds of deportability and inadmissibility include where the government has “reason to believe” the person is or was a drug trafficker; where the person is or has been a drug addict or
abuser; and where the person has admitted all the elements of a controlled substance offense.

A noncitizen charged under one of the conduct grounds can present evidence that the ground does not apply, e.g., the person should state (if this is true) that although he pleaded guilty to a delinquency charge or now-vacated adult charge, he actually did not do it. The person should present as much evidence as possible to support both the facts and, where this is an issue, his own credibility.

A. Inadmissible Because The Government Has “Reason To Believe” Drug Trafficking

A noncitizen is inadmissible if immigration authorities have “reason to believe” that she ever has been or assisted a drug trafficker. 8 USC § 1182(a)(2)(C). A conviction is not necessary, but a conviction or substantial underlying evidence showing sale or offer to sell will alert immigration officials and serve as reason to believe. Because “reason to believe” does not depend upon proof by conviction, the government is not limited to the record of conviction and may seek out police or probation reports or use defendant’s out-of-court statements.

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

To avoid being inadmissible under this ground, a noncitizen needs to plead to some non-drug-related offense. The person also should know that when applying for immigration status she will be questioned by authorities about whether she has been a participant in drug trafficking. She can remain silent but this may be used as a factor to deny the application.

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

B. Drug Addict or Abuser

A noncitizen found to be a drug addict or abuser can be found inadmissible (if addiction/abuse is “current”) and/or deportable (if addiction/abuse has occurred anytime since admission).48 Repeated drug possession findings, or a finding in drug court or

other contexts that the person is an addict or abuser, can trigger this ground. The government can use any evidence; the immigrant can contest this medical finding. However, in some contexts “abuse” is defined as more than one-time mere experimentation. This ground is not commonly employed.

**B. Formal admission of a drug offense**

A noncitizen who is convicted of “or who admits having committed, or who admits committing acts which constitute the essential elements” of any offense relating to controlled substances is inadmissible. Thus a qualifying “admission” of a controlled substance offense, or all of the elements of such an offense, will cause a noncitizen to be inadmissible even if there is no conviction.

Strict rules control what kinds of statements by a non-citizen constitute an “admission” of a controlled substance (or moral turpitude offense) triggering inadmissibility. The conduct must be a crime under the laws of the place where it was allegedly committed. The admission must be to all elements of a controlled substance violation. Partial admissions will not suffice, such as an admission to possession of a controlled substance but not to criminal intent where the law violated requires criminal intent. However, an otherwise valid admission will trigger inadmissibility even where noncitizen may have been found not guilty under that law due to an available defense to the crime. The DHS or consular official must provide noncitizen with an understandable definition of the elements of the crime at issue. This “informed admissions” rule is to ensure that noncitizens receive “fair play.”

**Guilty pleas.** Because a plea of guilty in criminal proceedings constitutes an admission, it might seem that every defendant who pleads guilty to a drug offense (or completes a form to qualify for TASC pre-plea diversion) will be found inadmissible, even if the charges are dropped or the conviction is later eliminated by rehabilitative relief under *Lujan-Armendariz* or vacated for cause. This is not the rule. The Board of

50 Note that most of the cases cited in this section involve formal admissions of crimes involving moral turpitude, not controlled substance offenses. Before 1990, only formal admissions relating to crimes involving moral turpitude carried immigration penalties, so earlier case law dealt only with that issue. As a matter of statutory construction, the same rules developed by moral turpitude case law apply to controlled substances, which simply were added as the category second to moral turpitude offenses in the “formal admission” section at 8 USC §1182(a)(2)(A)(i)(II), INA §212(a)(2)(A)(i)(II).
52 *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002).
Immigration Appeals has held that if a criminal court judge has heard charges relating to an incident, immigration authorities will defer to the resolution of the case in criminal court. If the final disposition is something less than a conviction, the “formal admission” ground of inadmissibility does not operate. The BIA has declined to find inadmissibility based on a guilty plea if the conviction is followed by effective post-conviction relief, pardon, withdrawal of charges, or where no resolution amounting to a conviction is entered pursuant to the plea. This is true even when the defendant has independently admitted the crime before an immigration officer or immigration judge. However, it is not guaranteed that a person who is acquitted will be protected from the immigration effect of independent admissions.

An admission made by a minor or an adult about a drug offense committed when the person was a minor does not trigger inadmissibility under this ground, because the admission was of committing juvenile delinquency, not a controlled substance crime. This is in keeping with consistent holdings of the Board of Immigration Appeals “that acts of juvenile delinquency are not crimes…for immigration purposes.”

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56 Matter of E.V., 5 I&N Dec. 194 (BIA 1953) (P.C. §1203.4 expungement)
58 Matter of MU, 2 I&N Dec. 92 (B(A 1944) (admission by adult of activity while a minor is not an admission of committing a crime involving moral turpitude triggering inadmissibility); but see US v. Gutierrez-Alba, 128 F.3d 1324 (9th Cir. 1997) (without discussion of issue of juvenile delinquency, juvenile’s guilty plea in adult criminal proceedings constitutes admission, regardless of whether adult criminal court prosecution was ineffective due to defendant’s minority status).
Note: Sex Offenses

For further discussion see Defending Immigrants in the Ninth Circuit, Chapter 9, § 9.32, www.ilrc.org/criminal.php

Overview. Conviction of rape or of “sexual abuse of a minor” is an aggravated felony. No particular sentence is required, i.e., less than one year imposed will not protect the immigrant from being held an aggravated felon under these two categories. Rape and most offenses that would constitute sexual abuse of a minor also are crimes involving moral turpitude.

Some alternate pleas that would avoid the rape/sexual abuse of a minor category involve offenses classed as “crimes of violence” for immigration purposes, for example, aggravated assault. Conviction of any “crime of violence” is an aggravated felony if a sentence of a year or more is imposed, so counsel using such an alternative must avoid the one-year sentence.

See Chart and Annotations for discussion of specific Arizona offenses.

Warning: Misdemeanor statutory rape under ARS § 13-1405 currently is classed as an aggravated felony as “sexual abuse of a minor,” regardless of sentence imposed and even if the victim was 17 years old. The Ninth Circuit is considering this issue en banc at this writing. Counsel should continue the hearing until the Ninth Circuit rules, plead to an alternate offense, or carefully consider whether there may still be immigration possibilities despite the conviction. See Part B.

A. Rape

Conviction of committing sexual intercourse obtained by force or serious threat will be held to be an aggravated felony as rape, regardless of sentence imposed. The Ninth Circuit found that rape by intoxication is rape for this purpose, and that third degree rape under a Washington statute that lacks a forcible compulsion requirement, where the victim made clear lack of consent, is also.

60 California Penal Code § 261 and 262 define rape as sexual intercourse obtained by force, threat, intoxication, or other circumstances.

61 U.S. v. Yanez-Saucedo, 295 F.3d 991(9th Cir. 2002).
Sexual activity that does not constitute intercourse, e.g. oral contact, might avoid classification as rape even if there is a threat of force. Such an offense would be an aggravated felony as a crime of violence if a sentence of a year were imposed, however.

B. Sexual Abuse of a Minor

Most offenses involving sexual intent toward the victim, where the victim is under the age of 18, will be held an aggravated felony as sexual abuse of a minor, even if no jail time is imposed. At this writing the Ninth Circuit en banc is considering lower rulings holding that statutory rape (consensual sexual intercourse with a person under the age of 18, e.g. ARS § 13-1405) is an aggravated felony as sexual abuse of a minor. Until the court rules, this is a dangerous plea.

Crime Involving Moral Turpitude (CMT): The Ninth Circuit recently held that consensual sexual intercourse between a person who is under the age of 16 and a person who is 21 or older, under Cal. Pen. Code § 261.5(d), is not categorically a CMT. Depending on the individual’s immigration situation, the fact that this offense is not a CMT may make it possible to obtain some relief from removal, even if the offense continues to be viewed as an aggravated felony.

Aggravated Felony: Sexual Abuse of a Minor. A Ninth Circuit panel upheld a BIA decision that consensual sex with a person under the age of 18 is an aggravated felony as sexual abuse of a minor. Estrada-Espinoza v. Gonzales, 498 F.3d 933 (9th Cir. 2007). As discussed above, the Ninth Circuit has agreed to hear this case en banc, however.

Committing a lewd act with a person under the age of 14, (Calif. P.C. § 288(a)), was held to be an aggravated felony as sexual abuse of a minor, even though the statute required no physical contact between defendant and victim. United States v. Baron-Medina, 187 F.3d 1144, 1146 (9th Cir. 1999). However, the Ninth Circuit also has recognized that some activity is not egregious enough to rise to the level of abuse. U.S. v. Pallares-Galan, 359 F.3d 1088 (9th Cir. 2004) (not all offenses with sexual intent that “annoy or molest” a minor under Calif. P.C. § 647.6(a) are “abuse.”)

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62 In an unpublished opinion with extensive discussion of various laws, the BIA found that a Texas offense of digital penetration did not constitute rape Matter of Gutierrez-Martinez, A17-945-476, available at www.lexisnexis.com/practiceareas/immigration/immigration_cases.asp.
63 In Estrada-Espinoza v. Gonzales, 498 F.3d 933 (9th Cir. 2007), a Ninth Circuit panel acknowledged that it was bound by a previous decision in Afridi v. Gonzales, 442 F.3d 1212 (9th Cir. 2006) to find that a conviction for unlawful sex with a minor under Cal. Penal Code § 261.5(c) constitutes sexual abuse of a minor. However, in a concurring opinion, two panel members suggested that Afridi was incorrectly decided and should be reconsidered. Afridi at 936 (J. Thomas, concurring). A petition for rehearing en banc in Estrada-Espinoza has since been granted, and it is possible that statutory rape will not be categorically held to be sexual abuse of a minor in the future.
64 Approximately two months after the panel decision in Estrada-Espinoza, the Ninth Circuit found that a conviction under Cal. Penal Code § 261.5(d) was not a crime involving moral turpitude. Quintero-Salazar v. Keisler, 506 F.3d 688 (9th Cir. 2007)
See discussion of specific offenses in the Chart, and possible alternate pleas discussed at “Note: Safer Pleas.” Safer pleas might include false imprisonment, unlawful administration of a drug or alcohol (ARS §13-1205), or certain sex offenses where the record does not establish the age of the victim, or there is no lewd intent toward the victim (e.g., § 13-1402 or 1403). For a sympathetic case, e.g. involving older teenage victim with perpetrator near age, investigate offenses such as ARS §§ 13-1201, 2907.01, 2908. If a felony is required, consider, e.g. aggravated assault with sentence of less than a year or with a vague record of conviction. See annotation to ARS § 13-1304.
**Note: Domestic Violence, Firearms, Prostitution, Smuggling**

*For further discussion see Defending Immigrants in the Ninth Circuit, Chapter 6, www.ilrc.org/criminal.php*

A. Domestic Violence Deportability Ground

A noncitizen is deportable if, after admission to the United States, he or she is convicted of a state or federal “crime of domestic violence,” stalking, or child abuse, neglect or abandonment. The person also is deportable if found in civil or criminal court to have violated certain sections of domestic violence protective orders. 8 USC § 1227(a)(2)(E). The convictions, or the behavior that is the subject of the finding of violation of a protective order, must occur on or after September 30, 1996.

1. Conviction of a Crime of Domestic Violence

The statute defines “crime of domestic violence” to include any crime of violence as defined in 18 USC § 16 “against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic violence or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from the individual’s acts under the domestic or family violence laws of the United States or any State, Indian Tribal government, or unit of local government.” 8 USC § 1227(a)(2)(E)(i).

This includes offenses where the domestic relationship is an element of the offense, as well as offenses such as straight assault or battery where the victim is proven to have the domestic relationship. The Ninth Circuit recently held that immigration judges cannot consider information from outside the record of conviction to prove the domestic relationship. *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004). Where possible defense counsel should keep information about the domestic relationship out of the record of conviction. A domestic violence counseling requirement as a condition of probation is information in the record of conviction that is used as evidence that a domestic relationship exists. But an offense that is not a “crime of violence” can carry a counseling requirement without incurring deportability; see below.

The only sure strategies to avoid a domestic violence conviction are (a) avoid conviction of a “crime of violence” and/or (b) have as the victim a person who does not have a qualifying domestic relationship (for example, if the ex-wife’s friend also was assaulted, plead to assault against that person rather than against the ex-wife).
Avoiding a plea to a crime of violence. If an offense is not a crime of violence, such as criminal trespass, criminal damage, and disorderly conduct, even a designation as a domestic violence offense under A.R.S. §13-3601 should not make it a deportable “crime of domestic violence,” to the extent the designation identifies only the domestic relationship and not the element of actual violence in the offense.

In Fernandez-Ruiz v. Gonzales, 466 F.3d 1121 (9th Cir. 2006) (en banc), the Ninth Circuit found that a conviction for a class 2 misdemeanor assault under § 13-1203 did not categorically constitute a crime of violence under 18 U.S.C. § 16(a) since recklessness under (A)(1) would not involve the “use, attempted use, or threatened use of physical force.” Therefore, a domestic violence conviction for simple assault under § 13-1203(A)(1) is not categorically removable as a “crime of domestic violence” unless the government can prove that the offense was committed intentionally, rather than recklessly. However, the government has successfully argued that, since assault committed intentionally or knowingly is punishable as a class 1 misdemeanor under § 13-1203(B), any conviction for assault under (A)(1) as a class 1 will automatically be considered a “crime of violence.”

A misdemeanor assault under A.R.S. §13-1203(A)(3) will not be held to constitute a “crime of violence” if the record of conviction does not reveal that the force involved amounted to more than mere offensive touching. The Ninth Circuit held that a misdemeanor offense that can be committed by “mere offensive touching” is not a crime of violence under 18 USC § 16, at least absent evidence in the record of conviction that actual violence was involved. Neither battery nor battery against a spouse under Calif. P.C. §§ 243, 243(e) is a crime of violence absent a record showing force amounting to actual violence. Subsection (A)(3) of A.R.S. §13-1203 should come within these holdings. It requires merely “touching another person with the intent to injure, insult or provoke” and is completed without the use or threat of force.

However, counsel must ensure that the reviewable record does not establish that actual violence, i.e. more than offensive touching, occurred. Courts can be expected to go to the record to ascertain this. See “Note: Record of Conviction.”

Crimes against property. There is a strong argument, which may or may not prevail, that only crimes of violence against persons and not property will trigger the “crime of domestic violence” deportation ground, even though 18 USC § 16 penalizes both. Thus there is some advantage to pleading to an offense against property rather than a person. While the DHS has invoked this ground of deportability based on offenses such as criminal damage, at A.R.S. §13-1602, and disorderly conduct, at A.R.S. §13-2904,

65 Ortega-Mendez v. Gonzales, 450 F.3d 1010 (9th Cir. 2006) (misdemeanor battery in violation of Calif. PC § 242 is not a crime of violence or a domestic violence offense); Matter of Sanudo, 23 I&N Dec. 968 (BIA 2006) (misdemeanor battery and spousal battery under Calif. PC §§ 242, 243(e) is not a crime of violence, domestic violence offense or crime involving moral turpitude. See also cases holding that § 243(e) is not a crime involving moral turpitude, Singh v. Ashcroft, 386 F.3d 1228 (9th Cir. 2004). Galeana-Mendoza v. Gonzales, 465 F.3d 1054 (9th Cir. 2006).
generally speaking, it is unlikely these offenses will support the charge. For one thing, 8 U.S.C. §1227(a)(2)(E)(i) requires that the crime of violence be “against a person” rather than against property. Moreover, when misdemeanors, these offenses do not satisfy the applicable definition of a crime of violence because force is not an element. The government could argue, however, that subsection ARS §13-2904.6, which is a felony involving recklessly handling, displaying or discharging a deadly weapon or dangerous instrument, involves a substantial likelihood that force may be used in committing the offense.

**Other options.** Along with the assault dispositions discussed above, alternate pleas that may avoid a conviction of a “crime of violence” are discussed at “Note: Safer Pleas.” They include felony and misdemeanor unlawful imprisonment A.R.S. §13-1303 under certain circumstances (e.g. record of conviction leaves open the possibility that restraint was by deceit or other means); disorderly conduct A.R.S. 13-2904 (except subsection 6); endangerment A.R.S. 13-1201; and criminal nuisance A.R.S. 13-2908. For further information about the complex definition of crime of violence under 18 USC § 16, see *Defending Immigrants in the Ninth Circuit* at § 9.13.

**Avoiding a plea involving a victim with a domestic relationship.** A designation of A.R.S. §13-3601 will establish that the victim had the required domestic relationship. If the principle offense is a crime of violence, this will cause deportability. Without the §13-3601, the offense will not be a crime of domestic violence unless the domestic relationship appears in the official record of conviction (see Tokatly v. Ashcroft, 371 F.3d 613 (9th Cir. 2004)) or is an element of the offense. Thus counsel should attempt to plead to straight assault as opposed to a domestic violence crime, and keep any domestic relationship outside the record. Where possible, counsel should plead to a crime directed against an “unprotected” person, such as the ex-spouse’s new lover.

**2. Civil or Criminal Court Finding of Violation of a DV Protective Order**

Even absent a conviction, a noncitizen will become deportable under the domestic violence ground if a civil or criminal court determines that the person “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.” 8 USC §1227(a)(2)(E)(ii). A juvenile delinquency court’s finding should be assumed to trigger deportability.

If the order is broader than this and the court’s determination is not specific, the person is not deportable for the violation. Or, counsel should negotiate taking some other penalty, such as a criminal conviction that does not cause deportability, rather than receiving an official finding of violation of a DV protective order.

Arguably ARS §13-2810 Interfering with Judicial Proceedings is overbroad with respect to this ground of removal in that the defendant may not be interfering with a protective order that pertains to domestic violence. Counsel should plea bargain against any
reference to ARS §13-3601 to eliminate the possibility that defendant violated a protective order of a domestic relation.

3. Crime of Child Abuse, Neglect or Abandonment.

Conviction of a “crime of child abuse, neglect or abandonment” causes deportability under the domestic violence ground. The BIA has set out an extremely broad definition of the term child abuse, which includes:

any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child’s physical or mental well-being, including sexual abuse or exploitation. At a minimum, this definition encompasses convictions for offenses involving the infliction on a child of physical harm, even if slight; mental or emotional harm, including acts injurious to morals; sexual abuse, including direct acts of sexual contact, but also including acts that induce (or omissions that permit) a child to engage in prostitution, pornography, or other sexually explicit conduct; as well as any act that involves the use or exploitation of a child as an object of sexual gratification or as a tool in the commission of serious crimes, such as drug trafficking.66

Counsel should assume that any conviction of child abuse under A.R.S. §13-3623 will cause deportability under this ground, even if the offense would not be considered a crime of violence or a crime involving moral turpitude. Counsel must attempt to bargain for a plea to some other offense that does not involve those elements. A plea to an offense that does not have age of the victim as an element is safe from this ground, as long as the record of conviction does not establish that the victim is a minor. The Board will permit itself to look to the record to determine whether the victim was under the age of 18.

Because “attempt” and “conspiracy” are not included in the statutory language defining crime of child abuse, but are included in other grounds of deportability, there may be some benefit to pleading to attempt rather than the offense. Immigration counsel can make the argument that it does not cause deportability under this ground.

4. Crime of Stalking

Section 13-2923 will be deportable as a stalking crime even if the conviction does not cite §13-3601 in the judgment. Stalking is a separate subsection of deportability and can render someone deportable even where the victim is not a protected domestic relation. The conviction, however, must be entered after September 30, 1996 to be deportable.

Because “attempt” and “conspiracy” are not included in the statutory language, there may be some benefit to pleading to attempt rather than the offense. Immigration counsel can make the argument that it does not cause deportability under this ground.

B. The Firearms Deportability Ground

A noncitizen is deportable if, at any time after entering the United States, he is “convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing or carrying or of attempting or conspiring to [commit these acts] in violation of any law, any weapon, part or accessory which is a firearm or destructive device (as defined in [18 USC § 921(a)])…” 8 USC § 1227(a)(C).

A safer immigration plea is to an offense that involves firearms as well as other types of weapons (such as a knife), where the record of conviction does not establish that a firearm was the weapon of conviction. See, e.g., A.R.S. §13-3102, misconduct involving weapons. See analysis in Chart of individual subsections of §13-3102.

Because “solicitation” is not included in the statutory language, there may be some benefit to pleading to Solicitation to commit a firearm offense under § 13-1002 rather than the straight offense. Immigration counsel can make the argument that it does not cause deportability under this ground.

Any offense involving trafficking in firearms and destructive devices (bombs and explosives) is an aggravated felony. So are state analogues to designated federal firearms offenses. See 8 USC § 1101(a)(43)(C), (E).

Significantly, conviction of being a felon or addict in possession of a firearm is an aggravated felony, U.S. v. Castillo-Rivera, 244 F.3d 1020 (9th Cir 2001), as well as being an undocumented immigrant in possession of a firearm.

C. Prostitution

A noncitizen is inadmissible if she “engages in” prostitution. 8 USC §1182(a)(2)(D). Prostitution is defined as engaging in sexual intercourse (as opposed to other sexual conduct) for hire. Kepilino v. Gonzales, 454 F.3d 1057 (9th Cir. 2006). While no conviction is required for this finding, one or more convictions for prostitution will serve as evidence, if they indicate that sexual intercourse was involved. Customers are not penalized under this ground. Prostitution is a crime involving moral turpitude. There are no decisions holding that a customer also commits a crime involving moral turpitude, but the government may charge that. Conviction of some offenses involving running prostitution or other sex-related businesses are aggravated felonies. See 8 USC § 1101(a)(43)(I), (K).

A non-citizen is deportable who has been convicted of importing noncitizens for prostitution or any immoral purpose. 8 USC § 1227(a)(2)(D)(iv).

Victims of alien smuggling who were forced into prostitution, or victims of any serious crimes, may be able to apply for temporary and ultimately permanent status if they

D. Smuggling

A noncitizen is inadmissible if immigration authorities have “reason to believe” that she ever has been a significant trafficker in persons or a knowing aider, abettor, assister, conspirator, or colluder in severe forms of trafficking in persons. 8 USC § 1182(a)(2)(H). Under a separate ground, a person may be inadmissible for having knowingly encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the U.S. in violation of any law. 8 U.S.C. § 1182(a)(6)(E). For both of these grounds, a conviction is not necessary, but a conviction for smuggling or substantial underlying evidence showing smuggling or assistance in smuggling will alert immigration officials and serve as grounds for the charge. Because these grounds do not depend upon proof by conviction, the government is not limited to the record of conviction and may seek out testimony or reports from border patrol or officials at a port of entry or use the defendant’s statements.

A noncitizen is also deportable if prior to the date of entry, at the time of any entry, or within five years of the date of any entry, he knowingly has encouraged, induced, assisted, abetted or aided any other alien to enter or to try to enter the U.S. in violation of any law. 8 U.S.C. § 1227(a)(1)(E)(i).

In Arizona, the grounds of inadmissibility and deportability may be satisfied if the noncitizen is caught at the border with persons hidden in a compartment in the vehicle or if the noncitizen is convicted for, or merely charged with, smuggling under ARS § 13-2319. Since it is the practice of at least one Arizona county attorney to charge persons being smuggled with conspiracy to commit § 13-2319, this would be a classic case in which the noncitizen could submit evidence to rebut the charge of removability. See Note: Immigration Status as an Element in Arizona Law.
Note: Burglary, Theft and Fraud

For further discussion see Defending Immigrants in the Ninth Circuit, Chapters 4 and 9, www.ilrc.org/criminal.php

Part I. Burglary

Burglary as an aggravated felony. A burglary conviction with a one-year sentence imposed might qualify as an aggravated felony in any of three ways: as “burglary,” as a “crime of violence,” or, if it involves intent to commit theft, as “attempted theft.” See 8 USC §1101(a)(43)(F), (G). With careful pleading counsel may be able to avoid immigration penalties for this offense.

Burglary is not an aggravated felony under any of these categories unless a sentence of at least a year has been imposed. A sentence of 364 days or less avoids an aggravated felony, and avoids the necessity for using the following analysis. For suggestions on how to avoid a one-year sentence, see Note “Sentence.”

If a one-year sentence is imposed, the only burglary conviction that is not an aggravated felony is

- burglary of an automobile or other non-structure, as defined in §13-1501,

- the record of conviction shows intent to commit “any felony” and the record does not identify the felony (or identifies a felony that is not an aggravated felony). However, even if the record shows intent to commit “any theft,” immigration counsel will point out that subsections of Arizona theft statutes have been held not to be aggravating felonies because they do not require an intent to deprive the owner temporarily or permanently. See Part II, infra.

The “generic” definition of burglary for this purpose is “an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.” Taylor v. United States, 494 U.S. 575 (1990). Auto burglary does not come within this definition of burglary and thus is not an aggravated felony as burglary. Neither is auto burglary a crime of violence, absent the presence on the record of information about violence against people or property. Ye v. INS, 214 F.3d 1128 (9th Cir. 2000). However, conviction of auto burglary might be held an aggravated felony as attempted theft if the record of conviction establishes that the offense was committed with intent to commit the aggravated felony “theft.” To prevent this, counsel should create a record of conviction where the client is guilty only of “any felony,” or an undesignated “any theft,” which under Arizona law includes offenses that are and are not “theft” for aggravated felony purposes.

Although difficult, counsel may be able to preserve an argument that a client’s conviction for burglary of a residential structure under Arizona law is not categorically an
aggravated felony. First, to provide an argument that the offense is not an aggravated felony as burglary, counsel should create a record that leaves open the possibility that (a) the person remained unlawfully “on” rather than “in” a residential structure, and/or (b) the entry or remaining was with consent, albeit with unauthorized intent (see *State v. Altamirano*, 166 Ariz. 432 (Ct. App. 1990). This is because the definition of burglary for immigration purposes is entry or remaining *in*, not *on*, a structure, and where the entry is unlawful, meaning without consent. Second, to provide an argument that the offense is not an aggravated felony as a “crime of violence,” counsel should leave open the possibility (a) that no force was used against the property (e.g., a window was not broken to gain entrance) and (b) the dwelling was not occupied at the time (meaning that it was not currently rented or lived in, as opposed to that the occupant was not at home). This is because the Arizona definition of dwelling includes an unoccupied dwelling, *U.S. v. Martinez-Martinez*, 468 F.3d 604 (9th Cir. 2006), which counters the assumption that a burglar may surprise an occupant and violence would ensue. Finally, to provide an argument that the offense is not an aggravated felony as attempted theft, counsel should plead to “any felony” or “theft or any felony.” While a plea to less than 365 is much safer in avoiding an aggravated felony, counsel may at least preserve an argument using this strategy.

**Burglary as a Crime Involving Moral Turpitude.** Burglary is a crime involving moral turpitude (“CMT”) only if the intended offense involved moral turpitude. Entry with intent to commit larceny where there is an intent to permanently deprive is a CMT, while entry with intent to commit an undesignated offense (“a felony”), or an offense that does not involve moral turpitude is not a CMT.

A class 6 felony for misdemeanor possession of burglary tools (§13-1505) may be held a CMT if the record reveals intent to commit a CMT, as opposed to, e.g., “any felony” or arguably “any theft.” See Chart.

**Part II. Theft**

**A. Theft as an Aggravated Felony**

The aggravated felony definition of theft includes a permanent or temporary taking. (Compare to the moral turpitude definition of theft, below, which only includes a permanent taking). A theft offense is “a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent.” *U.S. v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002); cited approvingly in *Duenas-Alvarez v. Gonzales*, 127 S.Ct. 815, 820 (2007). While a temporary taking still constitutes the aggravated felony “theft,” the Ninth Circuit has found that there is no theft where there is no intent to deprive the owner of rights and benefits, as is the case under some Arizona sections.
1. A conviction under ARS §13-1814(A) is not necessarily a “theft offense” because subsections (2), (4), and (5) do not require an intent to deprive the owner of rights and benefits. *Nevarez-Martinez v. INS*, 326 F. 3d 1053 (9th Cir. 2003).

2. A conviction for unlawful use of means of transportation, likewise, is not a theft offense because ARS § 13-1803 does not require an intent to deprive the owner. *U.S. v. Perez-Corona*, 295 F.3d 996 (9th Cir. 2002).

3. A theft conviction under ARS §1802 is not necessarily a “theft offense” because some subsections do not require an intent to deprive. *Huerta-Guevara v. Ashcroft*, 321 F. 3d 883 (9th Cir. 2003). Moreover, even if “receipt of stolen property” is equated with possession of stolen property, the government must establish that the person was convicted under a subsection requiring knowledge that the property was stolen. See *id.*, p. 887.

4. Theft of services does not constitute “theft” for aggravated felony purposes. If the record of conviction under ARS § 13-1802 is kept vague between theft of services and other theft, the offense is not an aggravated felony as theft.

**One-year sentence must be imposed.** An offense is not an aggravated felony as theft if a sentence of 364 days or less is imposed. 8 USC § 1101(a)(43)(G). See Note Sentence.”

**B. Theft as a Crime Involving Moral Turpitude.**

**Divisible Statute.** The Board of Immigration Appeals has long held that for theft to be a CMT, the offense must involve an intent to deprive the owner permanently, as opposed to temporarily, of rights and benefits. Where both types of offenses are contained in a statute, the statute is considered divisible for moral turpitude and the conviction is not a CMT unless the record establishes that the noncitizen was convicted of an intent to permanently deprive. See, e.g., *Matter of Grazely*, 14 I&N Dec. 330 (BIA 1973). While there is no Ninth Circuit case on point, ARS § 13-1802, 1803, and 1814(A) should be considered divisible for moral turpitude purposes, because some subsections do not include an intent to deprive the owner of rights and benefits, even temporarily. See discussion in Part A, supra.

**A single theft conviction and the CMT deportability/inadmissibility grounds.** A single conviction of a CMT committed within five years of last admission will make a noncitizen **deportable** only if the offense has a **maximum possible sentence of a year or more.** 8 USC § 1227(a)(2)(A).

A single conviction of a CMT will make a noncitizen **inadmissible** for moral turpitude. Under the “petty offense” exception, however, the noncitizen is not inadmissible if (a) she has committed only one CMT in her life and (b) the offense has a maximum sentence of a year and a sentence of six months or less was imposed. 8 USC § 1182(a)(2)(A). To meet the petty offense exception, criminal counsel should plead defendant to a misdemeanor with an actual sentence of six months or less or if necessary, a class 6
felony with no finding of aggravators, which arguably post-Blakely has a maximum sentence of one year, along with a sentence imposed of six months or less.

**Theft by Fraud.** A conviction of theft by fraud where the loss to the victim was $10,000 or more might be charged as an aggravated felony even if a sentence of a year or more was not imposed. See next section. However, the Board has acknowledged the difference between theft (without consent) and fraud (by deception), so that a conviction of a “straight” theft offense, where there was a loss to the victim of $10,000 is not an aggravated felony under the fraud ground. *Matter of Garcia-Madruga*, 24 I&N 436 (BIA 2008).

### Part III. Fraud

**Overview.** An “offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000” is an aggravated felony regardless of sentence imposed. Tax fraud where the loss to the government exceeds $10,000 and money laundering or illegal monetary transactions involving $10,000 also are aggravated felonies. Any offense containing fraud as an element is a crime involving moral turpitude.

**Avoiding an Aggravated Felony: Plead to an Offense that Does Not Involve Fraud or Deceit.** Where there was a loss to the victim of more than $10,000, counsel can avoid conviction of an aggravated felony by pleading to a theft offense rather than an offense involving fraud or deceit – or by creating a record that is vague between those options. The Board of Immigration Appeals has acknowledged that theft and fraud are distinct offenses, such that a conviction for theft, i.e. a taking without consent, with a loss to the victim exceeding $10,000 is not an aggravated felony under the fraud and deceit category. Section 13-1802(A) lists offenses that would be construed as involving deceit (e.g., (A)(3)) or as theft (e.g., (A)(1)). If the record of conviction indicates (A)(1), or is vague between the subsections, the fact that the victim’s loss exceeded $10,000 should not cause the conviction to be an aggravated felony. Recall, however, that a theft conviction is an aggravated felony if a sentence of a year or more is imposed. See discussion at Part II, *supra.*

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67 At the time of completion of these Notes, the Ninth Circuit has recently held in *Kawashima v. Mukasey*, __ F.3d __, 2008 WL 2579212 (9th Cir. July 1, 2008) that since the statute to which the defendant pleaded guilty did not require proof of any particular monetary loss, the record of conviction cannot be consulted to prove that the offense involved a loss exceeding $10,000. For practical purposes, this will render the aggravated felonies of fraud and money laundering under 8 USC § 1101(a)(43)(M) and (D) a nullity. This is at odds with the BIA’s decision in *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007), which held that any document, even one outside the record of conviction, may be consulted to prove the loss exceeding $10,000. Since Kawashima will likely be reheard en banc, and since it is difficult to predict where case law will ultimately settle, this version of the Notes will not attempt to advise counsel on these issues.

68 8 USC § 1101(a)(43)(D), (M).

69 *Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008) (welfare welfare fraud offense in violation of § 40-6-15 of the General Laws of Rhode Island is not a “theft offense”), citing with approval *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005) (Virginia's credit card fraud offense, § 18.2-195, did not substantially correspond to a theft offense under 8 USCS § 1101(a)(43)(G). Thus, the Virginia offense for which the alien was convicted was not a "categorical" match for an § 1101(a)(43)(G) offense).
Where a Plea to an Offense Involving Deceit or Fraud is Unavoidable. Note that “deceit” may be broadly defined to include offenses that do not contain all of the elements of fraud. If it is not possible to avoid such a plea, counsel should try to contain the record of conviction as described below. Counsel should be aware, however, that the Board of Immigration Appeals recently broke from extensive precedent to hold that any credible evidence, including evidence from outside the criminal record, can be used to establish the amount of loss. While the Ninth Circuit has recently held that even evidence in the record of conviction cannot establish the amount of loss, it is possible that eventually the Supreme Court will consider the issue and will rule with the Board. This is another reason to make every attempt to plead to a theft or other offense not involving fraud or deceit, where evidence would show a loss in excess of $10,000. (While the Board departs from the normal analysis to determine whether the loss exceeded $10,000, it will hold to the normal analysis, which only permits review of strictly limited documents from the conviction, in determining whether the offense of conviction involved theft versus deceit or fraud.)

Counsel should be wary of pleading to any fraud offense in which the loss to the victim(s) was $10,000 or more, regardless of whether this appears in the record of conviction. If possible, counsel should try to include a specific statement in the plea agreement that the loss to the victim under that count was less than $10,000. The Ninth Circuit held that a conviction of one count of bank fraud for passing a $600 bad check did not involve a loss over $10,000 since the plea agreement specified a $600 loss to the victim, even though restitution ordered as a result of the entire scheme (involving dismissed counts to which the defendant did not plead guilty but did make restitution) exceeded $10,000 and the probation report described a scheme involving more than $10,000. Chang v. INS, 307 F.3d 1185 (9th Cir. 2002). However, to the extent that restitution is held to equal “loss to the victim” under Arizona law, this strategy might not prevent the offense from being categorized as an aggravated felony. See Ferreira v. Ashcroft, 390 F.3d 1091, 1099-1100 (9th Cir. 2004).

See Note: Safer Pleas for suggestions of offenses that may be held not to involve fraud. See also additional discussion in the California Quick Reference Chart and Notes, at Note Fraud, at www.ilrc.org/criminal.php.

Note: Forgery §13-2002 is deportable as a crime involving moral turpitude. Forgery will only be an aggravated felony if the sentence is 365 days or more.

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70 See Matter of Babaisakov, 24 I&N Dec. 306 (BIA 2007) (testimony to the immigration judge can establish loss of over $10,000 in a fraud conviction).
71 See fn. 67.
Note: Safer Alternatives

Alternate Pleas with Less Severe Immigration Consequences

Introduction. This Note offers a brief explanation of proposed safer offenses. For further discussion see works listed in Note “Resources.” Some of these analyses have been affirmed in published opinions, while others are merely the opinion of the authors as to how courts might be likely to rule. A plea to the offenses below will give immigrant defendants a greater chance to preserve or obtain lawful status in the United States. However, almost no criminal conviction is entirely safe from immigration consequences, which is why this Note is entitled “safer,” not “safe,” alternatives.

Divisible statute and the record of conviction. Many of the offenses discussed below are safer only because they are divisible statutes. For the defendant to gain an advantage from a divisible statute, the defense counsel must keep careful control over what information appears in the “record of conviction.” A divisible statute is one that includes offenses that carry adverse immigration consequences as well as those that do not. Faced with a divisible statute, immigration authorities will look only to the record of conviction (the charging papers, plea colloquy or judgment, and sentence) to determine which offense actually was the subject of the conviction. If the record of conviction is vague enough so that it is possible that the noncitizen was convicted under a part of the statute without immigration consequences, the immigration consequences do not apply and the noncitizen wins. For further discussion see Note “Record of Conviction.”

For further discussion of all of the below offenses, please see the relevant sections of the Annotations to the Quick Reference Chart.

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A. All-purpose Substitute Pleas

1. Drug Programs

72 Special thanks to Norton Tooby, who has identified several potential safer offenses.
In some counties (including Maricopa, but not Pima), a successfully completed drug program ought not to be considered a conviction at all for immigration purposes. To be a “conviction” under 8 USC § 1101(a)(43)(A), the court must impose some punishment or restraint. As long as only the prosecutor imposes conditions such as completion of counseling, this does not occur in TASC or other drug programs. See Note: Definition of Conviction.

2. Solicitation, ARS §13-1002
This offense occurs when a person “commands, encourages, requests or solicits” another to commit criminal behavior. This offense is a possible alternate plea to avoid conviction of an aggravated felony or under the substance abuse, firearms or domestic violence grounds. There are three important caveats, however.

- The beneficial case law regarding solicitation does not apply outside the Ninth Circuit. Therefore your client should not travel outside the Ninth or travel outside the country before consultation with an immigration lawyer.
- Solicitation to commit an aggravated felony – while not an aggravated felony – may be removable under a different ground. For instance, Solicitation to Possess for Sale, while not an aggravated felony as a drug trafficking offense, is still a crime involving moral turpitude (CMT)\textsuperscript{73} and thus, depending on factors such as number and timing of conviction, may make the person inadmissible and/or deportable. Also, a conviction for solicitation related to trafficking may make the person inadmissible by providing the government with “reason to believe” that the person is assisting a drug trafficker in the trafficking.
- Congressional representatives have offered amendments to delete this defense from the aggravated felony statute. Such a law, if it passed, could be made retroactive to past pleas.

Thus, while solicitation is useful, other strategies may be more secure.

Crime Involving Moral Turpitude. Criminal defense counsel should assume that solicitation to commit a CMT will itself be held a CMT, although immigration counsel could at least argue that this is not so. Solicitation to commit a drug trafficking offense will be held a CMT.\textsuperscript{74}

Aggravated Felony. Solicitation has been held not to be an aggravated felony drug offense even when the crime solicited was possession for sale. \textit{Leyva-Licea v. INS}, 187 F.3d 1147, 1150 (9th Cir. 1999). Solicitation should not be held to be an aggravated felony in non-drug cases as well – for example, soliciting sex with a minor – based on the fact that conspiracy and attempt are specifically included in the aggravated felony definition (see 8 USC §1101(a)(43)(U) while solicitation is not.

\textsuperscript{73} Barragan-Lopez v. Mukasey, 508 F.3d 899 (9th Cir. 2007).
\textsuperscript{74} Id.
Other grounds of removal. Solicitation is not a deportable controlled substance offense because (a) it is a generic offense unrelated to controlled substances; and (b) attempt and conspiracy, but not solicitation, are included in the controlled substance grounds. Coronado-Durazo v. INS, 123 F.3d 1322, 1326 (9th Cir. 1997) (ARS §13-1002 is not a deportable controlled substance offense even where the offense solicited related to a controlled substance).

Under the above reasoning, solicitation ought not to cause inadmissibility or deportability in grounds where it is not specifically mentioned. It is not specifically included in the domestic violence deportation ground or the firearms deportation ground – except that “offering to sell” a firearm is a basis for deportation; see 8 USC §1227(a)(2)((C).


Hindering should be found to have the same effect as the federal accessory after the fact statute. Accessory after the fact is useful because it does not take on the character of the principal’s offense and therefore, it is a good alternative to a drug plea, firearms, or sex offense plea. However, the BIA has held that this type of offense will become an aggravated felony if a sentence of a year or more is imposed. See Defending Immigrants in the Ninth Circuit, §§ 2.12, 9.24 for an extensive discussion of accessory and defense arguments.

Aggravated felony. Hindering should not be an aggravated felony unless a one-year sentence is imposed. Similar to the federal accessory after the fact statute, hindering is a useful plea because it does not take on the character of the underlying offense. An immigrant’s conviction for helping someone who may have committed a drug offense, firearms offense, domestic violence or sexual offense is not itself a drug, firearms, or sexual offense conviction. Some counsel have negotiated for a plea to accessory after the fact of a drug crime even when the facts suggested that the defendant was the principal. The person will not be an aggravated felon or have a deportable or inadmissible offense.

However, the BIA in a questionable opinion held that accessory does constitute “obstruction of justice,” and therefore is an aggravated felony under 8 USC 1101(a)(43)(S) if a one-year sentence is imposed. Matter of Batista-Hernandez, 21 I&N 955 (BIA 1997) (accessory after the fact is not an offense “relating to controlled substances” but is an aggravated felony as obstruction of justice if a one-year sentence is imposed). Although the Ninth Circuit might reverse the BIA on this point in the future, counsel must do whatever is possible to avoid a one-year sentence. See Note: Sentence Solutions. If it is not possible to avoid a one-year sentence for this offense, and there is no other feasible option (for example, a plea to another offense, or two counts of hindering with less than 364 days each, to run consecutively), counsel can take steps to preserve a client’s strong argument to the Ninth Circuit. Counsel should indicate in the record, or leave the record open to the possibility, that the offense involved assisting the principle to avoid apprehension. Also, counsel should leave the record open to the
possibility that the offense involved concealing knowledge. See discussion of these strategies in Annotations to § 13-2550 in the Chart.

**Crime Involving Moral Turpitude.** The Ninth Circuit has found that a conviction for accessory after the fact under Cal. Penal Code § 32 is not a crime involving moral turpitude since it could include such conduct as a person providing food and shelter to a family member who has committed a crime. *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc). Since Cal. Penal Code § 32 is, if anything, broader than Arizona hindering, a conviction under §§ 13-2510-12 should not be held a CMT.

**Reason to believe trafficking.** If the principal committed a drug trafficking crime, the government may assert that a hindering conviction provides “reason to believe” that the defendant aided a drug trafficker and therefore the person is inadmissible under 8 USC 1182(a)(2)(C). This will have a devastating effect on persons who must apply for lawful status in the future, although not such a harsh effect on a permanent resident. See discussion of “reason to believe” at Note: Controlled Substances.

4. **Tampering, ARS § 13-2809**

Tampering may be treated the same as hindering, in that destruction of evidence of, e.g., a drug offense is not itself a drug offense. Hindering might be considered a safer plea since it is closer to accessory after the fact, and accessory after the fact is widely accepted as having this effect. Still, where the facts fit, tampering probably has the same effect as hindering, i.e., it is a good alternate plea to avoid controlled substance, firearms, or sex offenses, but will be an aggravated felony if a sentence of a year or more is imposed.

Tampering is less beneficial than hindering if a sentence of a year or more is imposed. Immigration counsel at least have a strong basis to challenge a BIA decision holding that an offense such as accessory after the fact or hindering constitutes “obstruction of justice,” because these offenses do not necessarily relate to an ongoing judicial process. See discussion of *Matter of Batista-Hernandez* in Hindering, supra. However, the tampering statute links the offense more directly to an ongoing judicial process.

5. **False statement to a police officer, ARS § 13-2907.01**

Making a false statement to a police officer is a good alternate plea where harsh immigration consequences would attach to a relatively minor offense, and where a false statement was made at some point. This offense is not an aggravated felony and might fit the facts of the aftermath of a domestic violence or statutory rape event, for example when the perpetrator denies wrongdoing or gives a false name. This might be held a crime involving moral turpitude, but immigration counsel can argue against this since there is no requirement of an intent to obtain something of value. See *Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2008).
6. **Criminal Nuisance, ARS § 13-2908**

Criminal nuisance can involve unreasonable conduct that recklessly creates a condition that endangers the safety or health of others by knowingly conducting or maintaining any premises where persons gather for purposes of engaging in unlawful conduct.

If the government is willing, plead to a class 3 misdemeanor, because it has few consequences and the facts can fit a variety of situations such as having people at a place use controlled substances, engage in sex with a minor, keep firearms, etc. It is not an aggravated felony or crime involving moral turpitude. As always counsel should strive to keep the record of conviction free of details, but even if it revealed details of the unlawful activity that went on (possessing an unregistered weapon, using drugs, sexual encounters, etc.), this should not transform the offense into a firearms, drug, etc. offense.

**B. Safer pleas for violent or sexual offenses**

*Overview of consequences.* Conviction of an offense that comes within the definition of a “crime of violence” under 18 USC § 16 can cause two types of adverse immigration consequences, plus additional harm if the record shows that the victim was a minor.

- If a sentence of a year or more is imposed it is an aggravated felony under 8 USC § 1101(a)(43)(F).
- Regardless of sentence, if the defendant had a domestic relationship with the victim it is a deportable offense as a “crime of domestic violence” under 8 USC § 1227(a)(2)(E).
- In addition, *if the record shows that the victim was a minor*, the offense might be classed as a deportable crime of child abuse if the offense involves “an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child’s physical or mental well-being.” Counsel should keep the victim’s age out of the record of conviction. See Note: Record of Conviction.

Under 18 USC § 16(a), an offense is a crime of violence if it has as an element intent to use or threaten force against a person or property. Under 18 USC § 16(b) a *felony* offense is a crime of violence even without intent to use force, if it is an offense that by its nature involves a substantial risk that force will be used. Offenses that involve an intent to use great force or sexual intent also commonly are held to be crimes involving moral turpitude.

*Besides the offenses discussed below, consider the “all-purpose” alternative pleas discussed at Part A.*
1. **Criminal Trespass in the Second and Third Degree, ARS §§1502, 1503.**
   Neither Second Degree or Third Degree Trespass would result in inadmissibility or deportability.

2. **Misdemeanor Criminal Damage, ARS § 13-1602.**
   Criminal damage should not result in inadmissibility or deportability if the sentence is under one year. The Board of Immigration Appeals found in an unpublished decision that a conviction for ARS §13-1602 is not a crime of domestic violence because the force was against property and not against person.

3. **Simple assault, ARS § 13-1203.**
   **Avoids Moral Turpitude.** Simple battery and simple assault are not crimes involving moral turpitude. See e.g. *Matter of B*, 5 I. & N. Dec. 538 (BIA 1953). However, counsel still should keep evidence of use of violent force out of the record of conviction, as well as evidence that the victim was a minor.

   **Avoids Domestic Violence,** with a carefully constructed record of conviction. Because A3 includes mere “insulting” touching, a record that identifies A3 or that leaves the record vague, and that does not contain evidence of more than offensive touching, is not a crime of violence. Therefore it is not a domestic violence offense even if coupled with a § 13-3601 reference. *Singh v Ashcroft*, 386 F.3d 1228 (9th Cir. 2004); *Ortega-Mendez v Gonzales*, 450 F.3d 1010 (9th Cir. 2006); *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006). See 8 USC § 1227(a)(2)(E) and discussion in Note “Domestic Violence.” Also, a plea to A1 as a class 2 or 3 misdemeanor will avoid a domestic violence offense since it may include a *mens rea* of recklessness. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc). However, a plea to A1 as a class 1 misdemeanor will trigger removability as a domestic violence offense. Counsel should assume that the court will look at the record, and therefore must keep evidence from the record that an (A)(3) offense involved more than mere offensive touching, or that an (A)(1) offense involved an intentional rather than reckless action.

   **Child Abuse Ground.** Where the record of conviction shows that the victim was under the age of 18, a conviction under A1 might be held to be a crime of child abuse or neglect even with reckless intent. However, a conviction under A3 might not be held to be a crime of child abuse, since offending or annoying a child may not be held to be abusive.

4. **Aggravated Assault, ARS § 13-1204**
   While not optimal, if a felony offense is required aggravated assault has some advantages. A felony conviction with a sentence imposed of less than a year is not an aggravated felony. Even if a sentence of a year or more is imposed, a plea with a vague record of conviction might not be held an aggravated felony. The best plea would be to the language of the statute. Assault can involve recklessness that creates a risk that injury will occur, not that force will be used; under current Ninth Circuit law, this should not be held a crime of violence. See annotation to ARS § 13-1203, 1204. Counsel must keep
evidence that the victim was a minor out of the record, or the offense is likely to be held a deportable crime of child abuse.

5. **Unlawful Imprisonment, ARS §13-1303.**

Especially as a misdemeanor, this is a safer alternate plea, depending on sentence and record factors.

**Aggravated Felony.** Counsel can avoid an aggravated felony by obtaining a sentence of 364 or less for any single count. If that is not possible, in a misdemeanor conviction keep the record clear of evidence that the restraint was effected by force or violence, since there is a good argument that the offense is not necessarily a crime of violence because it can be carried out by deceit.

**Domestic Violence and Child Abuse.** DHS will charge false imprisonment as a deportable domestic violence offense if §13-3601 is in the judgment. Counsel should attempt to avoid the §13-3601 notation, as well as other evidence in the record of conviction showing force was used or threatened against anyone with a domestic relationship, or abuse against a child was involved. However, if the offense is a misdemeanor and the record of conviction does not establish that force or threat of force was used (e.g., leaves open the possibility that the restraint was by deceit or other means), immigration counsel will have a strong argument that the conviction does not trigger deportation under that ground because it is not a crime of violence. If the victim was a child and the record of conviction is silent as to the details, there are strong arguments that it is not a deportable child abuse offense.

**Crime Involving Moral Turpitude.** It may not be. Knowingly restraining another person, without more, probably does not by its nature involve evil intent that amounts to moral turpitude. Unlawful imprisonment is distinguished from kidnapping by its lack of intent to do harm. See, e.g., *State v. Lucas*, 146 Ariz. 597, 604 (1985), *State v. Flores*, 140 Ariz. 469,473 (1984). Even if the record shows use of force, mere use of force (as opposed to force with intent to commit great bodily harm) does not necessarily involve moral turpitude. If victim is a child, defendant could plead to ARS §13-1302 Custodial Interference.

6. **Disorderly Conduct, ARS §13-2904**

This is a safer plea except subsection A6.

**Aggravated Felony.** Counsel can plead to the language of the statute generally or to any subsection with the exception of A6 to avoid a crime of violence characterization. If defendant pleads specifically to A6, counsel should obtain a sentence of 364 days or less.

**Firearms Ground of Deportation.** If defendant pleads to A6 and the record of conviction clearly identifies that defendant had a firearm or destructive device (i.e. explosive), then this is a ground of deportation. Defense counsel should either avoid a plea to A6, plead to the entire statute language, or keep the record of conviction vague as
to the type of weapon used, i.e., plead defendant to the statutory language, “a deadly weapon or dangerous instrument.”

**Domestic Violence, Child Abuse.** If defendant pleads to A6 and the offense was committed against a DV type victim or a minor, he/she may be deportable under the domestic violence or child abuse ground. See Note: Domestic Violence.

**Crime Involving Moral Turpitude.** Except for A6, this offense should not be held a CMT. However, to be safe it is advisable to leave the record of conviction vague as to the underlying facts. If a plea to A6 cannot be avoided, counsel should attempt to leave the record of conviction vague. An alternate plea would be to carrying a deadly weapon under ARS §13-3102(A)(1) (a class 1 misdemeanor), which has no immigration consequences as long as the weapon is not identified as a firearm or explosive device.

7. **Endangerment, ARS §13-1201.**

   **Aggravated Felony.** Even with a sentence of a year or more, this is not an aggravated felony because the statute can only be violated with a *mens rea* of recklessness. Since recklessness is not sufficient to constitute an aggravated felony as a “crime of violence,” this should not be an aggravated felony. See *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc).

   **Domestic Violence.** A crime of domestic violence must have a “crime of violence” as its underlying offense. Since Endangerment can only be violated through a *mens rea* of recklessness, it cannot be a “crime of violence” and thus cannot be a crime of domestic violence. See “Aggravated Felony” above.

   **Child Abuse.** Since child abuse can be triggered by an offense with a *mens rea* of recklessness or less, a conviction for Endangerment may be charged as child abuse if the record includes evidence that the victim was a minor. If the victim was under 18, defense counsel should attempt to keep the victim’s age out of the record of conviction.

   **Crime Involving Moral Turpitude.** The BIA has held in an unpublished decision that Endangerment is not a CMT. Counsel should be conservative and should try to keep the record vague, i.e. use boilerplate statutory language in the plea agreement. Mere risk of physical injury gives immigration counsel an argument that the conviction is not CMT. Recklessly causing substantial risk of imminent death may be more likely a CMT. See Note: Crimes Involving Moral Turpitude.

8. **Use of telephone to annoy, ARS § 13-2916**

   This is an excellent substitute for a harassment or stalking charge, if prosecutor is willing, to avoid deportability under the DV grounds. With a vague record of conviction it has no immigration consequences. It might also be a substitute charge in a sympathetic statutory rape case. As with other offenses in this section, counsel should attempt to keep the age of the victim out of the record of conviction in order to avoid a charge of child abuse.

9. **Threatening/Intimidating, ARS §13-1202**
This is not optimal, but with careful pleading this avoids some immigration consequences. Better plea is to use telephone to annoy. Counsel should attempt to keep the age of the victim out of the record of conviction in order to avoid a charge of child abuse.

**Aggravated Felony.** Both A1 and A2 are misdemeanors that cannot sustain a sentence of a year, but will be held a class 6 felony if done in retaliation for certain activities. In that case counsel should obtain a sentence of 364 days or less, or keep the record vague between A1 and A2. A2 may be held not to be a crime of violence since it does not necessarily involve a threat to use force on people or property (e.g., it could involve threatening to pull a fire alarm).

**Crime Involving Moral Turpitude.** A1 and A2 should not be held a CMT because they do not require any “wrong intent.”

10. **Misdemeanor DUI, ARS §28-1381.**

This offense will not result in deportability or inadmissibility. Negligent infliction of injury is not a “crime of violence.” *Leocal v. Ashcroft*, 125 S.Ct. 377 (2004).

Aggravated DUI in violation of ARS §28-1383A.1 (DUI with license suspended) is not a CMT if the record of conviction establishes or leaves open the possibility that the person was convicted for being in “actual physical control” of a vehicle while under the influence, rather than of driving under the influence. *See Hernandez-Martinez v. Ashcroft*, 343 F. 3d 1075 (9th Cir. 2003) (former ARS §28-697A.1 is “divisible”)

**C. Safer pleas for offenses related to firearms or explosives**

*See also Note “Other Grounds: Domestic Violence, Firearms, and Prostitution”*

**Overview of Consequences.** Conviction of an offense involving the purchase, sale, offer for sale, exchange, use, ownership, possession, carrying or the attempt or conspiracy to commit any of these acts involving a firearm or a destructive device triggers deportation. 8 USC § 1227(a)(C). If the offense involves trafficking in firearms or destructive devices it will be an aggravated felony. Also, state analogues to designated federal firearms offenses, such as being a felon or addict in possession of a firearm, are aggravated felonies. 8 USC §1101(a)(43)(C), (E).

**Note on Sentence.** Avoiding a sentence imposed of a year or more will not avoid the firearms deportation ground or the firearms aggravated felony classification. For example, sale of a firearm with a sentence imposed of six months is an aggravated felony, and also a basis for deportation under the firearms ground.

**Weapons misconduct, ARS § 13-3102(A)(1-15)**

Section 13-3102 can be a valuable plea because it is a divisible statute. With a vague record of conviction, or a plea to certain subsections (A1 through A7 and A10 through A13), the conviction will not be an aggravated felony as a firearms offense, or be an offense that causes deportability under the firearms ground. For example, both
“deadly weapons” and “prohibited weapons” include weapons that are not firearms or explosives. In these cases, counsel can avoid conviction of a firearms aggravated felony or a deportable firearms offense by (a) specifically identifying a non-firearms/explosive device in the record, or (b) keeping the record vague enough to permit the possibility that this was the weapon, e.g. pleading to a “deadly weapon.” See Quick Reference Chart for detailed analysis on the consequences of each subsection and how to construct a safer plea.

Avoiding an aggravated felony. A state firearms offense is an aggravated felony if it involves either trafficking in firearms or destructive devices, or is analogous to certain federal firearms offenses. If counsel cannot avoid mention of a firearm in the record of conviction, counsel still may be able to avoid an AF. Under subsection A7, the list of “prohibited possessors” do not exactly match the federal crimes designated as firearms aggravated felonies. Counsel, therefore, in an offense involving a prohibited possess or a firearm or explosive device, should either leave the record of conviction vague as to which subset of ARS § 13-3101(A)(7) is implicated or identify one of the following categories:

- A person who has been found a danger to self or others, where the record of conviction does not establish commitment to a mental institution. While the analogous federal offense requires commitment to a mental institution (18 USC § 922(g)(4)), ARS §26-540 permits various options including outpatient care.
- A person who is imprisoned at the time of possession. There is no federal analogue.
- A person who is serving probation for a domestic violence conviction, under ARS § 13-3101(A)(7)(d). (Federal law has similar provisions at 18 USC § 922(g)(8), (9), but these are not included in the aggravated felony definition at 8 USC 1101(a)(43)(E).)

D. Safer pleas for offenses relating to fraud, theft or burglary

See also Note “Burglary, Theft and Fraud”

1. First offense misdemeanor shoplifting, ARS § 13-1805.

   Theft with intent to permanently deprive the owner is a crime involving moral turpitude. However, a first moral turpitude offense that is a misdemeanor cannot cause deportability because it has a maximum sentence of only six months, and meets the petty offense exception for the inadmissibility ground.

2. Theft, ARS §13-1802.

   With careful pleading, a theft conviction can avoid deportability or inadmissibility.

   Aggravated Felony. As always, counsel should attempt to obtain 364 days or less. If it is not possible to avoid a sentence of a year or more, however, an aggravated felony still can be avoided with careful control of the record of conviction. Counsel should create a record that leaves open the possibility that the offense was A2, A3 or A6
and involved theft of services, or was A2 or A4 and did not involve an intent to deprive the owner either temporarily or permanently. These subsections do not require an intent to deprive the owner even temporarily, or involve theft of services, and so do not meet the aggravated felony definition of “theft.” Huerta-Guevara v. Ashcroft, 321 F. 3d 883 (9th Cir. 2003). Moreover, even if “receipt of stolen property” is equated with possession of stolen property, the government must establish that the person was convicted under a subsection requiring knowledge that the property was stolen. See id., p. 887.

**Crime Involving Moral Turpitude:** Intent to permanently deprive is required for a CMT. See e.g. Matter of P, 21 I&N Dec. 887 (BIA 1947); Matter of M, 2 I&N Dec. 686 (BIA 1946) (conviction for joyriding does not involve moral turpitude because defendant did not intend to effect a permanent taking). Where a theft statute prohibits both temporary and permanent taking, the statute is considered divisible for moral turpitude. ARS § 13-1802 is arguably a divisible statute. Subsections A1 and A3 contain an element to deprive the owner of property but **not permanent deprivation.** In re Juvenile Action No. J-98065, 141 Ariz. 404, 687 P.2d 412 (Ct. App. 1984) (theft does not require permanent deprivation; the statute requires control with the intent to deprive). Arguably, no subsection of theft is a crime involving moral turpitude because each subsection lacks an element of **permanent** deprivation. Subsections A2, A4, A5 and A6 do not have an element to deprive. A5 could be analogized to receiving stolen property, which has been held to involve moral turpitude. Wadman v. INS, 329 F.2d 812 (9th Cir. 1964) (finding receiving stolen property to be a CMT where defendant knew property was stolen). A6 could be a CMT because an intent to permanently deprive may be inferred.

3. **Unlawful use of means of transportation, ARS §13-1803.**

Aggravated Felony. A conviction for unlawful use of means of transportation is not an aggravated felony theft offense, as the intent to deprive the owner of use or possession is not an element of the offense. United States v. Perez-Corona, 295 F.3d 996 (9th Cir. 2002). Therefore while counsel should try to avoid a year’s sentence, this offense should not be an aggravated felony even with that. Counsel should keep the record free of evidence of an intent to deprive, because DHS will attempt to argue that that will constitute theft despite the lack of the element in the statutory description.

Crime Involving Moral Turpitude. Theft offenses that do not involve intent to permanently deprive the owner of the property are not classified as theft crimes involving moral turpitude. See e.g. Matter of D, 1 I&N Dec. 143 (BIA 1941) (driving an automobile without the consent of the owner is not a crime involving moral turpitude); Matter of P, 2 I&N Dec. 887 (BIA 1947); Matter of M, 2 I&N Dec. 686 (BIA 1946) (conviction for joyriding does not involve moral turpitude because defendant did not intent to effect a permanent taking). Keep the record free of evidence of intent to deprive.

4. **Theft of means of transportation, ARS §13-1814.**
**Aggravated Felony.** An Arizona conviction for theft of means of transportation does not constitute an aggravated felony if the record of conviction does not specify which of the five subsections of the statute constituted the offense. *Nevarez-Martinez v. INS*, 326 F.3d 1053 (9th Cir. 2003). In *Nevarez-Martinez*, the Court found that the statute is divisible because sections (A)(2), (A)(4), and (A)(5) contain no element of deprivation and, thus, do not meet the generic definition of theft. On the other hand, sections (A)(1) and (A)(3) contain an element of intent to deprive and as such are aggravated felonies.

**Crime Involving Moral Turpitude.** Subsections A2 and A4 are theft offenses that do not involve intent to permanently deprive the owner of the property and therefore, ought not to be classified as theft crimes involving moral turpitude. *See e.g. Matter of M*, 2 I&N Dec. 686 (BIA 1946) (conviction for joyriding does not involve moral turpitude because defendant did not intent to effect a permanent taking). Avoid other subsections, or leave the record of conviction vague between them and A1 and A4.

### 5. Taking Identity of Another Person or Entity, ARS §13-2008.

Although theft may be a better plea because it is the subject of specific case law, taking the identity of another person also may avoid a crime involving moral turpitude and aggravated felony as theft. Counsel, however, should note that they must construct a vague record of conviction, i.e. plead to the language of the statute. To ensure that the offense is not an aggravated felony, obtain a sentence of less than year. The government may also charge this as an aggravated felony if there is a loss to the victim or victims exceeding $10,000. Regarding proof of amount of loss of $10,000, see Note: Fraud.

### 6. Auto Burglary; Burglary of a Yard, ARS § 13-1506

*Not an aggravated felony.* To surely prevent an AF, obtain a sentence of 364 days or less. If that is not possible, auto burglary even with a one-year sentence imposed is not an aggravated felony as ‘burglary’ or a “crime of violence.” *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000). To make sure that the offense is not held an aggravated felony as attempted theft, the record of conviction should be kept clear of evidence that it was done with intent to commit theft with intent to deprive, i.e. it should read “intent to commit any felony” or “theft or any felony,” where the felony is not identified. However, since theft is a divisible statute as an aggravated felony, even intent to commit “any theft” arguably is not an aggravated felony.

Felony burglary of a residential yard with a sentence of one year may be held an aggravated felony as a “crime of violence” under 8 USC § 1101(a)(43)(F). Therefore, counsel should attempt to avoid specifically pleading to burglary of a residential yard. However, pleading to a “fenced commercial yard” or a “fenced residential or commercial yard” should avoid both an aggravated felony as a “crime of violence” or as “burglary.”

**Other consequences.** Auto burglary is a crime involving moral turpitude to the extent of the underlying intent. The safest plea is entry with intent to commit a felony.

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Flower Immigration & Refugee Rights Project, Immigrant Legal Resource Center
June 2008

(undefined, or one that is not a CMT). If that is not possible, immigration counsel at least can argue that entry with intent to commit “a theft” is not a CMT, since Arizona theft arguably is divisible for CMT purposes.

This plea is an alternative to perjury under ARS §2702 because it avoids being a crime involving moral turpitude as fraud and aggravated felony perjury.

Crime Involving Moral Turpitude. False swearing should not be found to be a CMT because it does not involve materiality or a fraudulent intent. *Hirsch v. INS*, 308 F.2d 562 (9th Cir. 1962); *Matter of C*, 1 I. & N. Dec. 14 (BIA, AG 1940) (false statements held not to involve moral turpitude where there is no indication that fraud was involved). Counsel should keep evidence regarding materiality or fraudulent intent out of the record of conviction in case the immigration authorities (wrongly) attempt to use that in evaluating whether the offense is a CMT.

Aggravated Felony Perjury. If a sentence of a year or more is imposed, false swearing should not be considered an aggravated felony because there is no requirement of materiality. *See, e.g., discussion in Matter of Martinez-Recinos*, 23 I&N Dec. 175 BIA (2001) (Calif. statute requiring knowingly false sworn material statement is perjury). Still, as always counsel should obtain 364 days or less where possible.

Avoid Aggravated Felony Fraud or Deceit with Loss to Victim of $10,000 or more. Because “deceit” is not well-defined, counsel should assume conservatively that a conviction under §13-2703 would be held an aggravated felony under this category. Therefore counsel should avoid pleading to this offense if there is a loss exceeding $10,000. Regarding proof of the $10,000 loss, see Note: Fraud.

E. Safer pleas for offenses related to drugs
See further discussion in Note “Drug Offenses” and annotated Chart

Remember the “conduct grounds.” This Part is a discussion of which dispositions can avoid immigration consequences as convictions. Be aware of conduct-based immigration consequences that may apply even absent a drug conviction. If there is evidence that the defendant is or has been a drug addict or abuser, or has ever been or aided a drug trafficker, immigration penalties may attach even if there is no conviction or one that is not an aggravated felony.

A. Dispositions That Do Not Result In a Conviction Relating to a Controlled Substance Offense. These most-favored dispositions are not aggravated felonies, and further do not even cause deportability or inadmissibility as a “conviction relating to a controlled substance offense.”
1. **Successfully Completed Drug Program (in some counties).** While there is no case on point, a successfully completed drug program in some counties (for instance, Maricopa County, but not Pima County) ought not to be considered a conviction at all for immigration purposes. To be a “conviction” under 8 USC § 1101(a)(43)(A), the court must impose some punishment or restraint. As long as only the prosecutor imposes conditions such as completion of counseling, this does not occur in some drug programs. See Note: Definition of Conviction.

2. **Hindering Prosecution, Tampering with Evidence.** It has long been held that convictions such as federal accessory after the fact and misprision of felony do not take on the character of the underlying offense. Therefore assisting another to evade prosecution is not a drug offense even if the principal committed a drug offense. See, e.g., *Matter of Bautista-Hernandez*, 21 I&N 955 (BIA 1997). Hindering prosecution in particular is analogous to accessory after the fact, and the same principle should apply to tampering. However, counsel must avoid *a sentence imposed of a year or more*, or the conviction will be charged as an aggravated felony as obstruction of justice. See Chart Annotations for ARS §§ 13-1510-12 and 13-2809. In some cases counsel have bargained for an accessory or hindering type conviction when the initial charge was that the defendant was the principal. Also, where the principal is a drug trafficker, the government may assert that the conviction gives it “reason to believe” that the immigrant assisted a trafficker in trafficking.

3. **Where controlled substance is not identified.** If a state conviction record does not specifically identify the controlled substance involved, the conviction is not one relating to a controlled substance as defined under federal law. *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965) (record must prove that substance was a controlled substance under federal law; federal and state definitions of controlled substance vary). For instance, in Arizona, some statutes include substances such as boldenone and methandrol that do not appear on the federal list.

   **Example:** A noncitizen is charged with § 13-3407 and the defender bargains for a substitute complaint that does not identify the controlled substance involved. Even if the offense involved sale, it would not be an aggravated felony or a deportable or inadmissible offense. In addition, the conviction itself would not provide the government with “reason to believe” the person was inadmissible as a trafficker. Note, however, that in determining “reason to believe” the government can look outside the record, for example at the police report or original complaint.

   However, possession of paraphernalia has been held a controlled substance conviction even where the substance is not identified. *Luu-Le v INS*, 224 F.3d 911 (9th Cir. 2000).

4. **Alcohol versus Drugs.** Some offenses are divisible between controlled substances and alcohol, for example driving under the influence of drug or alcohol under ARS 28-1383 and unlawful administration of drug or alcohol under ARS § 13-1205. To avoid a controlled substance conviction, counsel should leave the record of conviction
vague between alcohol and controlled substances, or if that is not possible, leave the record vague as to what controlled substance was involved. Note that felony § 13-1205 could be charged as an aggravated felony crime of violence, so counsel should avoid a sentence of one year or more. See Chart Annotations.

5. **First Minor Conviction That Is Expunged Under Rehabilitative Relief.** A first conviction for simple possession, for a less serious offense such as possession of paraphernalia or use, or for giving away a small amount of marijuana, can be entirely eliminated for immigration purposes by “rehabilitative relief” such as withdrawal of plea under ARS § 13-907. *Lujan-Armendariz v INS*, 222 F.3d 728 (9th Cir. 2000), *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000). In some counties, successful completion of a drug program ought not to be held a conviction (see above), but even if it were, the withdrawal of charges under a drug program in a first offense would get this benefit. **Note:** This benefit only applies in immigration proceedings taking place in Ninth Circuit states. (Apart from these first minor drug offenses, withdrawal under ARS § 13-907 has no immigration benefit.)

6. **Straight Solicitation Under ARS § 13-1002, even for a sale offense.** The Ninth Circuit specifically has held that solicitation under § 13-1002 is not an aggravated felony and is not a deportable or inadmissible drug offense, even where the crime solicited was possession or possession for sale. *Coronado-Durazo v INS*, 123 F.3d 1322, 1326 (9th Cir. 1997) (not a deportable offense); *Leyva-Licea v INS*, 187 F.3d 1147 (9th Cir. 1999)(not an aggravated felony). This plea presents some risk, however, in that federal legislation has been introduced to eliminate the solicitation defense. It is possible that such a law could pass and could apply retroactively to past convictions. For that reason, solicitation is a valuable alternate plea but may be less safe than others. See also discussion of “offering” to commit a drug offense under ARS § 13-3405 et seq. next section. **Note:** This benefit only applies in immigration proceedings taking place in Ninth Circuit states.

7. **Vacation of judgment for cause** will eliminate any conviction for immigration purposes, so that the person no longer will have an aggravated felony or be deportable based on the conviction. See writings by Norton Tooby on obtaining post-conviction relief in Note “Resources.” The person still might face consequences under the conduct grounds, which do not require a conviction.

B. **Convictions That Are Not Aggravated Felonies But That Are, Or Might Be, Held To Cause Deportability Or Inadmissibility.**

*Remember: How much these convictions harm an immigrant is an individual determination.* A permanent resident who is deportable for a drug conviction but does not have an aggravated felony conviction might be able to apply for a waiver; therefore one of the below dispositions may not be so serious. In contrast, an immigrant who hopes to apply for a green card through a family member will be forever barred if she receives a drug conviction that makes her inadmissible. See “Note: Determining Defense Goals” for more information.
1. **Use versus Possession.** Conviction of use or possession of a controlled substance is a deportable or inadmissible offense; the question is whether it can avoid being an aggravated felony. It is likely that a recidivist simple possession will be held an aggravated felony, at least if the prior offense was pleaded and proved at the subsequent prosecution. *To be sure of avoiding an aggravated felony, counsel should plead to “use” or leave the record of conviction vague between use and possession; even recidivist “use” is not an aggravated felony.* Counsel can plead to the language of the statute (“possession or use”) under section (a)(1) of ARS §§ 13-3405, 3407 or 3408, or specifically to use.

2. **Possession of Paraphernalia.** This has the same effect as a plea to use. It is not an aggravated felony, but is a controlled substance offense that causes deportability and inadmissibility. (For paraphernalia, this is true even if the record does not reveal the controlled substance.)

3. **Offering to Commit a Drug Offense (including Sale) under ARS §§ 13-3405, 3407, 3408.** Offering to sell a controlled substance under these statutes should not be an aggravated felony drug trafficking offense, although sale is. *U.S. v. Rivera-Sanchez,* 247 F.3d 905 (9th Cir. 2001) (en banc). However, as a practical matter most immigration judges will find that a generic plea to ARS §§ 13-3405, 3407, 3408 is an aggravated felony, even though it includes “offering.” Therefore counsel should not rely on it. In addition, there is a strong argument that, like conviction of solicitation of a drug crime under ARS § 13-1002, solicitation under these statutes should not be a basis for deportation or inadmissibility. However, most Arizona judges have held that unlike § 13-1002, offering to sell under ARS §§ 13-3405, 3407, 3408 is a deportable and inadmissible offense. For more information, see discussion at *Defending Immigrants in the Ninth Circuit,* § 3.4(G).

4. **Possession of 30 grams or less, use, of marijuana and hashish exception.** A single conviction for simple possession of 30 grams or less of marijuana or hashish or being under the influence of these drugs or THC-carboxylic acid, is not a basis for deportation. It is a ground of inadmissibility, but a waiver exists for many persons including family immigrants. 8 USC § 1182(h). If possible have the record reflect that the quantity was 30 grams or less; if the amount was greater, make sure the record of conviction is sanitized of the quantity. See Chart, ARS § 13-3405.

**F. Sentence of 364 Days or Less**

Many offenses become aggravated felonies only if a sentence of a year or more is imposed. These include crime of violence, theft, receipt of stolen property, burglary, bribery of a witness, commercial bribery, counterfeiting, forgery, trafficking in vehicles that have had their VIN numbers altered, obstruction of justice, perjury, subornation of perjury, and with some exceptions, false immigration documents. See 8 USC § 1101(a)(43). Often defense counsel have more leeway in avoiding a one-year sentence for a particular count than in pleading to an alternate offenses. For creative suggestions
about how to arrive at less than a one-year sentence even in somewhat serious cases, see Note “Sentence.”

Many other offenses are aggravated felonies regardless of sentence imposed, for example, sexual abuse of a minor, rape, and firearms and drug offenses. Fraud and money laundering offenses depend on whether $10,000 was lost or involved, not on sentence. Avoiding a one-year sentence in these cases will not prevent an aggravated felony. See Note “Aggravated Felonies.”

G. Lesser Potential Sentence for Moral Turpitude Purposes: Attempt, Solicitation, Facilitation

Attempt, facilitation and solicitation probably will be held to involve moral turpitude if the underlying offense does. However, they may avoid immigration consequences based on a single moral turpitude conviction due to the fact that they lower the maximum potential sentence. A single CMT conviction will not have immigration consequences if the sentence is sufficiently low.

- A single CMT conviction causes deportability under the CMT ground only if the offense was committed within five years after admission and carries a potential sentence of a year or more. 8 USC 1227(a)(2)(A)(i). Thus a potential sentence of under a year prevents deportability for a single CMT.

- A single CMT conviction will not cause inadmissibility if it carries a potential sentence of a year or less, with an actual sentence imposed of six months or less. 8 USC 1182(a)(2)(A)(ii). Thus a potential sentence of a year or less can prevent inadmissibility for a single CMT.

We conservatively assume that immigration authorities will hold a class 6 felony to have a potential sentence of more than a year due to Guidelines, so the goal is to get to a misdemeanor. A conviction for attempt will cause a class 6 felony to become a class 1 misdemeanor. A conviction for solicitation will cause a class 5 or 6 felony to become a class 1 or 2 misdemeanor. A conviction for facilitation will cause a class 4 or 5 felony to become a class 1 misdemeanor, and a class 6 felony to become a class 3 misdemeanor. (However, post-Blakely immigration counsel can argue that where no aggravating factors are present, a class 6 felony carries a top of one year, low enough to qualify for the petty offense exception – so that is worth obtaining if it is the best available.)

Remember that this only protects the person from consequences under the CMT grounds of inadmissibility and deportability based on a single CMT. The conviction still might bring consequences as an aggravated felony, domestic violence offense, etc.

H. Is your client a U.S. citizen without knowing it?
A United States citizen faces no immigration consequences for any conviction. A citizen cannot be prosecuted for any offense for which alienage is an element (such as illegal re-entry).

All persons born in the United States and Puerto Rico are U.S. citizens. Many people who were born in other countries also are U.S. citizens and may not know it. Many people born abroad inherited U.S. citizenship at birth from a parent without being aware of it. Others who were permanent residents here as children may have automatically become citizens when a parent naturalized. To begin the inquiry, ask the defendant the following two threshold questions.

- When you were born did you have a parent or a grandparent who was a U.S. citizen? and
- At any time before your 18th birthday did the following take place (in any order): you were a permanent resident, and one or both parents naturalized to U.S. citizenship?

If the answer to either threshold question might be yes, additional information needs to be collected, after which the case may be analyzed according to a citizenship chart. For assistance contact an immigration attorney or resource center; local non-profit immigration organizations also have expertise in this area, and if your local U.S. Passport office is not overburdened it might offer assistance. Note that if the client is a U.S. citizen, generally it is faster and better to apply for an American passport at a U.S. passport agency as proof of citizenship than to ask Citizenship and Immigration Services (CIS) for a citizenship certificate. However, the defendant can assert citizenship as a defense in removal proceedings and have the immigration judge decide the case (unfortunately often while the person remains detained by immigration authorities).

**Juvenile Delinquency Counsel: You Can Make a Citizen**

A lawful permanent resident youth will automatically become a U.S. citizen, without filing any paper or proving good moral character, if one parent with custody over him naturalizes to U.S. citizenship (i.e., is granted citizenship after applying) before the youth’s 18th birthday. This will protect the youth from the danger that he may acquire an adult conviction that will make him deportable before he gets his life on track.
Note: Immigration Status as an Element of Arizona Statutes

In the past several years, the Arizona state legislature has increasingly adopted new civil and criminal laws in which immigration status is an element of the statute. Due to the complex nature of immigration law, however, these laws have created a great deal of confusion among attorneys and judges who do not regularly practice immigration law and may have difficulty determining the immigration status of a particular defendant. As a result, inaccurate and incorrect judgments often occur. This section addresses several state laws in which immigration status is an element of the statute and offers suggestions for defense attorneys to argue that a person does not fall within a particular statute.

A. Offenses Non-Bailable (“Prop. 100”)

In November 2006, Arizona voters approved Proposition 100, an amendment to the Arizona constitution that would deny bail to persons who have committed a “serious felony offense” (defined as a class 1, 2, 3, or 4 felony) and were found to have “entered or remained in the United States illegally.” Prop. 100 became effective December 7, 2006 and amended Arizona Constitution Article II, Sec. 22 and Arizona Revised Statutes §13-3961. Section 13-3961(A) now reads (in part):

“A person who is in custody shall not be admitted to bail if the proof is evident or the presumption great that the person is guilty of the offense charged and the offense charged is one of the following:…

5. A serious felony offense if there is probable cause to believe that the person has entered or remained in the United States illegally. For the purposes of this paragraph:
   (a) The court shall consider all of the following in making a determination that a person has entered or remained in the United States illegally:
      (i) Whether a hold has been placed on the arrested person by the United States immigration and customs enforcement.
      (ii) Any indication by a law enforcement agency that the person is in the United States illegally.
      (iii) Whether an admission by the arrested person has been obtained by the court or a law enforcement agency that the person has entered or remained in the United States illegally.
      (iv) Any information received from a law enforcement agency pursuant to section 13-3906.
      (v) Any evidence that the person has recently entered or remained in the United States illegally.
      (vi) Any other relevant information that is obtained by the court or is presented to the court by a party or any other person.”
In Hernandez v. Lynch, 167 P.3d 1264 (Ariz. 2007) the Arizona Court of Appeals upheld the constitutionality of Prop. 100, finding that it did not violate either the Equal Protection or Due Process clause of the U.S. Constitution. However, the Court found that Prop. 100 did not apply to those who had once entered illegally but subsequently became lawful permanent residents or citizens.76

When representing a noncitizen in an initial appearance, there are various arguments that defense counsel can make to try to obtain bail for a client charged with a serious felony offense:

- **Is my client a citizen?** If the client has a parent or grandparent who was born in the U.S, or if one or both of the client’s parents naturalized before client turned 18 and the client was a permanent resident before her 18th birthday, it is possible that client is automatically a U.S. citizen even though she was born outside the U.S. This is not an uncommon occurrence, particularly in border states where movement between countries is fluid. See Section I: Is your client a U.S. citizen without knowing it? If client has a valid claim to citizenship, she should not be subject to Prop. 100.

- **Is my client a permanent resident?** Under Hernandez v. Lynch, supra, lawful permanent residents who originally entered or remained in the U.S. illegally are not subject to Prop. 100. Many Arizona judges mistakenly believe that all persons subject to an ICE hold are undocumented and therefore do not qualify for bond under § 13-3961(A)(5)(a)(i). However, lawful permanent residents who commit certain crimes will have an ICE hold but are nevertheless eligible for bond pursuant to Hernandez v. Lynch.

- **Did my client obtain another type of lawful status?** Permanent residence is not the only type of lawful immigration status that one might obtain after “entering or remaining illegally.” Many noncitizens may be granted various forms of relief from removal, including Temporary Protected Status (TPS), asylum, withholding of removal, protection under the Convention Against Torture, NACARA, or certain types of visas for assistance in the prosecution of a crime after entering illegally or overstaying a visa. While Hernandez v. Lynch excluded citizens and permanent residents from Prop. 100, the court failed to address whether persons who have another type of lawful immigration status should be held nonbondable as well. Arguably, persons with other types of lawful

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76 Hernandez v. Lynch at 1269.
status are no more likely to pose a flight risk than permanent residents or citizens; therefore, the former should similarly not be subject to Prop. 100.

- **Is my client eligible for lawful status?** Many noncitizens who entered or remained illegally in the U.S. and are currently undocumented may nevertheless be eligible to apply for lawful immigration status. Under § 8 U.S.C. § 1229a(a)(3), the immigration court is the "sole and exclusive procedure for determining whether an alien may be admitted to the United States." Therefore, counsel can argue that until an immigration judge has determined whether a noncitizen is eligible for lawful status, a determination of eligibility for bond cannot be made. The prosecution may argue that eligibility for lawful status does not mean that a noncitizen did not “enter or remain illegally”; however, the defense can counter that the holding in *Hernandez v. Lynch* that naturalized citizens and permanent residents are not subject to Prop. 100 strips the statute of its ability to be literally applied.

To determine whether a client is eligible for lawful status, counsel can inquire:
- Has anyone in your family ever filed a petition for you?
- Has your business or workplace ever filed a petition for you?
- Have you ever been physically or psychologically abused by a spouse who is a U.S. citizen or permanent resident?
- Are you afraid that someone will persecute or torture you if you are returned to your home country?
- Is your spouse, parent, son or daughter (over 21 years of age), or sibling a U.S. citizen or permanent resident?
- Have you lived in the U.S. for ten years or more?
- Have you ever been the victim of a crime or willing to cooperate in a criminal prosecution?

If the answer to any of these questions is “yes,” a noncitizen may be eligible to apply for lawful status and therefore eligible for bond.

- **Can someone really “remain illegally”?** It is important to remember that, while entering the U.S. illegally is a crime, merely overstaying a visa is not. While remaining beyond the expiration date of a visa is a violation of immigration law, immigration law is civil, not criminal. It is unclear whether the term “illegally” as used in § 13-3961(A)(5) refers to criminal or civil activity. However, if it refers solely to criminal activity, it is not possible to “remain illegally” in the U.S. since the only law that will be violated is a civil one.

The implications of this are twofold. First, a noncitizen who entered on a visa and overstay would arguably not be subject to Prop. 100 since the person did not commit a criminal act and therefore did not “remain
illegally.” Second, since a person who has overstayed his visa is likely to use a false ID or false Social Security card at some point, the presentation of such documents as evidence does not conclusively demonstrate that he is subject to Prop. 100. For instance, a person who overstays his visa is just as likely to use false documents to try to work as a person who entered illegally. However, since a person who overstayed his visa is arguably not subject to Prop. 100, the mere presence of a false document submitted into evidence is insufficient to demonstrate that the person entered illegally.

For more information regarding Prop. 100, contact Kara Hartzler at the Florence Immigrant & Refugee Rights Project at khartzler@firrp.org.

B. Smuggling

Under ARS § 13-2319, a person may be convicted if she knowingly smuggles a person not a United States citizen, permanent resident, or a person “otherwise lawfully in this state” for profit or commercial purpose. Although there is evidence that the legislature intended this law to be applied against smugglers, one county attorney has frequently charged the person smuggled with this offense under the § 13-1003 conspiracy statute.

In determining whether a person is “otherwise lawfully in this state,” counsel should ascertain, not only whether the person has current lawful status, but also whether the person may be eligible to apply for lawful immigration status. Under 8 U.S.C. § 1229a(a)(3), the immigration court is the "sole and exclusive procedure for determining whether an alien may be admitted to the United States.” Therefore, counsel can argue that until an immigration judge has determined whether a noncitizen is eligible for lawful status and has adjudicated the application for status, a person cannot be found to be “not lawfully in this state.”

For a list of questions to determine whether someone may be eligible for lawful immigration status, see Section A: Offenses Non-Bailable.
**Note: Client Immigration Questionnaire**  
*For all non-citizen defendants*

**Purpose:** To obtain the facts necessary for an immigration expert to determine current immigration status, possible immigration relief, and immigration consequences of a conviction and. For more information on immigration relief see referenced sections of *Calif. Criminal Law and Immigration* (“CCLI”).

**Documents:** Photocopy any immigration documents/passport.

**Criminal History:** Rap sheets and possible current plea-bargain offenses needed before calling.

Note: While completing this questionnaire, on a separate sheet of paper create one chronology showing dates of criminal acts and convictions as well as the immigration events discussed in the questionnaire.

<table>
<thead>
<tr>
<th>Client's Name</th>
<th>Date of Interview</th>
</tr>
</thead>
<tbody>
<tr>
<td>Immigration Hold: YES  NO</td>
<td></td>
</tr>
<tr>
<td>Client's Immigration Lawyer</td>
<td>Telephone Number</td>
</tr>
</tbody>
</table>

1. **Entry:** Date first entered U.S.? ___________ Visa Type: ___________
   - Significant departures: Date: ______ Length: ______ Purpose: __________
   - Date last entered U.S.? ___________ Visa Type: ___________
   - Relief: Undocumented persons here for 10 yrs with citizen or LPR family might be eligible for non-LPR cancellation. See CCLI § 11.3.

2. **Immigration Status:** Lawful permanent resident? YES  NO
   - If so, date client obtained green card? ___________
   - Relief: Consider cancellation of removal for long-time residents; See CCLI § 11.10.
   - Other special immigration status: (refugee), (asylee), (temp. resident), (work permit), (TPS), (Family Unity), (ABC), (undocumented),
     - (visa - type: ___________) Date obtained? ___________
     - Did anyone ever file a visa petition for you? YES  NO
   - Name and #: __________________________ Date? ___________.
Type of visa petition? __________________    Was it granted? YES    NO

3. Prior Deportations: Ever been deported or gone before an immigration judge?   YES

NO   Date? __________________________

Reason? ___________________________________________________

Do you have an immigration court date pending? YES    NO

Date? __________________________

Reason? ___________________________________________________

4. Prior Immigration Relief: Ever before received a waiver of deportability [§ 212(c) relief or cancellation of removal] or suspension of deportation?

YES   NO Which: __________ Date: __________

5. Relatives with Status: Do you have a U.S. citizen (parent), (spouse),

(child -- DOB(s) __________________________), (brother) or (sister)?

Do you have a lawful permanent resident (spouse) or (parent)?

Relief: Consider family immigration, see CCLI § 11.13.

6. Employment: Would your employer help you immigrate (only a potential benefit to professionals)? YES    NO

Occupation: __________    Employer's name/number: __________________________________

7. Possible Unknown U.S. Citizenship: Were your or your spouse's parent or grandparent born in the U.S. or granted U.S. citizenship? YES    NO    Were you a permanent resident under the age of 18 when a parent naturalized to U.S. citizenship? YES    NO

8. Have you been abused by your spouse or parents? YES    NO

Relief: Consider VAWA application, see CCLI § 11.19.

9. In what country were you born? ________________    Would you have any fear about returning? YES    NO

Why?

Relief: Consider asylum/withholding, or if recent civil war or natural disaster, see if entire country has been designated for “TPS.” See CCLI §§ 11.4-5, 7.
10. Are you a victim of serious crime or alien trafficking and helpful in investigation or prosecution of the offense?  **YES**  **NO**

Relief: Consider “T” or “U” visa; see CCLI §§ 11.28-29.
Note: Other Resources
Books, Websites, Services

Books

Immigrant Legal Resource Center. The ILRC publishes Defending Immigrants in the Ninth Circuit, by Katherine Brady, co-author of this chart and notes and an immigration attorney for the last twenty years. This is an expanded version of California Criminal Law and Immigration, that contains extensive discussion of Arizona law. It discusses eligibility for immigration relief, categories of immigration penalties, and plea strategies. The Tenth edition (updated through April 2008) is available at publications at www.ilrc.org or contact the Immigrant Legal Resource Center, 1663 Mission St., Suite 602, San Francisco CA 94103, tel. 415/255-9499, fax 415/255-9792.

The Immigrant Legal Resource Center publishes several other books and materials on immigration law, all written to include audiences of non-immigration attorneys. See list of publications at www.ilrc.org or contact ILRC to ask for a brochure.

Law Offices of Norton Tooby. A criminal practitioner of thirty years experience who has become an expert in immigration law as well, Norton Tooby has written several books that are national in scope. Criminal Defense of Non-Citizens includes an in-depth analysis of immigration consequences and moves chronologically through a criminal case. Aggravated Felonies and Crimes Involving Moral Turpitude provide general discussion of these areas, and also discuss and digest in chart form all federal and administrative immigration opinions relating to these categories. Other books include studies of means of obtaining post-conviction relief under California law, and nationally. Go to www.criminalandimmigrationlaw.com or call 510/601-1300, fax 510/601-7976.


Websites

The Florence Immigrant & Refugee Rights Project go to www.firrp.org.

Board of Immigration Appeals (BIA) decisions can be accessed from a good government website. Go to www.usdoj.gov/eoir. Click on “virtual law library” and look for “BIA/AG administrative decisions.”

The website of the law offices of Norton Tooby offers a very valuable collection of archived articles and a free newsletter. Other services, including constant updating of Mr. Tooby’s books, are offered for a small fee. Go to www.criminalandimmigrationlaw.com.
The website of the Immigrant Legal Resource Center offers material on a range of immigration issues, including a free downloadable manual on immigration law affecting children in delinquency, dependency and family court, and information about immigration applications for persons abused by U.S. citizen parent or spouse under the Violence Against Women Act (VAWA). Go to www.ilrc.org in general; for crimes information go to www.ilrc.org/criminal.php, and for juvenile information go to www.ilrc.org/sijs.php.

The National Immigration Project of the National Lawyers Guild offers practice guides and updates on various issues that can affect criminal defendants. The National Immigration Project provides information and a brief bank on immigration and criminal issues, on VAWA applications for persons abused by citizen or permanent resident spouse or parent, and applications under the former § 212(c) relief. The Project also will post a chart of immigration consequences of federal offenses. Go to www.nationalimmigrationproject.org.

The New York State Defenders Association has excellent practice guides as well as a chart of immigration consequences of New York offenses. Go to http://www.nysda.org/idp/index.htm

The national Defending Immigrants Project, located at the National Legal Aid and Defender Association, posts information about criminal defense of immigrants. Among other resources the NLADA website provides links to charts similar to this one, showing immigration consequences of offenses under New York, New Jersey, Florida, Texas and Illinois law. Go to www.nlada.org.

**Consultation**

The Florence Immigrant & Refugee Rights Project offers free consultations on immigration consequences to criminal defense attorneys in the state of Arizona. Contact Kara Hartzler at (520) 868-0191 ext. 103 or khartzler@firrp.org.

University of California Davis School of Law offers free consultation in immigration consequences through its Immigration Clinic. hscooper@ucdavis.edu.

The Immigrant Legal Resource Center provides consultation for a fee on individual questions about immigration law through its regular attorney of the day services. Questions are answered within 48 hours or sooner as needed. The ILRC has contracts with several private and Public Defender offices. For information go to “contract services” at www.ilrc.org or call 415.255.9499.

Staff of the Los Angeles Public Defender office can consult with Graciela Martinez of the appellate division by contacting her at gamartin@co.la.ca.us.
The National Immigration Project of the National Lawyers Guild (Boston) offers consultation. Contact Dan Kesselbrenner at dan@nationalimmigrationproject.org. The Project is a membership organization but also will consult with non-members.