IMMIGRATION CONSEQUENCES OF PROP 36 AND OTHER NEW CALIFORNIA OFFENSES

Part Two: Property Crime Offenses

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I. Overview: Prop 36 and New Property Crimes

A. What is California Proposition 36 ("Prop 36")?

In late 2024, California voters approved ballot measure Proposition 36[1], known as "Prop 36." The purpose of Prop 36 is to permit certain misdemeanor offenses—especially simple possession of a controlled substance, petty theft, and shoplifting—to be punished as felonies under certain circumstances, such as when the person has prior convictions for similar offenses. Prop 36 went into effect on December 18, 2024.

This two-part Practice Advisory delves into the new legal provisions introduced by Prop 36 and the potential impacts they may have on the immigration status of noncitizens. Part I discusses controlled substance offenses, and Part II discusses property crime. This advisory addresses the property offense provisions of Prop 36. The most important provisions are new California Penal Code §§ 666.1 and 490.3.[2]

B. What is Penal Code § 666.1?

Section 666.1 applies to two minor California misdemeanors: shoplifting (Penal Code § 459.5) and petty theft (Penal Code § 490.2, defined at Penal Code § 484). Both shoplifting and petty theft involve property valued at no more than $950, and for that reason, they carry a maximum sentence of six months or less. Section 666.1 provides that a conviction for petty theft or shoplifting that occurs on or after December 18, 2024, can have a harsher punishment if the person was convicted of two or more prior enumerated theft-related offenses. See Penal Code § 666.1(a)(2) and see Chart for Penal Code § 666.1 at **Appendix A**. These prior convictions can be from before, on, or after December 18, 2024. With qualifying priors, the petty theft or shoplifting conviction can be punished as a "wobbler" offense, meaning either as a felony or as a misdemeanor.

Immigration consequences of Penal Code § 666.1

- *Crime Involving Moral Turpitude (CIMT)*. Petty theft is a CIMT, but shoplifting should not be held to be a CIMT. See further discussion at **Section II.A**, and see Client Handout #1,

[1] See California Proposition 36, the "Homelessness, Drug Addiction, and Theft Reduction Act," effective December 18, 2024, https://vig.cdn.sos.ca.gov/2024/general/pdf/prop36-text-proposed-laws.pdf. 3. *See e.g.* J. Richard Couzens, Proposition 36: Homelessness, Drug Addiction, and Theft Reduction Act and Related Legislation (Nov. 2024) https://capcentral.org/wp-content/uploads/2024/11/PROPOSITION-36-homelessness-drug-addiction-and-theft-reduction-act-and-related-legislation.pdf 4.
[2] All references to Penal Code or Vehicle Code will refer to California law, unless otherwise noted.

at **Appendix B**. Practitioners must check to see if any of the priors are CIMTs. [3] See Chart at **Appendix A**.

- *Aggravated felony (AF)*. ICE might assert that a Penal Code § 666.1 conviction with a year or more imposed is an AF as theft, so defenders should try to avoid a sentence of a year or more. However, even with a year's sentence, no Penal Code § 666.1 conviction should be held an AF because the loss to the victim cannot exceed $10,000.[4] See discussion at **Section II**, and see Client Handout #2 at **Appendix C**.
- *Mandatory detention (MD)*. For more information on mandatory detention, see ILRC, *Understanding Mandatory Detention* (Dec. 2025).[5] Briefly, for MD purposes, immigrants are divided into two groups.
    - **Group 1:** A person inside the United States who was not admitted to the U.S. at a port of entry (because they entered without inspection or were paroled in), and who is in removal proceedings under Immigration and Nationality Act (INA) § 212(a), is subject to mandatory ICE detention in either of two ways. Under the 2025 Laken Riley Act, they are subject to MD if they are merely arrested for, charged with, or convicted of theft, shoplifting, or burglary. INA § 236(c)(1)(E). Therefore, any pending charge under Penal Code § 666.1 subjects the person to MD – at least until the charge is dropped and the case is resolved in some other way. Group 1 people are also subject to MD if they are inadmissible under the criminal grounds of inadmissibility at INA § 212(a)(2), for example, for two CIMT or one felony CIMT conviction.
    - **Group 2:** A person inside the U.S. who was admitted at a port of entry or who is an LPR, and who is in removal proceedings under INA § 237(a)(2), faces a different standard. They are subject to mandatory detention if they are deportable under the crimes grounds at INA § 237(a)(2) (other than the domestic violence or human trafficking grounds).

See **Section II** for a more detailed discussion of Penal Code § 666.1 and defense strategies in immigration and criminal proceedings.

C. What is Penal Code § 490.3?

While section 666.1 increases the penalty for petty theft and shoplifting based on prior convictions, section 490.3 provides that if a defendant is currently charged with multiple theft or shoplifting offenses, then "the value of property or merchandise stolen may be aggregated into a single count or charge." If the person is convicted of a theft or shoplifting charge and the total value in the aggregated cases exceeds $950, then the "degree of theft" changes. The charge changes from petty theft (Penal Code § 490.2, a six-month misdemeanor) to grand theft (Penal

[3] ILRC, *All Those Rules about Crimes Involving Moral Turpitude* (June 2021), https://www.ilrc.org/resources/all-those-rules-about-crimes-involving-moral-turpitude-june-2021.
[4] *Matter of Reyes*, 28 I&N Dec. 52 (A.G. 2020) (a conviction for a theft offense is only an aggravated felony under INA § 101(a)(43) where the sentence is one year or more *and* the loss to the victim or victims exceeds $10,000).
[5] https://www.ilrc.org/sites/default/files/2026-01/%20Understanding-Mandatory-Detention.pdf.

Code § 487, a wobbler), or from shoplifting (Penal Code § 459.5) to commercial burglary (Penal Code § 459/460(b)).

- *Crime Involving Moral Turpitude (CIMT)*. California theft is a CIMT, but shoplifting and commercial burglary are not CIMTs. See discussion at **Section II**, and see Client Handout #1, at **Appendix B**.
- *Aggravated felony (AF)*. A conviction for theft is an AF only if a sentence of a year or more is imposed and a loss to the victim/s exceeds $10,000. This seems unlikely as it would require at least 11 petty theft convictions where the loss to the victim(s) was a $950 loss. Neither shoplifting nor burglary is an AF, regardless of sentence or loss. See further discussion at **Section II**, and give the client's lawyer, family, or friends a copy of Client Handout #2, at **Appendix C**.
- *Mandatory detention*. See discussion at Penal Code § 666.1 and discussion at **Section IV**.

See **Section II** for further discussion of Penal Code § 490.3 and defense strategies in immigration and criminal proceedings.

D. What are the Prop 36 sentence enhancements for property offenses?

Prop 36 created two new sentence enhancements for theft offenses. These may come up less commonly. The enhancement under Penal Code § 12202.6 adds from one to four years of incarceration for loss resulting from theft or property damage exceeding $50,000. This enhancement could become an AF if the same count carried both this amount of loss and a sentence of a year.[6] The enhancement could also trigger mandatory detention. The enhancement under Penal Code § 12022.65 adds consecutive sentences for three or more persons acting together who take, attempt to take, or damage or destroy property while committing a felony. Depending on the underlying felony, this may be a CIMT, AF, or mandatory detention trigger.

See **Section III** for a further discussion of the sentencing enhancements.

More convictions resulting in a mandatory state prison sentence—which can result in more transfers to ICE.

Prop 36 will result in more people serving their sentences in state prisons rather than in county jails. This change can harm noncitizen defendants. The California state prison system, known as the California Department of Corrections and Rehabilitation (CDCR) is exempt from prohibitions on cooperation with federal immigration enforcement placed on California local law enforcement agencies.[7] The practical implication of this rule is that more noncitizens will be

[6] See *Matter of Khan*, 28 I&N Dec. 850 (BIA 2024); *Matter of Reyes*, 28 I&N Dec. 52 (A.G. 2020).
[7] Government Code § 7284.4 reads for the purposes of the Values Act (which limits state cooperation with DHS) "'California law enforcement agency' does not include the Department of Corrections and Rehabilitation." For a more in-depth analysis of Prop 54 and the California Values Act, please see ILRC, *Practice Advisory: SB 54 and the California Values Act: A guide for criminal defenders* (Feb. 2018), https://www.ilrc.org/sites/default/files/resources/sb54_advisory-gr-20180208.pdf.

transferred to ICE custody directly from the state prison system. For that reason, criminal defenders should attempt to avoid state prison sentences for their noncitizen clients.

II. New Property Crimes Under Prop 36 and their Potential Immigration Consequences

A. Penal Code § 666.1—shoplifting or petty theft with priors

This statute provides that a person who has two or more prior convictions, including offenses that occurred before the law's effective date, may be charged with a new petty theft or shoplifting offense as a wobbler punishable in the local jail. A second or subsequent conviction under this statute will be a wobbler that is punishable by jail or state prison.

To qualify as a "prior" conviction, the Government must prove that (1) the defendant was previously convicted of a theft offense listed under Penal Code § 666.1 and (2) the defendant served a term in a penal institution.[8] The jury instructions provide that a defendant who was convicted of a foreign or out-of-state conviction may have been convicted of a "prior" for purposes of Penal Code § 666.1.[9]

Many of the prior convictions referenced under section 666.1 include offenses that historically are not removable offenses as CIMTs. In other words, these previously immigration-neutral pleas may now be used as prior convictions under Penal Code § 666.1. However, pleading to these offenses may still provide noncitizen defendants with protections, as they are not CIMTs and cannot count as a second CIMT for immigration purposes. These offenses include:

- Burglary as described in Penal Code § 459;[10]
- Identity and mail theft as described in Penal Code § 530.5(a) and (d)(2).[11]
- Receiving stolen property (with a sentence of 364 days or fewer) as described in Penal Code § 496;[12]

[8] CALCRIM No. 1850 (2026), https://www.justia.com/criminal/docs/calcrim/1800/1850//.
[9] CALCRIM No. 1850 citing *People v. Perry*, 204 Cal.App.2d 201 (1962). Defenders should make sure that the out of state offense is an offense "described in" section 666.1 and that the out of state matches the elements of the state offense. The *Perry* decision is based on the 1962 version of Penal Code § 666 which lists various offenses such as "burglary, "carjacking", or "robbery." The court held that given that the statute lists the crimes it does not limit them to California offenses. By contrast, Penal Code § 666.1 lists each offense "as described in" the California Penal Code. There is an argument that *Perry* may not apply especially if the elements for the out of state crime differ from the California elements. For a helpful analysis of how to make sure the elements match please see ILRC, *How to Use the Categorical Approach Now (2021)* (Oct. 2021). https://www.ilrc.org/sites/default/files/resources/2021_categorical_approach_oct_final2.pdf).
[10] Section 459 is not a CIMT because it can be committed by mere lawful entry into a commercial building with bad intent. *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1103-05 (9th Cir. 2011).
[11] Sections 530.5(a) and (d)(2) are not CIMTs because minimum conduct does not require fraud or harm. *Linares-Gonzalez v. Lynch*, 823 F.3d 508 (9th Cir. 2016).
[12] Section 496 is not a CIMT because it involves intent to temporarily deprive the owner of property. *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009).

- Shoplifting (misdemeanor) as described in Penal Code § 459.5;[13]
- Theft or unauthorized use of a vehicle (with a sentence of 364 days or fewer) as described in Vehicle Code § 10851;[14]

A conviction under Penal Code § 666.1 (petty theft or shoplifting with priors) may be a CIMT

A theft offense is a CIMT where "it involves an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded."[15] A conviction for Penal Code § 666.1 is a CIMT, but there might be a rare circumstance where a conviction for 666.1 might fall under the petty offense exception for the grounds of inadmissibility[16] or the grounds of deportability[17] *as long as the underlying priorable crimes are **not** CIMTs*.

Immigration practitioners must review the noncitizen's record carefully to see if the prior convictions were CIMTs under immigration law. If the priors were not CIMTs, then the first conviction for Penal Code § 666.1 would fall under the petty offense exception, where the maximum term of imprisonment for the first conviction does not exceed one year, *as long as* the noncitizen is sentenced to a term of imprisonment of six months or less (for the grounds of inadmissibility). However, a second conviction for Penal Code § 666.1 would not fall under the petty offense exception and would make a noncitizen both inadmissible and deportable.

Criminal defense practitioners should continue to recommend that their noncitizen clients enter pleas to property offenses that are not CIMTs in the hope that if a defendant is charged and convicted under Penal Code § 666.1, the conviction would fall under the petty offense exception to removal.

How a conviction under Penal Code § 666.1 might affect a noncitizen client

A conviction under Penal Code § 666.1 for theft or shoplifting is a CIMT.[18] However, a conviction for a single CIMT is not necessarily a ground of inadmissibility or deportability. The petty offense exception might apply where a noncitizen seeking admission to the United States

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[13] Section 459.5 is not a CIMT because it can be committed by mere lawful entry into a commercial building with bad intent. *Hernandez-Cruz*, 651 F.3d at 1103-05.
[14] Section 10851 (misdemeanor) is not a CIMT because minimum conduct is taking with intent to temporarily deprive. *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016) (en banc).
[15] *Matter of Diaz-Lizarraga*, 26 I&N Dec. 850, 853 (BIA 2016); *see also Lopez v. Garland*, 116 F.4th 1032, 1040 (9th Cir. 2024); *Silva v. Garland*, 993 F.3d 705, 714 (9th Cir. 2021) deferring to the BIA's interpretation of theft as a CIMT.
[16] INA § 212(a)(2)(A)(ii)(II) (a conviction for a single CIMT is not a ground of inadmissibility where the maximum possible sentence did not exceed one year imprisonment and the noncitizen was not sentenced to a term of imprisonment in excess of six months).
[17] INA § 237(a)(2)(A)(i) (a conviction for a single CIMT is not a ground of deportability unless the noncitizen committed the offense within five years of the date of admission, and a sentence of a year or longer may be imposed.
[18] *Lopez v. Garland*, 116 F.4th at 1040; *Matter of Diaz-Lizarraga*, 26 I&N Dec. at 853.

has only been convicted of one CIMT.[19] Additionally, a conviction for a single CIMT might not be a ground of deportability.[20]

> **Example:** In 2014, Josh, a noncitizen, pled to Penal Code § 459 (burglary) after being assured that a conviction under § 459 was not a criminal ground of inadmissibility or deportability. In 2016, Josh pled to Penal Code § 496 (receipt of stolen property) after (again) being assured that a 496 was not a criminal ground of inadmissibility or deportability as long as the sentence was under one year. (Neither Penal Code §§ 459 nor 496 is a CIMT).[21] On January 11, 2025, Josh was arrested and charged with Penal Code § 666.1 based on his two prior convictions. On February 11, 2025, Josh pled to Penal Code § 666.1.
>
> - Assuming that Josh is undocumented and is subject to the grounds of inadmissibility, because this conviction is Josh's first conviction for a CIMT, and because the maximum possible sentence does not exceed one year, this offense should fall under the petty offense exception to the grounds of inadmissibility, as long as he is sentenced to six months or less.[22]
> - Assuming that Josh is a lawful permanent resident, he would not be subject to the grounds of deportability for a CIMT conviction because a sentence of one year or more may not be imposed.[23]
> - Then, on July 12, 2025, Josh was arrested again for shoplifting and was charged once again with violating Penal Code § 666.1. Regardless of whether Josh is undocumented or is an LPR because it's his second conviction under Penal Code § 666.1, he is now inadmissible and deportable for having been convicted of two CIMTs. He could also be sentenced to state prison, where he could be transferred to ICE custody and removed for having been convicted of more than one CIMT.

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[19] A person is not inadmissible to the United States if they have been convicted of a single CIMT where the maximum possible sentence does not exceed imprisonment for one year and the person was not sentenced to a term of imprisonment in excess of six months. INA § 212(a)(2)(A)(ii)(II).

[20] A person is not deportable from the United States where they have been convicted of one CIMT committed five years after the date of *admission* and the maximum potential sentence is less than one year. INA § 237(a)(2)(A)(i). For permanent residents, the admission date is when the person entered lawfully into the United States or the date they became a permanent resident, whichever is earliest. For non-permanent residents, the admission date is when the individual last lawfully entered the United States.

[21] The minimum conduct for a conviction under Penal Code § 459 includes a lawful entry. *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1103-05 (9th Cir. 2011). Section 459 requires intent to commit larceny or any felony including non-CIMT offenses. This statute is not divisible between "larceny" and "any felony" as to the specified felony. *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014). The BIA has held that the federal generic elements of burglary include an unlawful entry where the intended offense is a CIMT. *Matter of Z*, 5 I&N Dec. 383 (BIA 1953). The minimum conduct for a conviction under Penal Code § 496 includes intent to deprive a person of their property or the value of their property temporarily. *Castillo Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009). By contrast, the BIA has held that a theft offense is a CIMT where there is an intent to deprive an owner of their property under circumstances where the owner's property rights are substantially eroded. *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016).

[22] INA § 212(a)(2)(A)(ii)(II).

[23] INA § 237(a)(2)(A)(i).

What can a criminal defense attorney do to help Josh?

- **Pre-trial Diversion.** Josh's advocates can help him by trying to get him into a pre-plea diversion program. See **Section E**.
- **Other Alternatives.** If the District Attorney and Probation Department will not agree to pre-trial diversion, then Josh could try to negotiate for a charge that will not result in the possibility of a state prison sentence, and that is an immigration-neutral plea, such as Penal Code § 459/460(b) (second-degree burglary) or Penal Code § 496 (with a sentence of 364 days or fewer). But if Josh is undocumented and entered without inspection, a conviction for Penal Code § 459/460(b) could subject him to mandatory detention under the Laken Riley Act. See **Section D**.

B. Penal Code § 490.3—Aggregates the value of theft offenses

Where a person is charged with one or more counts of petty theft or shoplifting[24] (where the value of the goods does not exceed $950), the prosecutor can aggregate the value of all the property or merchandise stolen into a single count or charge, with the sum of the value of all the property determining the degree of theft. An aggregate loss amount exceeding $950 could be filed as a felony wobbler. There is no requirement that the complaining witness be the same victim in each act, nor that the crimes occurred at the same time, at the same place, or were part of a common scheme. California recently published the jury instructions for Penal Code § 490.3.[25]

It is difficult to imagine petty theft offenses aggregating in value to over $10,000, so the resulting sentence should not be an aggravated felony even if a sentence of a year or more is imposed. Moreover, neither shoplifting nor commercial burglary is ever an aggravated felony. But practitioners should be aware that if the client is convicted of a theft offense where the aggregate value of the loss exceeds $10,000 and the client is sentenced to a year or more, then the offense would be an aggravated felony theft offense.[26]

Below is an example of the potential immigration consequences of this plea.

> **Example:** On January 2, 2026, Avi was arrested for stealing a bicycle that was worth $500. On February 2, 2026, Avi was arrested again and charged with stealing a bicycle worth $500. Rather than charging Avi with two misdemeanor petty thefts, the prosecutor can now aggregate the value of the property to over $950 and charge Avi with felony grand theft.
>
> If Avi is not a U.S. citizen, this conviction could result in the following immigration consequences:
>
> - If Avi has DACA (Deferred Action for Childhood Arrivals), they can lose it for having been convicted of a felony.

[24] Under section 490.3, theft or shoplifting, includes, but is not limited to, Penal Code §§ 459.5 (shoplifting, maximum six-month sentence); 484 (theft); 488 (misdemeanor petty theft), and 490.2 (petty theft not exceeding $950).
[25] CALCRIM 1801 (2026), https://www.justia.com/criminal/docs/calcrim/1800/1801/.
[26] *Matter of Reyes*, 28 I&N Dec. 52 (AG 2020).

- If Avi has Temporary Protected Status (TPS), they can lose it for having been convicted of a felony.
- If Avi is undocumented and was either paroled into the United States or entered the United States without inspection, they would be subject to mandatory detention if she is placed in removal proceedings under INA § 236(c)(1)(E) (Laken Riley Act, see **Section D**).
- If Avi has been a lawful permanent resident for fewer than five years, they risk being removable for having been convicted of a felony CIMT within five years of admission, where a sentence of one year or longer may be imposed.
- If Avi picks up additional theft convictions and the loss to the victims is over $10,000 in the aggregate, and they are sentenced to one year or more imprisonment, they will have been convicted of an aggravated felony under INA § 101(a)(43)(G). They will face near-certain deportation.

What can a criminal defense attorney do to help Avi?

- **Pre-trial Diversion.** Avi's advocates can help them by getting them into a pre-trial diversion program. Pre-trial diversion is never a conviction for immigration purposes. See **Section E**.
- **Other Alternatives.** If the District Attorney and Probation Department will not agree to pre-trial diversion, then Avi could try to negotiate for a charge that will not result in the possibility of a state prison sentence and that is an immigration-neutral plea, such as Penal Code § 459/460(b) (second-degree burglary) or Penal Code § 496 (with a sentence of 364 days or fewer). But it is a little more complicated depending on Avi's status.
    - **LPR**. If Avi is an LPR a 459/460 is not a criminal ground of deportability or mandatory detention.
    - **Entered without inspection**. If Avi is undocumented and entered the United States without inspection, a conviction for Penal Code § 459/460(b) could subject them to mandatory detention under the Laken Riley Act, see **Section D**.
    - **DACA**. If Avi has DACA, then a 459 would cause them to lose DACA status, since having three misdemeanor convictions or one felony conviction is a bar to DACA.
    - **TPS**. If Avi has TPS, then more than one misdemeanor would cause them to lose TPS status.

An attorney who specializes in criminal immigration can help you craft an immigration neutral plea.

III. Property Crime Sentencing Enhancements

A sentencing enhancement where the government must prove the elements of the enhancement beyond a reasonable doubt is part of the conviction for immigration purposes.[27] In other words, a sentencing enhancement can convert a crime from a non-removable offense into a CIMT or even an aggravated felony.

[27] *Matter of Khan*, 28 I&N Dec. 850, 853 (BIA 2024).

i. **Penal Code § 12022.6** (sentencing enhancement of one to four years for where a person takes, damages, or destroys any property in the commission or attempted commission of a felony, or commits a felony violation of Penal Code § 496 (receipt of stolen property) with a loss of $50,000 to $3,000,000).

- Any sentencing enhancement for a theft offense under Penal Code § 484, where the government must prove the elements of the enhancement beyond a reasonable doubt, and where the loss to the victim exceeds $10,000, ***and*** the person is sentenced to one year or more imprisonment, is an AF.
- Any conviction for Penal Code § 496, where the person is sentenced to one year or more imprisonment (regardless of the loss) is an AF.

ii. **Penal Code § 12022.65** (any person who acts in concert with two or more persons to take, attempt to take, damage, or destroy any property in the commission of a felony shall be punished by an additional and consecutive term of imprisonment of one, two, or three years).

This enhancement, where the underlying crime is Penal Code § 484 (theft) and the loss to the victim or victims is not specified, should *not* be an aggravated felony theft offense, even with a sentence of one to three years imprisonment.

This enhancement, where the underlying crime is Penal Code § 594 (vandalism) might be charged as a CIMT. Immigration practitioners should argue against this interpretation of the statute because vandalism is not base, vile, or depraved conduct.[28] Criminal defense attorneys should be aware of this possibility and attempt to avoid this enhancement for their noncitizen clients.

The risk with these enhancements is that the noncitizen will be sentenced to state prison and then transferred to ICE custody and placed in removal proceedings.

IV. Mandatory Detention and the Laken Riley Act

The Laken Riley Act, found at INA § 236(c)(1)(E), expands the mandatory detention provisions of INA § 236(c).[29] The Laken Riley Act provides that noncitizens who entered the United States without inspection, or who were paroled into the United States, *and* who are arrested for, charged with, or convicted of, or who admit committing acts related to any theft offense including burglary, shoplifting, larceny, assault of a law enforcement officer, or any acts that result in death or serious bodily injury to another person is subject to mandatory detention. The

[28] *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995); *see also Matter of N-*, 8 I&N Dec. 466, 468 (BIA 1959).

[29] For an in-depth analysis of The Laken Riley Act, *see* NIP, *Practice Advisory: The Laken Riley Act's Mandatory Detention Provisions* (Feb. 5, 2025), https://nipnlg.org/sites/default/files/2025-02/Alert-Laken-Riley-Act.pdf. For an in depth analysis of The Laken Riley Act and juveniles, see ILRC, *The Laken Riley Act & Juvenile Delinquency* (Mar 2025) https://www.ilrc.org/sites/default/files/2025-03/The%20Laken%20Riley%20Act%20%26%20Juvenile%20Delinquency.pdf. *See also* ILRC, *Understanding Mandatory Detention* (Dec. 2025), https://www.ilrc.org/sites/default/files/2026-01/%20Understanding-Mandatory-Detention.pdf.

definition of the terms "shoplifting", "burglary", "theft", etc., has the meanings given to these terms in the jurisdiction where the acts occurred.[30]

Immigration and criminal defense practitioners must be aware that even an *arrest* for shoplifting or burglary for certain noncitizens might result in mandatory ICE detention during the pendency of removal proceedings.

A. Who might be subject to mandatory detention after an arrest or conviction for one of the specified crimes under INA § 236(c)(1)(E)?

- Any noncitizen who entered the United States without inspection.
- Any noncitizen who entered the United States with fake or fraudulent documents (*e.g.,* a person who used their brother's border crossing card to enter the United States).
- Any noncitizen who was paroled into the United States.
- Any DACA or TPS holder *who is otherwise removable who* entered the United States without inspection or with fake or fraudulent documents.

B. Who should not be subject to mandatory detention after an arrest for one of the specified crimes under INA § 236(c)(1)(E)?

- Any person who entered with inspection and overstayed their visa – including DACA and TPS holders.
- Any DACA or TPS recipient who is not otherwise removable, regardless of how they entered the United States. In other words, an arrest for a theft offense should not trigger the mandatory detention provisions in INA § 236(c) absent a conviction.
- People who were "waved in" at the border.[31]
- Lawful permanent residents, except for very limited circumstances (where they are charged with the grounds of inadmissibility after traveling abroad under INA §§ 212(a)(6)(A) or (C) or 212(a)(7) (attempting to enter or entered without proper documentation or having committed fraud, misrepresentation, or falsely claiming U.S. citizenship).
- Minors should not be subject to mandatory detention under section 236(c)(1)(E). First, a minor is *not* arrested for committing a "crime," rather they are arrested for acts of juvenile

[30] The Laken Riley Act provides that people who are subject to the following grounds of inadmissibility who have been arrested for one of the above crimes are subject to mandatory detention under INA § 236(c):
- INA § 212(a)(6)(A) (present in the United States without being admitted or paroled);
- INA § 212(a)(6)(C) (any person who by fraud or willful misrepresentation of a material fact or by a false claim to U.S. citizenship has entered the United States); or,
- INA § 212(a)(7) (any person who entered or attempted to enter the United States without proper immigration documents).*See* INA § 236(c)(1)(E).

[31] *See Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010).

delinquency.[32] Second, a minor cannot be convicted of a crime – instead, they are subject to an adjudication of civil juvenile delinquency.[33] As a result, anyone with a juvenile arrest or adjudication should not be subject to mandatory detention under the INA § 236(c)(1)(E).

V. Alternative Dispositions for Sections 666.1 and 490.3

A. Pre-trial diversion

Pre-trial diversion is often the best potential outcome for noncitizen clients who are charged with crimes. Federal immigration law defines a conviction as entering a plea of guilty or no contest before a judge, a judge making a finding of guilt, or admitting to facts sufficient to warrant a finding of guilt. The judge must also impose some form of "restraint" on the defendant, including a fine, treatment program, or classes.[34] Deferred Entry of Judgment (DEJ) in California, where the defendant admits the conduct or is found guilty of the underlying conduct by a judge and is sentenced by a judge to some form of restraint, *is* a conviction for immigration purposes.[35] The key difference between pre-plea diversion and deferred entry of judgment is that with pre-trial diversion, the defendant does not admit to criminal conduct, and the judge does not make a finding of guilt. California has several different pre-trial diversion programs for defendants including:

- Penal Code § 1000 controlled substance diversion
- Penal Code § 1001.1 misdemeanor diversion
- Penal Code § 1001.20 cognitive disability diversion
- Penal Code § 1001.36 mental health diversion
- Penal Code § 1001.40 traffic violation diversion
- Penal Code § 1001.61 bad check diversion
- Penal Code § 1001.80 veterans diversion
- Penal Code § 1001.81 theft diversion (but only if the county has set up a program)
- Penal Code § 1001.83 primary caregiver diversion

Section 666.1 provides that the prosecuting attorney or the probation department may refer the defendant to a theft diversion program or a deferred entry of judgment program under Penal Code § 1001.81. But section 1001.81 is *only* available if the county prosecutor or probation department has created this program. Advocates will have to check to see if their county has this program. Advocates should also note that while pre-trial diversion is *not* a conviction for immigration purposes, DEJ is a conviction.

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[32] *Matter of Ramirez-Rivero*, 18 I&N Dec. 135, 137 (BIA 1981). ("It is settled that an act of juvenile delinquency is not a crime in the United States and that an adjudication of delinquency is not a conviction for a crime within the meaning of our immigration laws." Collecting cases). *See also,* ILRC, *The Laken Riley Act & Juvenile Delinquency* (Mar. 2025) https://www.ilrc.org/sites/default/files/2025-03/The%20Laken%20Riley%20Act%20%26%20Juvenile%20Delinquency.pdf.

[33] *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000).

[34] INA § 101(a)(48)(A).

[35] *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001); *see also Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017).

B. Other alternative dispositions

If pre-trial diversion is not an option, advocates should consider filing a motion under Penal Code § 17(b) to reduce a felony charge to a misdemeanor. A recharacterization of a felony as a misdemeanor could avoid triggering any offense that is a CIMT where the maximum possible sentence is a year or more. Getting a 17(b) could help a client maintain their DACA or TPS status and could also help a person convicted of a CIMT qualify for the petty offense exception because it reduces the potential sentence to 364 days. Please note that ICE argues that a conviction reduced under Penal Code § 17(b) is not given immigration effect unless the reduction was due to a procedural or substantive defect in the underlying sentence.[36]

Another option is to plead the client to a different offense, such as burglary. Section 459/460 has the same sentence as Penal Code § 666.1 and can take a sentence of one year or more without becoming a removable offense – but it can subject a noncitizen who was not admitted to the United States and is charged in removal proceedings to mandatory detention under the Laken Riley Act. There are advantages to taking a conviction for burglary rather than shoplifting because it is very well established that Penal Code § 459 is neither a CIMT nor an aggravated felony.

Finally, advocates should always consider filing for post-conviction relief where appropriate.[37]

VI. Other Issues for Immigration Advocates

New Aggravated Felony Grounds of Deportability. Immigration attorneys must be aware of the aggravated felony grounds of removability. A conviction for a California theft offense where the person is sentenced to one year or more imprisonment and the loss to the victim exceeds $10,000 is an aggravated felony theft offense under INA § 101(a)(43)(G).[38]

CIMTs and Sentences. The new enhanced sentences and sentence enhancements may transform CIMTs that previously fell under the petty offense exception into CIMTs that do not fall within any exception. Be sure to look at the potential sentence and the sentence imposed or suspended when assessing these cases to determine whether the conviction falls under the petty offense exception for the grounds of inadmissibility or the grounds of deportability. Seek reduction of wobbler theft offenses to a misdemeanor before or at sentencing under Penal Code § 17(b). There is some risk that immigration will not honor the reduction if it occurs after sentencing.

Vandalism. Generally, a California conviction for vandalism is not a CIMT, and it's not an aggravated felony. However, an immigration judge might find that the sentencing enhancement under Penal Code § 12022.65 transforms the offense into a CIMT because of the loss amount

[36] *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019); 8 CFR § 1003.55 (2024). For arguments that this interpretation is too restrictive see ILRC, *California Sentences and Immigration* (Nov. 2020) https://www.ilrc.org/sites/default/files/resources/immigration_and_sentence_11.2020.pdf.
[37] ILRC, *Overview of California Post Conviction Relief for Immigrants* (July 2022), https://www.ilrc.org/sites/default/files/resources/ca_pcr_july_2022.pdf; ILRC, *Infographic about California Post-Conviction Relief Vehicles* (Apr. 2026), https://www.ilrc.org/resources/infographic-about-california-post-conviction-relief-vehicles.
[38] *Matter of Reyes*, 28 I&N Dec. 52 (A.G. 2020).

at issue. Criminal defenders should avoid a vandalism offense with a Penal Code § 12022.65 enhancement, and immigration advocates should argue that vandalism with an enhancement does not make the offense a CIMT because the underlying conduct is not base, vile, or depraved behavior.

VII. Protections for Noncitizens Under SB 54

Criminal defenders should be aware of the protections afforded to noncitizens under SB 54, as these protections can help mitigate the potential immigration consequences of a conviction under Prop 36. With some exceptions, SB 54 limits local agencies, including local police and sheriffs' offices from cooperating with immigration enforcement. SB 54 prohibits local agencies from doing the following:

- State and local enforcement agencies[39] are prohibited, without exception, from honoring immigration "hold" or detainer requests beyond the termination of criminal custody.
- Law enforcement agencies are prohibited from responding to immigration notification requests to supply information about a defendant's release date.

Local law enforcement is permitted to notify immigration authorities of release dates or facilitate the transfer of individuals to immigration authorities only when the person comes within an exception to SB 54. These exceptions apply to persons:

- Arrested and held to answer for a serious (Penal Code § 1192.7(c)), violent (Penal Code § 667.7(c)), or state prison felony); or
- Convicted of a serious or violent state prison felony; or
- Convicted within the past five years of a misdemeanor for certain enumerated wobbler offenses or convicted within 15 years of certain enumerated felony offenses.[40]

Any person convicted of a straight misdemeanor is entitled to the full protections of SB 54. The ILRC has published a practice advisory that discusses the protections and limitations of SB 54.[41]

VIII. Conclusion

Immigration advocates and criminal defenders must be aware of the federal immigration consequences of a plea to a Prop 36 crime, whether it be a property offense or a controlled substance offense. With careful pleading, we might be able to mitigate the immigration consequences of these laws on noncitizens.

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[39] "California law enforcement agency" means a state or local law enforcement agency, including school police or security departments. Govt Code § 7284.4. It does not include the California Department of Corrections and Rehabilitation (the state prison system). *Ibid.*

[40] Govt Code § 7282.5(a)(3)(A)-(AE).

[41] ILRC, *Practice Advisory: SB 54 and the California Values Act: A Guide for Criminal Defenders* (Feb. 2018) at https://www.ilrc.org/sites/default/files/resources/sb54_advisory-gr-20180208.pdf.

Appendix A
Chart of Penal Code § 666.1 Underlying Property Offenses

Offense	Code	Aggravated Felony?	Crime Involving Moral Turpitude (CIMT)?
Robbery	Penal Code § 211	Yes, with a sentence of one year or more	Yes. But immigration advocates can argue that it is not.
Carjacking	Penal Code § 215	No	Assume it's a CIMT but immigration advocates can argue that it's not
Elder Abuse (Theft, Fraud, Forgery)	Penal Code § 368(d) and (e)	Yes, if one year sentence is imposed *and* loss exceeds $10,000	Assume yes
Petty Theft	Penal Code §§ 484, 490.2	No	Yes
Grand Theft	Penal Code §§ 487, 487h	Yes, if 1 year sentence is imposed *and* loss exceeds $10,000	Yes
Shoplifting	Penal Code § 459.5	No	No
Burglary	Penal Code § 459/460	No	No
Receipt of Stolen property	Penal Code § 496	Yes, if 1 year is imposed	No
Identity Theft and Mail Theft	Penal Code § 530.5	Yes, if loss exceeds $10,000	No
Theft or Unauthorized Use of a Vehicle	Vehicle Code § 10851	Yes, if 1 year is imposed	No

Appendix B
Client Handout #1

A Conviction for Cal. Penal Code § 459.5 (Shoplifting) is not a Crime Involving Moral Turpitude and is not an Aggravated Felony Under Federal Immigration Law

Immigration Effect of California Penal Code §§ 484, 459.5, 490.3, 666.1

NOTE: This document was given to me by my attorney and pertains to a possible legal defense. I request that you do not take this document away from me. I do not admit alienage by possessing or submitting this document, but if I am charged with being an alien, I submit the following legal information.

Penal Code § 459.5, is not a crime involving moral turpitude (CIMT) for immigration purposes. The Ninth Circuit has held that California commercial burglary (Penal Code §§ 459/460(b)) with intent to commit larceny is not an immigration CIMT, because the elements of the offense are to enter an open business during regular business hours with intent to commit theft, but with no requirement of taking. *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1104-05 (9th Cir. 2011). The court found that California burglary is not "theft" because theft requires an actual taking, and is not "attempted theft" because that requires a "substantial step" toward committing theft, and simply entering an open store with bad intent does not amount to a "substantial step." *Id.* at 1104-1105.

Shoplifting is a lesser included offense of California commercial burglary and has these same elements: permitted entry into an open business with intent to commit larceny, but no actual taking. As the California Supreme Court found, "Burglary and shoplifting do not require any taking, merely an entry with the required intent." *People v. Gonzales*, 2 Cal. 5th 858, 872 (2017). The jury instructions for shoplifting, CALCRIM 1703, provide: "To prove that the defendant is guilty of this crime, the People must prove that: (1) The defendant entered a commercial establishment; (2) When the defendant entered the commercial establishment, it was open during regular business hours; AND, (3) When (he/she) entered the commercial establishment, (he/she) intended to commit theft… The defendant does not need to have actually committed theft as long as (he/she) entered with the intent to do so."

For this reason, shoplifting also is not theft or attempted theft and is not a CIMT.

California shoplifting, Penal Code § 459.5, and petty theft, Penal Code §§ 488, 490.2, are not aggravated felonies for immigration purposes, including when they are sentenced pursuant to Penal Code §§ 490.3 or 666.1.

Appendix C
Client Handout #2

No Conviction Under Cal. Penal Code § 666.1 is an Aggravated Felony as defined by INA §§ 1101(a)(43)(G) or (M)

NOTE: This document was given to me by my attorney and pertains to a possible legal defense. I request that you do not take this document away from me. I do not admit alienage by possessing or submitting this document, but if I am charged with being an alien, I submit the following legal information.

Penal Code § 666.1 is not an aggravated felony. A plea to Cal. Penal Code § 666.1 is not an aggravated felony regardless of the sentence, because the loss to the victim does not and cannot exceed $10,000. Section 666.1 provides that anyone who has two or more prior convictions for a theft offense and who is later convicted of shoplifting or petty theft, can be charged with a felony wobbler. For a California theft offense to be an aggravated felony under INA § 101(a)(43)(G) or (M) the person must be sentenced to a year or more imprisonment *and* the loss to the victim(s) must exceed $10,000. *Matter of Reyes*, 28 I&N Dec. 52 (A.G. 2020). A conviction for Penal Cal. Penal Code § 666.1, where the sentence is one year or more but the loss to the victim does not exceed $10,000, is not an aggravated felony.

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The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.