QUICK REFERENCE CHART AND ANNOTATIONS

FOR DETERMINING

IMMIGRATION CONSEQUENCES OF SELECTED ARIZONA OFFENSES

Immigrant Legal Resource Center
Florence Immigrant and Refugee Rights Project
Maricopa County Office of the Public Defender

Principal authors are Katherine Brady, Holly Cooper, Kara Hartzler, Beth Houck, Angie Junck, and Ryan Moore

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 *Defending Immigrants in the Ninth* Circuit (www.ilrc.org, 2009) 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,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, 2010, and 2012, Kara Hartzler of the Arizona Defending Immigrants Partnership revised and expanded the Chart. The ILRC and FIRRP are grateful to our colleagues in the national Defending Immigrants Partnership and to the Gideon Project of the Open Society Foundation for funding the national project, and providing support to the Arizona project in 2011-2012..

Aggravated Felony	**Aggravated Felony**, 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
CMT	**Crime Involving Moral Turpitude (CMT)**. 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.
DRUG	**Controlled Substance offenses.** 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 U.S. 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.
DV CHILDREN	**Crimes of Domestic Violence, Stalking, Violation of Protection Order, Crime of Child Abuse, Neglect or Abandonment.** 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.
FIREARMS	**Firearms offenses**, 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.

DIVISIBLE STATUTES, RECORD OF CONVIC-TION

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. In cases other than those involving CMT's, or aggravated felonies for fraud or operating a prostitution business, 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 fractual 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.

OFFENSE	AGG. FELONY	CRIME INVOLVING MORAL TURPITUDE	DOMESTIC VIOLENCE, DRUGS, FIREARMS, OTHER	ADVICE
1. § 1001 Attempt	Yes if underlying crime is AF	Yes if underlying crime is CMT	Yes if underlying offense is. Exception: might avoid deportability for stalking and crime of child abuse, neglect or abandonment. See Note: Dom Violence	Because attempt carries a shorter maximum sentence, an attempt plea to a class 6 felony that is a CMT may give benefit. See Note: Safer Pleas.
2. § 1002 Solicitation	No if drug offense, but yes if crime of violence; others are uncertain. This rule only applies in 9th Cir.	Yes if underlying crime is CMT, but may be arguments in inadmissibility (see "Advice"). Solic. to Poss. for Sale is CMT	No, except offer to sell gun may be deportable firearms offense.	Good alternate plea to avoid agg felony (except for COV), especially for drug offenses. Also reduces potential sentence which may aid for CMT. Some legislative threat; see Note: Safer Plea.
3. § 1003 Conspiracy	Yes if underlying crime is AF	Yes if underlying crime is CMT	Deportable and inadmissible for controlled substance and firearms offenses; may give imm attorneys argument in DV offense	Consider solicitation instead.
4. §1004 Facilitation	Yes if underlying crime is AF	Yes if underlying crime is CMT (but see Advice)	Assume yes conservatively if underlying offense is.	See Note: Safer Pleas. Reduced sentence may help CMT. See Note: Safer Pleas.
5. § 1102 Negligent homicide	Not AF under current law because not crime of violence	No	Could be child abuse, neglect if ROC shows victim is child. Not DV because not crime of violence	Keep victim's age (if minor) out of record of conviction.
6. § 1103 Manslaugh-ter	Divisible. A1, A4, and arguably A5 are not	Yes, although A4 and A5 are arguably not	DV if victim had dom relationship though arguably not if plea is to A1, A4, A5 or if plea is vague as to subsection	To avoid agg fel, try for A1; to avoid CMT, try for A4
7. § 1104 Murder 2nd Degree	Yes	Yes	DV if victim had dom relationship	See manslaughter
8. § 1105 Murder 1st Degree	Yes	Yes	DV if victim had dom relationship	See manslaughter
9. § 1201 Endanger-ment	No.	Maybe, if record shows serious physical injury	Deportable for child abuse if the record shows victim was a minor	Good alternate to other charges, such as aggravated assault, misconduct w/ a weapon. Keep age of victim out of the record.

OFFENSE	AGG. FELONY	CRIME INVOLVING MORAL TURPITUDE	DOMESTIC VIOLENCE, DRUGS, FIREARMS, OTHER	ADVICE
10. § 1202 Threatening /Intimidating	Maybe if 1-yr sentence; no if property damage not caused by force	Divisible: A1 and A2 probably are not CMTs	A1 and A3 may be DV offenses if ROC shows victim had domestic relationship. Could also be charged as deportable child abuse if 3601 referenced and victim was a child.	Avoid 1-yr sentence, keep ROC open to possibility of undefined violation of A2.
11. § 1203 (A)(1) Simple Assault	Only if a sentence of a year (see 13-1204). Plus under current law, recklessly causing injury or offensive touch is not a COV.	No, except immigration will charge as CMT if class 1 misd and there is 13-3601.	Can be deportable for DV, avoid by dropping 13-3601 tag and keeping domestic relation out of record, pleading to class 2 and/or leaving open possibility of A3, insulting but not violent touching. Could also be charged as deportable child abuse if record shows V is a minor.	To avoid COV, leave record open to reckless causation. See Note: COV. Or leave record open to A3, no more than "insulting touching." To avoid AF as a COV, get a 364 or less. To avoid CMT and DV grounds, keep domestic relation out of record of conviction, plead to class 2, and/or leave open A3 possibility.. See Note: Safer Pleas
1203(A)(2)	Yes if 1-yr sentence is imposed.	See 1203(A)(1)	Yes if dom relationship is in record. If so, leave record open to A3, A1. Could also be charged as deportable child abuse if record shows V is a minor.	See 1203(A)(1).
1203(A)(3)	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.	No, except possibly with intent to injure. Keep record vague as to insult/provoke.	Dangerous to have dom relationship on record, but may escape if record leaves open mere intent to insult/provoke. See Note: Dom Violence. Could also be charged as deportable child abuse if record shows V is a minor.	Where possible obtain 364 or less in agg offense. Leave record vague that mere offensive touching occurred. See Note: Safer Pleas/ Violence.
12. § 1204 Aggravated Assault	Divisible: if 1-yr or more imposed, and if record shows substantial risk force may be used, may be AF as COV.	Assume yes, but imm attys at least can argue A2 and A8 are not .	Assume deportable under DV grnd, if record shows intent and dom relationship; assume deportable under firearms grnd, if elements involve weapon (e.g. A2). Deportable for child abuse for A6, with possible exception if assault was 1203A3	To avoid AF, leave vague or plead specifically to recklessness and/or get 364 or less. Substitute plea Endangerment (see notes supra and infra) or simple assault. But with vague record of conviction, this may be a charge on which defendant can take 365. See Endnote.
13. § 1205 Unlawful administer drug/ alcohol	Not as drug. Because possibly DHS would charge as a COV, obtain 364 or less.	Yes.	Drug conviction only if CS ID'd on the record. Leave record vague between drugs and alcohol.	Might avoid removal under drug ground..

OFFENSE	AGG. FELONY	CRIME INVOLVING MORAL TURPITUDE	DOMESTIC VIOLENCE, DRUGS, FIREARMS, OTHER	ADVICE
14. § 1206 Assault by prisoner/ juvenile	Yes, if sentence of 365 and record shows intent	Probably.	No.	Obtain 364 or less and plead to recklessness or intent to insult/provoke
15. § 1209 Drive-by shooting	Yes as COV if 1-yr or more sentence imposed.	Yes	Deportable under firearms ground, also under DV if record shows dom relationship	To avoid AF, obtain 364 or less.
16. § 1211 Discharging firearm at a structure	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.	Probably a CMT, but possible B is not CMT so leave record vague.	Deportable under firearms ground.	To avoid AF, obtain 364 or less and/or show that structure not inhabited and is owned by defendant. To attempt to avoid a CMT, try to leave record vague between A (residence) and B (non-residence).
17. § 1302 Custodial Interference	Maybe as obstruction of justice if violation of court order and sentence of 365	Probably not since no intent required	Unlikely, but perhaps as "child abuse."	Avoid reference to violation of a court order and 365
18. § 1303 Unlawful Imprison ment	Maybe COV if felony and 1-yr or more sentence. **May not be COV if restraint by deception or intimidation.** But leave record clear of details. E.g., storeowner or officer making an improper detention might use legal "intimidation" but not force.	Probably not, although some AZ judges have so held.	At risk of DV deportable if 13-3601. If 13-3601, plead to misdo with record showing possible restraint by deception or other non-violent means to give imm atty's an argument. May also be deportable as child abuse if victim was a child.	Misdo unlawful imprison effected by deceit is a relatively good alternative to a violent or sex offense. Felony restraint by deceipt might be termed a crime of violence. See Note: Safer Pleas/Violence. Leave record clear of details as much as possible.
19. § 1304 Kidnapping	Probably as COV if 1-yr or more sentence imposed; or if ransom involved, regardless of sentence.	Yes	DV if record shows domestic relationship.	See misdo unlawful imprisonment to perhaps avoid DV. Avoid 1-yr sentence to avoid agg felony.
20. § 1305 Access Interference	Yes with 365 as obstruction of justice	Probably	Possibly as DV child abuse	Potentially a better plea than kidnapping, depending on length of sentence.
21. § 1402 Indecent Exposure	Probably not but ICE may argue it is, try to keep minor's age out of record)	Probably not (but to be sure, try to keep minor's age out of record)	Conceivably deportable for child abuse if V is child; attempt to keep age out of record	Keep record clear of egregious details, try to plead to language of the statute. Safer plea: Disorderly Conduct.

OFFENSE	AGG. FELONY	CRIME INVOLVING MORAL TURPITUDE	DOMESTIC VIOLENCE, DRUGS, FIREARMS, OTHER	ADVICE
22. § 1403 Public Sexual Indecency	Not AF as sexual abuse of a minor as long as record does not show minor was aware of conduct, or lewd intent toward minor.	No, unless victim is a minor and is aware of conduct	Possibly deportable for child abuse if record shows V is child and is aware of conduct	To avoid CMT and ag fel, do not let record establish a minor victim was aware of conduct. Keep record clear of egregious details or intent. Safer plea: Disorderly Conduct.
23. § 1404 Sexual Abuse	Yes, if 1-yr or more imposed; If less than 1-yr, and against minor, assume ag fel though imm counsel have arguments against this	Assume yes, though imm counsel have arguments against this	DV if victim has domestic relationship and force is used; may be child abuse though imm counsel have arguments against this	See endnote. Safer plea: Assault.
24. § 1405 Sexual Conduct with a Minor	Divisible, may not be if consensual and with older minor.	Possibly.	Possibly for child abuse, and DV if victim has domestic relationship	Avoid references to emotional/physical harm and nonconsensual nature. Leave age of victim out if possible.
25. § 1406 Sexual Assault	Yes, in almost all circumstances.	Yes	DV if domestic relationship; child abuse if child	See Note: Safer Pleas
26. §1406.01 Sexual Assault Spouse (Repealed)	Yes, unless counsel obtains 364 days or less *and* record does not foreclose possibility that offense was oral sex rather than intercourse	Yes.	Deportable under DV ground	See assault, false imprisonment, Note: Safer Pleas
27. § 1410, 1417 Child Molestation, Continuous abuse	Yes as SAM regardless of sentence imposed	Yes	Yes as child abuse	Avoid AF by pleading to agg assault 13-1204A4; possibly avoid deportability as child abuse if linked to 13-1203A3. See Note Safer Pleas.
28. § 1424 Voyeurism	Possibly if victim was a minor.	Maybe.	Unlikely, but potentially as stalking or child abuse.	Good alternative to Stalking.
29. § 1502, 1503 Criminal Trespass 2nd and 3rd degree	No, punishable as a misdo	No because no intent to commit CMT	No	A safer plea.
30 § 1504 Criminal Trespas 1st degree	Possibly, obtain 364 or less on felony convictions.	Possibly if intent to commit theft; A1, A4, and A5 may be even w/o theft	Should not be DV because DV shdn't be held to apply to property, but try to avoid DV reference	To further avoid potential problems, plead to §13-1502, 1503; but with the preceding conditions, this should be a safer plea.

OFFENSE	AGG. FELONY	CRIME INVOLVING MORAL TURPITUDE	DOMESTIC VIOLENCE, DRUGS, FIREARMS, OTHER	ADVICE
31. § 1505 Possession of Burglary Tools	No	Divisible; keep record free of "CMT burglary" – see Advice	No.	Keep record from showing intent to commit a CMT, i.e. not a burglary that involves intent to commit theft, but rather "theft or any felony."
32. § 1506 Burglary 3rd degree	Only if 365 days. If 365 unavoidable, see Advice.	Divisible. Keep record open to intent to commit *any felony* or *theft or any felony*"	Can't be DV even if dom relationship is in the record because it is not a COV, as long as record leaves possibility of car or commercial yard as burgled.	Burglary w/ 1-yr sentence is not an AF if (a) was of a *car or fenced commercial yard, and* (b) involved intent to commit undesignated felony or undesignated theft. Keep record vague on these points
§1507 Burglary 2nd	Yes if 365 but imm counsel may have arguments.	See 13-1506.	Keep dom relationship out of record to avoid DV deportable.	To avoid AF, get 364 days or see §§ 13-1506, 1505.
§ 1508 Burglary 1st	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.	See 13-1506	Keep dom relationship out of record to avoid DV deportable. May be deportable on separate ground if record refers to firearm or explosives.	Get 364 or less to avoid AF.
33. § 1602 Criminal Damage	No.	Probably Not	No	Good plea to avoid immigration consequences, particularly if record is vague between subsections.
34. § 1603 Criminal Littering or Polluting	No.	No.	No.	Good alternate plea to criminal damage if you must avoid a CMT.
35. § 1604 Agg. Criminal Damage	Possibly, with 365 days.	Possibly.	Probably not because DV should be against people, not property, but try to keep dom relationship out of record.	Try to plead to recklessness or keep record vague between intent and reckless.
36. § 1702 Reckless burning	No because 365 not possible and reckless mens rea	Avoid since the gov't charges as CMT, but imm counsel have good defenses.	Probably not because DV should be agst people not property, but try to keep dom relationship out of record.	
37. § 1703 Arson of Structure or Property	Assume yes even with less than 365 days	Yes	Yes DV if dom relationship. Yes deportable firearms grnd if used explosive device.	Try to leave record vague as to owner of property.

OFFENSE	AGG. FELONY	CRIME INVOLVING MORAL TURPITUDE	DOMESTIC VIOLENCE, DRUGS, FIREARMS, OTHER	ADVICE
38. § 1704 Arson of Occupied Structure	Assume yes even with less than 365 days.	Yes.	Yes DV if dom relationship. Yes deportable firearms grnd if used explosive device.	Dangerous plea.
39. § 1705 Arson of jail or prison	Assume yes even with less than 365 days.	Yes.	Yes, if explosive used.	Dangerous plea.
40. § 1706 Burning of wildlands	Assume yes even with less than 365 days if pleads to "intentionally"	Probably, unless mens rea of recklessness or negligence.	No.	Good alternative to arson if can plead to reckless or negligence; otherwise, may be better off with § 13-1703.
41. § 1802 Theft	Try to avoid 365 days, but If that is not possible, see Advice. Avoid conviction of A3 if $10k loss to victim .	Divisible. A3, A5 and A6 may be CMT. No CMT if record leaves possibility of plea to A1, A2, A4 without intent to *permanently* deprive.	No	To avoid theft AF even if sentence is 1 yr or more: Plead to A2, A3 or A6 with record vague as to theft of services, or to A2 or A4 where record does not establish intent to deprive the owner temporarily *or* permanently. To avoid fraud AF even with $10k loss, plead to subsection other than A3.
42. § 1803 Joyriding	Avoid 365 days where possible, but not AF "theft" as long as record does not show intent to deprive temporarily *or* permanently.	No	No	Safer plea. See *United States v. Perez-Corona*, 295 F.3d 996 (9th Cir. 2002) (13-1803 not AF even with 1 yr sentence b/c no intent to deprive).
43. § 1804 Theft by Extortion	Probably if sentence of 365 though imm. counsel have arguments to contrary.	Probably, although A5, A6, and A7 leave imm. counsel arguments.	No.	May be good alternate plea with vague record. To avoid ag fel, plead to obtaining "services" or leave record vague as to property or services.
44. § 1805 Shoplifting	Yes if 365 days.	Yes if record shows intent to deprive permanently	No	See Theft, § 13-1802. See endnote re proof of intent by concealment.
45. § 1807 Issuing Bad Checks	Possibly if more than $10,000 loss to victim	May be divisible: it is not known whether fraud is essential element. If record establishes fraud, CMT.	No	If $10k loss, theft is a safer plea. If court finds this offense involves "deceit" it will be an agg felony with $10k loss to victim.

OFFENSE	AGG. FELONY	CRIME INVOLVING MORAL TURPITUDE	DOMESTIC VIOLENCE, DRUGS, FIREARMS, OTHER	ADVICE
46. § 1814 Theft of Transport	Try to avoid 365 days, but if that is not possible, see Advice. Avoid conviction of A3 if $10k loss to victim .	Divisible. A1, A3, A5 are CMT. No CMT if record leaves possibility of plea to A2, A4 without intent to *permanently* deprive.	No	To avoid theft AF even if sentence is 1 yr or more: Plead to A2 or A4 where record does not establish intent to deprive the owner temporarily *or* permanently. To avoid fraud AF even with $10k loss, don't let record establish plea to A3.
47. §§ 1902 - 1904 Robbery; Agg and Armed Robbery	Yes if 365 days or more imposed.	Yes.	DV conviction if record shows V has domestic relationship. § 13-1904 deportable firearms offense if record establishes gun or explosive	Plead to a safe Theft subsection. If weapon is involved, do not ID on the record as gun or explosive.
48. § 2002 Forgery	Probably, if 365 days or $10k or more loss to victim/s	Yes	No	To avoid AF, try for A3 and plead to real document with false info; also consider Theft, ARS 1802; Taking Other's ID, ARS 13-2008.
49. § 2003 Possession of Forgery Device	See forgery	See forgery	No.	See forgery
50. § 2004 Criminal simulation	Yes if loss of $10k or more to victim/s.	Yes	No.	Consider Theft, ARS 1802; Taking Other's ID, ARS 13-2008.
51. § 2006 Criminal Imperson-ation	Yes if loss of $10k or more to victim/s.	Probably, but may be divisible; plead to A3 or leave subsection vague	No.	Consider Theft, ARS 1802; Taking Other's ID, ARS 13-2008.
52. § 2008 Taking identity of another person	365 days may be OK with vague record. Danger that $10k loss to victim is AF deceit	Maybe not with very vague record.	No.	While Theft is more secure, this may work to prevent CMT, AF as theft. Still a danger with $10k loss to victim.
53. § 2319 Smuggling	Yes, unless person smuggled is self, spouse, child, or parent	Yes.	Yes, as a ground of deportability and inadmissibility.	Try to avoid, but if person smuggled is self, spouse, parent, or child, include this in plea.
54. § 2405 Compound-ing	Possibly, with sentence of 365	No, although ICE may charge it	No.	Good alternative to drug offense and other dangerous pleas
55. § 2407 Tampering w/ a Public Record	Yes, if loss of $10k or 365 days	Divisible, try to plead to intent to deceive, rather than defraud	No.	If possible, plead to intent to deceive, rather than defraud.
56. § 2408 Securing Proceeds	No.	Probably not, although ICE may charge it.	No.	Good alternate plea.

OFFENSE	AGG. FELONY	CRIME INVOLVING MORAL TURPITUDE	DOMESTIC VIOLENCE, DRUGS, FIREARMS, OTHER	ADVICE
57. §2502-3 Escape in 2nd and 3rd	Maybe w/ 365, but imm counsel have strong arguments	Probably not.	No.	Plead to escape that occurred AFTER sentencing or leave record vague
§ 2504 Escape in 1st	Yes w/ 365 days.	Yes.	Firearms offense if A2 includes firearm or explosive	Avoid if possible; try to plead to 2nd or 3rd degree.
58. 2506-7 FTA, 1st and 2nd degree	§ 2506 no. *Avoid* §2507; see Advice re character of underlying offense. Sentence given for FTA itself is irrelevant.	Probably not.	No	FTA is AF if (a) for service of sentence of an offense carrying a *possible* 5 yrs or more, or (b) before a court pursuant to a court order to answer to or dispose of a felony carrying a *possible* 2 yrs or more. See 8 USC § 1101(a)(43)(Q), (T).
59. § 2508 Resisting Arrest	Yes if 365	Probably not.	No.	To avoid a CMT, also leave record open to possibility of A2 plea.
60. §2510-12 Hindering	Yes if 365 days as obstruction of justice, but not a drug or sexual abuse of a minor AF	Probably.	Good alternate plea for drugs, firearms, DV, sex offenses. Caution: may be inadmissible under "reason to believe" if principal is drug trafficker.	Because hindering does not take on the character of the underlying offense, this is a good alternate plea if 365 can be avoided
61. § 2602 Bribery of official	No	Yes	No.	Only bribery of a witness and commercial bribery are AF's.
62. § 2605 Commercial Bribery	Yes if 365 days or more	Yes.	No.	
63. § 2702 Perjury	Yes if 365 days or more	Yes	No	See False Swearing
64. § 2703 False Swearing	Try to avoid 365, but shd not be AF as perjury absent showing of materiality	Shd not be CMT, but ICE may charge it	No.	Safer plea for false statements to gov't.. See also § 13-2907.01.
65. § 2809 Tampering	See hindering, ARS 13-2510	See hindering	See hindering	See hindering
66. § 2810 Interfering with Judicial Proceeding	No, b/c cannot be sentenced to 365 days	Probably not.	Yes, as violation of protection order under A2	Plead to straight statutory language or avoid A2 altogether. Use of Telephone to Annoy § 13-2916 is a good alternative.
67. § 2904 Disorderly Conduct	No.	A6 might be charged as CMT. Others not CMT, but leave record vague as to facts	A6 is deportable firearms offense if record ID's firearm or explosive. Keep record vague. Also A6 deportable as DV or child abuse against V where record shows dom relationship.	Keep record open to possibility that A6 was not the plea, and keep details vague and free of egregious or violent acts, and it is a safer plea.

OFFENSE	AGG. FELONY	CRIME INVOLVING MORAL TURPITUDE	DOMESTIC VIOLENCE, DRUGS, FIREARMS, OTHER	ADVICE
68. § 2907.01 False Statement to a Police Officer	Not an agg felony	Maybe not because no requirement of materiality	No.	Good substitute plea for DV, drug, stat rape with older teen; see endnote.
69. § 2908 Criminal Nuisance	No.	No, except conceivably if unlawful conduct is CMT	No. This could be a substitute plea for charges relating to use of drugs, firearms, unlawful sex, etc.	If prosecution is willing to accept this misdemeanor, this is an excellent plea for immigration purposes.
70. § 2916 Use of Telephone to Annoy	No.	No, if record of conviction vague or only mild conduct	Not a DV or stalking offense, if record of conviction is vague or shows only mild conduct	Good alternative to harassment, stalking
71. § 2921A Harassment	No.	Probably not; no intent to harm	May be charged as DV "stalking" offense if 13-3601. Better than 2921.01, but still a danger.	To avoid deportable "stalking" offense, plead to §2916 Use of Telephone to Annoy. §2921A might not cause deportability with vague, or minor, factual record.
72. §2921.01 Agg. Harrass	Maybe, avoid 365 or more. If not possible, leave open possibility plea was to A2.	A1 is CMT but A2 may not be.	DV. Assume yes, but leave open possibility that plea was to A2, which might prevent this. A1 is DV.	To try to avoid AF even with 1-yr or more, leave open possibility plea was to A2. Keep facts vague in record. For alternatives, see safer pleas in notes.
73. § 2923 Stalking	Yes with 365 days or more	Yes	DV: Yes	See harassment, assault., endangerment
74.§ 3102 Weapons Misconduct	Divisible. Crimes of Violence with a 1-year sentence; felon in poss firearm; undocumented immigrant in poss firearm are agg felonies.	Divisible, e.g. simple poss of weapon is not a CMT.	To avoid deportable firearms offense, don't ID weapon as gun, explosive. Divisible for DV ground	See endnotes of subsections.
75. § 3107 Unlawful Discharge of a Firearm	No	No	Yes, firearms	
76. § 3214 Prostitution	No	Probably. Soliciting Prostitute also CIMT.	Inadmissible under prostitution ground but divisible	Plead to conduct other than sexual intercourse or leave vague.
77. § 3405 Marijuana Offenses	Divisible.	Divisible	Deportable and inadmissible for drug conviction; divisible for reason to believe trafficking	See endnote of subsections and Note: Controlled Substances.

OFFENSE	AGG. FELONY	CRIME INVOLVING MORAL TURPITUDE	DOMESTIC VIOLENCE, DRUGS, FIREARMS, OTHER	ADVICE
78. §§ 3407, 3408 Dangerous & Narcotic Drug Offenses	Divisible	Divisible	See marijuana, except note exceptions for poss., use of 30 grams or less mj or hashish; see Note: Controlled Substances	See endnote of subsections and Note: Controlled Substances.
79. § 3415 Drug Paraphernalia	No	No	Controlled substance	NOT A SAFE PLEA; will have severe consequences and cause both deportability and inadmissibility; if possible, try to show that it related to 30 grams or less of mj
80. § 3623 Child or Vulnerable Adult Abuse	Possibly, with an intentional mens rea and a sentence of 365	Divisible.	Deportable as child abuse if record specifies child rather than vulnerable adult.	Try to avoid reference to actual harm to child.
81. § 3705 Unlawful Copying or Sale	Possibly, with a sentence of 365 days or more	Probably.	No.	To have the best chance of avoiding a CMT or agg. felony, plead to A1, A2, or A6

OTHER OFFENSES	A.R.S. § 28-	AGGRAVATED FELONY	CRIME INVOLVING MORAL TURPITUDE	OTHER DEPORTABLE, INADMISSIBLE GROUNDS	ADVICE
82. Unlawful flight	28-622.01	No.	Possibly if docs show disregard for lives of others.	No.	Potentially a safe plea.
83. DUI	28-1381	No	No	No	
84. Extreme DUI	28-1382	No	No	No	
85. Aggravated DUI	28-1383A1	See DUI	Divisible between Driving and Actual Physical Control and knew and should have known of license suspension	No	A plea to straight Actual Physical Control is best, but Driving/Actual Physical Control leaves arguments, plea to "should have known" license was suspended is better
	28-1383A2	No	No	No	
	28-1383A3	No *	Probably Not	Potentially removable as child abuse under domestic violence ground	Plead to endangerment 13-1201 with no mention of age of victim
	28-1383A4	No.	Maybe	No	Try for plea to A2 instead

1. Attempt, A.R.S. § 13-1001.

Summary: Generally, a conviction for attempt carries the same immigration consequences as the principal offense. *Matter of Vo,* 25 I&N Dec. 426, 428 (BIA 2011) ("An attempt involves the specific intent to commit the substantive crime, and if commission of the substantive crime involves moral turpitude, then so does the attempt, because moral turpitude inheres in the intent"); *United States v. Taylor*, 529 F.3d 1232, 1238 (9th Cir. 2008) (Arizona's definition of "attempt" is coextensive with the federal definition); *United States v*. *Gomez-Hernandez*, 680 F.3d 1171, 1175 (9th Cir. 2012) (same). 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.

Crime Involving Moral Turpitude (CMT): Attempt to commit a CMT will be held to be a CMT. 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 CMTs.

- 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 i*nadmissibility* 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 presumptive sentence 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). *United States v. Taylor*, 529 F.3d 1232, 1238 (9th Cir. 2008) (Arizona's definition of "attempt" is coextensive with the federal definition).

Otherwise Removable: As discussed in the Summary above, a conviction for attempt generally carries the same immigration consequences as the principal offense. However, some deportation grounds do not include attempt to commit the offense at all; there, a plea to attempt provides immigration counsel with an 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.

Note that a plea to "attempt" will always involve an intentional *mens rea* and thus preclude the benefits of a plea to a statute that is divisible because it includes a lower *mens rea*. *United States v. Gomez-Hernandez*, 680 F.3d 1171, 1176 (9th Cir. 2012) ("it is well-settled that attempted aggravated assault under Arizona law covers only intentional conduct") (citing *State v. Kiles,* 175 Ariz. 358, 857 P.2d 1212, 1224 (1993) ("[A]ttempt is a specific intent crime and by definition involves *intentional* conduct."). For instance, in order to avoid a crime of violence or a crime of domestic violence under ARS § 13-1203(A)(1) or § 13-1204, counsel would be better off pleading to a straight assault than an attempt in order to leave open the possibility of a reckless *mens rea*.

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 (except as a "crime of violence" 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 down-side of solicitation is that there are moves to legislatively eliminate the defense by adding "solicitation" to, e.g., the definition of aggravated felony. For this 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* per *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.

Immigration counsel may also be able to argue that *Barragan-Lopez* only applies to CMTs that render an immigrant *deportable* under 8 USC § 1227, not CMTs that render an immigrant *inadmissible* under 8 USC § 1182. The BIA recently stated that "the Ninth Circuit has indicated that section [1227(a)(2)(A)] is broader in its coverage of crimes involving moral turpitude than section [1182(a)(2)(A)(i)(I)], because it would include inchoate offenses, such as solicitation and facilitation, that are not specifically enumerated in the inadmissibility statute, which lists only attempts and conspiracies." *Matter of Vo,* 25 I&N Dec. 426, 429 n. 4 (BIA 2011). Therefore, immigration counsel can argue that a conviction for Arizona solicitation to commit a CMT does not make a person inadmissible. Because this argument is not yet widely accepted, defense counsel should conservatively advise clients that most immigration judges and officials will find to the contrary.

Because the potential sentence is less for solicitation than for the principal 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 ARS § 13-1002 is not a drug trafficking aggravated felony, even if the principal 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 ARS § 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." However, solicitation will still trigger an aggravated felony as a "crime of violence" since soliciting a violent act poses a substantial risk that physical force will be used against another even if the actual violence may occur after the solicitation itself. *Prakash v. Holder,* 579 F.3d 1033, 1036 (9th Cir. 2009); *Matter of Guerrero*, 25 I&N Dec. 631 (BIA 2011). Therefore, counsel should assume that a plea to soliciting a "crime of violence" will itself be found a "crime of violence."

While the court in *Prakash* affirmed the holdings of *Coronado-Durazo* and *Leyva-Licea* that solicitation is not removable as a controlled substance offense or a drug trafficking aggravated felony, it is unclear whether the rationale in *Prakash* could be extended to other aggravated felonies. There is a strong argument that the inclusion of a "substantial risk" in the definition of a "crime of violence" found at 18 U.S.C. § 16(b) limits *Prakash* and *Matter of Guerrero* to crimes of violence. However, apart from drug crimes, defense counsel should be cautious when pleading to solicitation as a means to avoid an aggravated felony.

Other grounds: Deportable and Inadmissible Drug Conviction. Regarding controlled substance convictions, the Ninth Circuit has held that solicitation under ARS § 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) (ARS § 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, soliticitation 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 may prevent deportability under the domestic violence ground.

Note: solicitation incorporated into substantive offenses, such as offering to commit a drug offense. The Ninth Circuit has held that offering to commit a drug trafficking offense is not an aggravated felony even when the offense is included in a drug statute instead of under a separate "generic" statute such as ARS § 13-1002. Rosas-Castaneda v. Holder, 655 F.3d 875, 885 (9th Cir. 2011); *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). This means that a plea to, e.g., offering to sell or offering to transport for sale under ARS §§13-3405(A)(4), 13-3407(A)(7), or 13-3408(A)(8) should avoid conviction of an aggravated felony.. In practice, however, immigration judges are not consistently applying this precedent to Arizona law and will often find the offense to be 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."

The Ninth Circuit has found that a conviction under a "specific" solicitation statute, such as offering to possess for sale, offering to transport for sale, or offering to sell, would render a noncitizen removable for an offense relating to a controlled substance. Rosas-Castaneda v. Holder, 655 F.3d 875, 881 (9th Cir. 2011); *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009). While counsel can argue that this holding conflicts with the Ninth Circuit's en banc decision in *U.S. v. Rivera-Sanchez*, 247 F.3d 905, 909 (9th Cir. 2001) (en banc) (Calif. Health & Safety § 11360), which makes no distinction between generic solicitation and specific solicitation statutes, a conviction for "offering" to possess for sale/transport for sale/sell will likely be found removable as a controlled substance offense. Whenever, possible, counsel should attempt to plead to the generic solicitation statute under ARS § 13-1002.

3. Conspiracy, A.R.S. § 13-1003.

Summary: Conspiracy will likely incur the same immigration consequences as the underlying crime, with the possible exception of domestic violence; *see* "other grounds." However, immigration counsel can argue that the Arizona definition of "conspiracy" is broader than the federal definition of "conspiracy" located at 18 U.S.C. § 371 for two reasons. First, the federal definition requires that the act be committed by one of the co-conspirators, while the Arizona definition allows the act in question to be committed by a person who is not one of the co-conspirators. Second, the federal definition limits conspiracy liability to the persons with whom the defendant directly conspired, while the Arizona definition permits a conviction for working with "the conspirator of one's conspirator." *See* ARS § 13-

1003(B). These arguments have not been recognized by any court and have been rejected in an unpublished Ninth Circuit decision. *See Banda-Montoya v. Holder,* 07-74794, 2011 WL 3555891 (9th Cir. Aug. 12, 2011) (finding that Arizona and federal definitions of conspiracy contain the same elements). Therefore, defense counsel should conservatively advise clients that a conviction for conspiracy will have the same consequences as a plea to the principal offense.

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); *but see* "Summary."

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

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 likely be a crime involving moral turpitude or an aggravated felony, if the principal offense is. *See* "Note: Domestic Violence."

. **Facilitation, A.R.S. §13-1004**

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 is not available and the only other alternative would be to plead to a straight aggravated felony.

Facilitation is likely to 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. The Ninth Circuit has also held that the federal definition of "facilitation" is equivalent to that of "aiding and abetting." *United States v. Jimenez*, 533 F.3d 1110, 1114 (9th Cir. 2008). 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). While immigration attorneys can argue that, like

solicitation, facilitation should be treated as a separate offense, this argument is not likely to be successful.

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 discussion 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 should not be 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. However, under *Matter of Silva-Trevino,* 24 I&N Dec. 687 (A.G. 2008), it is possible that an immigration judge will inquire about the facts of the case, for purposes of moral turpitude only. While this should be held as improper, because the element of "negligence" should define the case, counsel should be prepared for this possibility.

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 crime of violence because it does not create a risk that force will be used, under *Leocal*); *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). See further discussion at ARS § 13-1203, assault.

The BIA has held that a death that is caused by "extreme recklessness or a malignant heart"—such as vehicular homicide while under the influence—may meet the aggravated felony definition of murder. *Matter of M-W,* 25 I&N Dec. 748 (BIA 2012). But because this statute requires a mens rea of negligence, rather than extreme recklessness, it should not be an aggravated felony for murder under 8 USC § 1101(A)(43)(A).

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. However, if the record of conviction shows that the victim was a minor, it likely will be charged as deportable as a crime of child abuse, neglect, or abandonment. *Matter of Velazquez-Herrera,* 24 I&N Dec. 503 (BIA 2008). Immigration counsel would have arguments against this if the age of the victim was not "actually required" in order to convict the defendant of the offense. *United States v. Aguila-Montes de Oca,* 655 F.3d 915, 937 (9th Cir. 2011) (en banc).

. Manslaughter, A.R.S. § 13-1103

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 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, as is A5. 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) (assault committed recklessly does not meet the federal definition of a "crime of violence" under 18 U.S.C. § 16); *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012). A1 and A5 (with a reckless mens rea) should not be an aggravated felony as murder unless there is a showing of conduct that rises above ordinary recklessness. *Matter of M-W,* 25 I&N Dec. 748 (BIA 2012) (death that is caused by "extreme recklessness or a malignant heart"—such as vehicular homicide while under the influence—may meet the aggravated felony definition of murder).

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, it may be removable as an offense of child abuse, abandonment, or neglect. *Matter of Velazquez-Herrera,* 24 I&N Dec. 503 (BIA 2008). Unless the plea is to A5, immigration counsel would have arguments against this if the age of the victim was not "actually required" in order to convict the defendant of the offense. *United States v. Aguila-Montes de Oca,* 655 F.3d 915, 940 (9th Cir. 2011) (en banc).

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. 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. This is true even for A3 since the BIA has held that a death that is caused by "extreme recklessness or a malignant heart"—such as vehicular homicide while under the influence—may meet the aggravated felony definition of murder. *Matter of M-W,* 25 I&N Dec. 748 (BIA 2012).

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 ground of domestic violence unless the plea was to A3. If the victim is a minor and the age of the victim appears in the record of conviction, a conviction would be removable under the ground of child abuse, neglect, or abandonment. *Matter of Velazquez-Herrera,* 24 I&N Dec. 503 (BIA 2008). Immigration counsel would have arguments against this if the age of the victim was not "actually required" in order to convict the defendant of the offense. *United States v. Aguila-Montes de Oca,* 655 F.3d 915, 940 (9th Cir. 2011) (en banc).

. 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 or contains the age of the victim, a conviction for first-degree murder would likely also be removable under the grounds of domestic violence or child abuse, neglect, or abandonment. *Matter of Velazquez-Herrera,* 24 I&N Dec. 503 (BIA 2008). Immigration counsel would have arguments against this if the age of the victim was not "actually required" in order to convict the defendant of the offense. *United States v. Aguila-Montes de Oca,* 655 F.3d 915, 940 (9th Cir. 2011) (en banc).

9. Endangerment, A.R.S. §13-1201

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): Possibly, particularly if serious injury is threatened. No case law has yet defined whether endangerment is a crime involving moral turpitude, and unpublished BIA case law has been mixed. ICE has been charging this as a CMT more frequently and it is possible that some immigration judges will find it to be so in light of case law suggesting that a *mens rea* of "recklessness" is sufficient to establish an offense as a CMT. *See Matter of Silva-Trevino,* 24 I&N Dec. 687 (A.G. 2008).

Mere risk of injury or death—with no actual injury or other aggravating factor— gives immigration counsel an argument that the conviction is not a CMT. *See Matter of Fualaau,* 21 I&N Dec. 475, 478 (BIA 1996). The BIA's recent decision in *Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011) supports this since a statute encompassing "endangerment-like" behavior was only found a CIMT when combined with the aggravating factor of fleeing a police officer. *See also Uppal v. Holder,* 576 F.3d 1014 (9th Cir. 2009) (an assault statute not involving a specific intent to injure or a special trust relationship and not requiring that the assault cause death or even serious bodily injury cannot qualify as a categorical CIMT). Defense counsel should be conservative and try to keep the record vague, i.e. use boilerplate statutory language in the plea agreement, and avoid mentioning any aggravating factors such as injury, the age of the victim, or the circumstances of the offense.

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); *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012) (California "general intent" crime that employs a mens rea of recklessness is not categorically a "crime of violence"

under section 16(b)). 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: **Domestic Violence.** This is not a crime of domestic violence because it is not a crime of violence.

Other Grounds: Crime of Child Abuse, Neglect or Abandonment: 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 Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) (unreasonably placing a child in a situation that poses a threat of injury to the child's life or health is categorically a crime of child abuse even though no proof of actual harm or injury to the child is required). However, *Matter of Soram* may be in conflict with the Ninth Circuit's decision in *Pacheco-Fregozo v. Holder*, 576 F.3d 1030 (9th Cir. 2009), which held that a statute that includes only the *possibility* of harm, with no actual physical or emotional injury, does not categorically fall within the definition of a "crime of child abuse." *See Jimenez-Juarez v. Holder,* 635 F.3d 1169, n.2 (9th Cir. 2011) (upholding *Pacheco-Fregozo* post-*Soram*). Defense counsel should plead to language that avoids any reference to actual harm or injury to the victim in order to preserve this argument for immigration counsel.

Defense counsel should attempt to cleanse the record of any mention that victim was a minor. If the age of the victim is in the record of conviction, immigration counsel should argue that the BIA's decision permitting this in *Matter of Velazquez-Herrera,* 24 I&N Dec. 503 (BIA 2008), was an incorrect interpretation of Ninth Circuit law, and implicitly overruled in *United States v. Aguila-Montes de Oca,* 655 F.3d 915, 937 (9th Cir. 2011) (en banc). In an age-neutral statute, the fact that the victim was a minor is a "non-element fact" because it does not set out an element that is set out in the criminal statute. Neither is the minor age of the victim necesassary to *prove* any element of the offense that is set out in the criminal statute. Therefore an immigration judge may not consider this fact in characterizing the offense of conviction.. *United States v. Aguila-Montes de Oca,* 655 F.3d 915, 937 (9th Cir. 2011) (en banc).

Other Grounds: Firearms: If the record demonstrates that the offense was committed with a firearm, a charge of removal may be brought on the basis of a firearms conviction. 8 USC § 1227(a)(2)(C). Unlike the age of the victim, see Other Grounds: Crime of Child Abuse, Neglect or Abandonment, immigration counsel would probably not be able to argue that the firearm was not "actually required" in order to convict the defendant of the offense. See *United States v. Aguila-Montes de Oca,* 655 F.3d 915, 936-37 (9th Cir. 2011) (en banc). Defense counsel should be careful to remove any reference to a firearm from the record of conviction. If it is not possible to remove any reference, defense counsel should refer generally to a "gun" or "bb gun," which will permit immigration counsel to argue that the offense is not properly identified as a "firearm" under the federal immigration definition at 18 USC § 921(a)(3)..

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): Divisible. The Ninth Circuit has held that a conviction for Criminal Threats under California law is a CMT. *Latter-Singh v. Holder*, 668 F.3d 1156, 1158 (9th Cir. 2012). However, in finding it to be categorically a CMT, the Ninth Circuit relied on three aspects of the California statute that are not necessarily present in the Arizona statute. First, the Arizona statute does not require a threat of "death or great bodily injury," since the plain language of the statute includes threats of physical injury, damage to property, or serious public inconvenience. Second, the Arizona threats statute does not require an intent that the victim believe the threat will be carried out since the legislature specifically amended the language in 1994 to delete a requirement that there be an "intent to terrify." 1994 Ariz. Sess. Laws, ch. 200, § 11. Third, the Arizona threats statute does not require intent and may be violated by a mens rea of mere negligence. *In re Kyle M.*, 200 Ariz. 447, 449 (Ariz. Ct. App. 2001); *In re Ryan A.*, 39 P.3d 543 (AZ 2002). Therefore, while the statute is not categorically a CMT, defense counsel should attempt to keep these elements out of the record of conviction or any other documents whenever possible.

Because A3 requires the person to threaten in order to support gang or racketeering activity, it is likely that the DHS will 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 may be charged as a crime of violence, but immigration counsel will have strong arguments that it lacks the requisite intent since it is a strict liability offense. *In re Kyle M.*, 200 Ariz. 447, 449 (Ariz. Ct. App. 2001). A2 is not 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).

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/Child Abuse, Abandonment or Neglect. 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). Immigration counsel can argue that the statute does not have the requisite mens rea to be a "crime of violence" and thus cannot be a "crime of domestic violence" but immigration judges may not agree. *See* Aggravated Felony, above. No sentence is required and a misdemeanor will suffice. Consider a plea to assault, § 13-1203(A)(3). See Note: Domestic Violence. If the victim is a minor and the age of the victim appears in the record of conviction, a conviction would be removable under the ground of child abuse, neglect, or abandonment. *Matter of Velazquez-Herrera,* 24 I&N Dec. 503 (BIA 2008). Immigration counsel would have strong arguments against this if the age of the victim was not "actually required" in order to convict the defendant of the offense. *United States v. Aguila-Montes de Oca,* 655 F.3d 915, 940 (9th Cir. 2011) (en banc).

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). The Ninth Circuit has expanded this holding to find that intentional assault that wounds, maims, disfigures, or endangers the life of another is categorically a CMT. *See Uppal v. Holder,* 576 F.3d 1014 (9th Cir. 2009). 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.

A conviction for A2 or A3 coupled with a reference to 13-3601 could also be a CMT if the record of conviction demonstrates that there was "serious bodily injury." Though the statuory language of A2 and A3 make it unlikely that this would be part of the factual basis, defense counsel should strike any mention of "serious bodily injury" from the record of conviction.

The Ninth Circuit has held that "a relationship of trust" must be present in order for simple assault to rise to the level of a CMT. *Morales-Garcia v. Holder,* 567 F.3d 1058, 1065 (9th Cir. 2009). Simple assault committed against persons other than a spouse (such as former cohabitants or people who are more akin to strangers or acquaintances) does not trigger a CMT. *Id.* at 1065-66. Since ARS § 13-3601 includes former cohabitants, relatives outside of the immediate family, and in-laws, mere conviction of DV assault may be insufficient to constitute a CMT. Counsel should specify the defendant's relationship to the victim if it is outside of the immediate family and leave the relationship vague if it is a spouse or child (remember, however, that any conviction defined as domestic violence by a state statute will be removable under the DV ground of deportability)

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. *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012) (California "general intent" crime that employs a mens rea of recklessness is not categorically a "crime of violence" under section 16(b)). However, a conviction under A2 will be a crime of violence. *Camacho-Cruz v. Holder*, 621 F.3d 941, 943 (9th Cir. 2010) ("intentionally placing another person in reasonable apprehension of immediate bodily harm" is a crime of violence). See discussion at Other Grounds: Domestic Violence, below.

Note that a plea to *attempted* assault will always involve an intentional *mens rea* and thus preclude the benefits of a plea to recklessness. *United States v. Gomez-Hernandez*, 680 F.3d 1171, 1176

(9th Cir. 2012) ("it is well-settled that attempted aggravated assault under Arizona law covers only intentional conduct") (citing *State v. Kiles,* 175 Ariz. 358, 857 P.2d 1212, 1224 (1993) ("[A]ttempt is a specific intent crime and by definition involves *intentional* conduct."). Therefore, in order to avoid a crime of violence or a crime of domestic violence, counsel would be better off pleading to a straight assault than an attempt in order to leave open the possibility of a reckless mens rea.

Regarding the year's sentence, simple assault under Arizona law is only punishable as a misdemeanor with a maximum sentence of six months. However, if a conviction for assault under § 13-1203 serves as the basis for an aggravated assault under § 13-1204, a sentence of one year or more could result in 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."

A conviction under A2 coupled with a reference to 13-3601 will be a crime of domestic violence. Camacho-Cruz v. Holder, 621 F.3d 941, 943 (9th Cir. 2010) ("intentionally placing another person in reasonable apprehension of immediate bodily harm" is 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); *Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010);); *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012) (California "general intent" crime that employs offensive touching and a mens rea of recklessness is not categorically a "crime of violence" under section 16(b)). Therefore, a plea to A3, even with a *mens rea* of "intentionally," should not be held a categorical 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. Counsel should avoid pleading to A1 as a class one misdemeanor, or to A2. Where possible, counsel should also attempt to keep the record clear of information that more than recklessness or mere offensive touching was involved.

Note that a plea to *attempted* assault will always involve an intentional *mens rea* and thus preclude the benefits of a plea to recklessness. *United States v. Gomez-Hernandez*, 680 F.3d 1171, 1176 (9th Cir. 2012) ("it is well-settled that attempted aggravated assault under Arizona law covers only intentional conduct") (citing *State v. Kiles,* 175 Ariz. 358, 857 P.2d 1212, 1224 (1993) ("[A]ttempt is a specific intent crime and by definition involves *intentional* conduct."). Therefore, in order to avoid a

crime of violence or a crime of domestic violence, counsel would be better off pleading to a straight assault than an attempt in order to leave open the possibility of a reckless mens rea.

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. Note, however, that because of the risk that the Ninth Circuit might decide to revisit *Tokatly* in light of subsequent Supreme Court cases, where possible criminal defense counsel should put all efforts into avoiding a crime of violence. Immigration counsel will continue to cite *Tokatly* and other beneficial governing precedent, unless and until it is modified. See discussion in Note: Domestic Violence.

If there is no reference to § 13-3601 but the record of conviction mentions a domestic relationship, this may be removable as a crime of domestic violence. *United States v. Aguila-Montes de Oca,* 655 F.3d 915, 940 (9th Cir. 2011) (en banc). Immigration counsel would have arguments against this if the domestic relatioship was not "actually required" in order to convict the defendant of the offense. *Id.* at 937.

Other Grounds: Child Abuse, Abandonment, or Neglect: If the victim is a minor and the age of the victim appears in the record of conviction, a conviction would be removable under the ground of child abuse, neglect, or abandonment, even in the absence of a reference to § 13-3601. *Matter of Velazquez-Herrera,* 24 I&N Dec. 503 (BIA 2008). Immigration counsel would have strong arguments against this if the age of the victim was not "actually required" in order to convict the defendant of the offense. *United States v. Aguila-Montes de Oca,* 655 F.3d 915, 940 (9th Cir. 2011) (en banc). However, defense counsel should always attempt to leave the age of a minor victim out of the 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 most unpublished BIA decisions have held to the contrary. Simple assault knowing that the person was a police officer under A8 should not be a CMT, particularly when the plea involved mere offensive touching or the possibility of it under §13-1203(A)(3). The same might be true for other occupations listed in A8.

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. But the Ninth Circuit has recently suggested that a California "general intent" crime that employs a mens rea of recklessness would not be a "crime of violence" under section 16(b). *See Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012).

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.

Note that a plea to *attempted* assault will always involve an intentional *mens rea* and thus preclude the benefits of a plea to recklessness. *United States v. Gomez-Hernandez*, 680 F.3d 1171, 1176 (9th Cir. 2012) ("it is well-settled that attempted aggravated assault under Arizona law covers only intentional conduct") (citing *State v. Kiles,* 175 Ariz. 358, 857 P.2d 1212, 1224 (1993) ("[A]ttempt is a specific intent crime and by definition involves *intentional* conduct."). Therefore, in order to avoid a crime of violence or a crime of domestic violence, counsel would be better off pleading to a straight assault than an attempt in order to leave open the possibility of a reckless mens rea.

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

Other Grounds: Child Abuse: A6 (person is eighteen years of age or older and commits the assault on a child who is fifteen years of age or under) will likely be charged as a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)(i). See *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) (unreasonably placing a child in a situation that poses a threat of injury to the child's life or health is categorically a

crime of child abuse even though no proof of actual harm or injury to the child is required). However, *Matter of Soram* may be in conflict with the Ninth Circuit's decision in *Pacheco-Fregozo v. Holder*, 576 F.3d 1030 (9th Cir. 2009), which held that a statute that includes only the *possibility* of harm, with no actual physical or emotional injury, does not categorically fall within the definition of a "crime of child abuse." See *Jimenez-Juarez v. Holder,* 635 F.3d 1169, n.2 (9th Cir. 2011) (upholding *Pacheco-Fregozo* post-*Soram*). Defense counsel should conservatively advise that any plea to A6 will be removable as a crime of child abuse but attempt to plead to language that avoids any reference to actual harm or injury to the victim.

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:** This conviction will make a person deportable and inadmissible as a controlled substance offense only if the record of conviction specifies that the offense involved a drug, rather than alcohol. Defense counsel should plead to alcohol or at least leave the record vague between alcohol and controlled substances.

In theory, a conviction is only removable as a controlled substance offense if the drug is identified as a federally recognized controlled substance in the record of conviction. However, some unpublished BIA decisions have held that, even though the Arizona controlled substance schedule contains drugs that do not appear on the federal schedule, the Arizona legislature "intended to" track the federal list of illegal drugs such that an Arizona drug conviction is removable regardless of whether a controlled substance is identified. See *In Re: Ramon Roberto Huerta-Flores A.K.A. Roberto Huerta*, : A092 444 014 - ELO, 2010 WL 5808899 (BIA Aug. 27, 2010). Therefore, counsel should try to leave the record vague as to what controlled substance was involved but should not assume that a controlled substance conviction with an unidentified drug will be safe.

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 most immigration judges have held to the contrary. Assault in which a person intentionally or knowingly inflicts serious physical injury is likely a CIMT. *Uppal v. Holder,* 576 F.3d 1014 (9th Cir. 2009). 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. *Flores-Lopez v*. *Holder*, 685 F.3d 857 (9th Cir. 2012) (California "general intent" crime that employs a mens rea of recklessness is not categorically a "crime of violence" under section 16(b)). 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 a non-firearm weapon or 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.** Probably, if a 365 day or more sentence is imposed, although immigration counsel can argue that it is not categorically a crime of violence since the weapon could be fired at one's own house. *See U.S. v. Martinez-Martinez,* 468 F.3d 604 (9th Cir. 2006).

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 try 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 that 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, arguably 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). A false imprisonment statute that does not require an intent to do harm should not be a CMT, although the Ninth Circuit has held that "violence, menace, fraud, or deceit"—which is similar to the requirement of "physical force, intimidation or deception" here—implies an intent to do harm. *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 626 (9th Cir. 2010). However, since the statute can also be violated by something other than "physical force, intimidation or deception" if the victim is a child or an incompetent adult, a vague record of conviction that does not specify the means by which the "restraint" was achieved should not be a CMT. See *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 627 (9th Cir. 2010)

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. The Ninth Circuit has held that kidnapping is not an aggravated felony crime of violence under 18 USC § 16(a) because it may be committed without the use or threat of violence, and the same arguments would apply here. *United States v. Marquez-Lobos*, 683 F.3d 1061, 1066 (9th Cir. 2012) (citing *State v. Bible,* 175 Ariz. 549, 604, 858 P.2d 1152 (1993)). In *Marquez-Lobos,* the Ninth Circuit also noted that when the victim is a minor who is less than 18 years old or incompetent, a lack of consent may be established through non-acquiescence by the lawful custodian, which does not involved the use or threat of violence. *Id.* (citing *State v. Viramontes,* 163 Ariz. 334, 336, 788 P.2d 67 (1990)). 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. Defense counsel should keep the record free of reference to force or intimidation in order to allow immigration counsel to argue against this.

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 involved "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. See *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) (unreasonably placing a child in a situation that poses a threat of injury to the child's life or health is categorically a crime of child abuse even though no proof of actual harm or injury to the child is required). 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.

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."**

19. Kidnapping, A.R.S. 13-1304

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 or involved a minor or incompetent adult 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. The Ninth Circuit has held that this statute is not an aggravated felony crime of violence under 18 USC § 16(a) because it may be committed without the use or threat of violence. *United States v. Marquez-Lobos*, 683 F.3d 1061, 1066 (9th Cir. 2012) (citing *State v. Bible,* 175 Ariz. 549, 604, 858 P.2d 1152 (1993)). In *Marquez-Lobos,* the Ninth Circuit also noted that when the victim is a minor who is less than 18 years old or incompetent, a lack of consent may be established through non-acquiescence by the lawful custodian, which does not involved the use or threat of violence. *Id*. (citing *State v. Viramontes,* 163 Ariz. 334, 336, 788 P.2d 67 (1990)). 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. Defense counsel should keep the record free of reference to force or intimidation in order to allow immigration counsel to argue against this.

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 (though immigration counsel would have arguments against the latter). 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). It can also encompass unreasonably placing a child in a situation that poses a threat of injury to the child's life or health even though no proof of actual harm or injury to the child is required. See *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010). A plea to Custodial Interference or False Imprisonment is safer.

21. Indecent Exposure, ARS § 13-1402.

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 might be charged as deportable child abuse or aggravated felony sexual abuse of a minor if the record demonstrates that the child was harmed. 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): Indecent exposure without a sexual intent is not a CMT. See *Nunez v. Holder*, 594 F.3d 1124, 1133-34 (9th Cir. 2010) ("it is the sexual intent with which the exposure occurs" that transforms it into a CMT); *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). Arizona indecent exposure requires mere recklessness regarding the

possibility of causing offense and could be committed by topless or nude sunbathing, or an intoxicated man who needed to urinate in public.

Even an offense that includes a plea to sexual motivation under ARS § 13-118 (which states that the defendant committed the crime "for the purpose of the defendant's sexual gratification") is not categorically a CMT. *Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010). The Ninth Circuit has held that moral turpitude only inheres if the offense involved an intent to do harm or resulted in actual harm to the victim. Defense counsel should keep the language of the plea vague and avoid any references to specific sexual conduct or harm to the victim.

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). However, if the conviction includes a plea to ARS § 13-118 for sexual motivation (which states that the defendant committed the crime "for the purpose of the defendant's sexual gratification") there is a stronger possibility that the offense would be found an aggravated felony, if the offense is punished as a class 6 felony based on the victim being under 15 years of age. If instead the victim is a minor but 15 years or older, counsel should attempt to keep age from the record, but immigration counsel have a very strong argument that the offense is not sexual abuse of a minor. *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc); *Nijhawan v. Holder,* 129 S. Ct. 2294 (2009). Since sexual abuse of a minor requires both "sexual conduct" and "physical or psychological harm" to the victim, *United States v. Medina-Villa,* 567 F.3d 507, 513 (9th Cir. 2009), defense counsel should avoid any references to specific sexual conduct or harm to the victim.

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. However, "child abuse" can also encompass unreasonably placing a child in a situation that poses a threat of injury to the child's life or health even though no proof of actual harm or injury to the child is required. See *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010). Immigration attorneys can also argue that there are minor ways to violate the statute (nude sunbathing, public urination) that do not constitute child abuse, and that it may not constitute child abuse if the conviction was for the general offense, rather than the section requiring that the victim was under the age of 15. See Note: 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.

22. Public Sexual Indecency, A.R.S. §13-1403

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. Defense counsel should keep the language of the plea vague and avoid any references to the victim's awareness of the offense or harm to the victim.

Aggravated felony: Sexual Abuse of a Minor. Divisible. In *Rebilas v. Mukasey*, 527 F.3d 783 (9th Cir. 2008) ~~*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 786. 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. Try to keep the age of the victim out of the factual basis and avoid a plea to (B)

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 Velazquez-Herrera,* 24 I&N Dec. 503 (BIA 2008). If the statute does not have as an element that the victim is under 18, it still may be a deportable crime of child abuse if the reviewable record of conviction establishes this fact. To prevent (A) from being a deportable crime of child abuse, do not let the record establish that the victim was under age 18.

For (B) or for (A) when the record establishes minor age, under *Rebilas, supra,* immigration counsel can argue that "child abuse" was not committed if the minor was unaware of the offender's conduct. However, "child abuse" can also encompass unreasonably placing a child in a situation that poses a threat of injury to the child's life or health even though no proof of actual harm or injury to the child is required. *See Matter of Soram*, 25 I&N Dec. 378 (BIA 2010). A plea to Indecent Exposure may be safer, but if this is not possible, try to avoid a plea to (B) and keep the victim's age and the minor's awareness of the conduct out of the record of conviction. See Note: Domestic Violence.

23. **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): Sexual touching without the consent of a victim of any age will be held a CMT.

Regarding touching the breast of a person under the age of 15, the Board of Immigration Appeals held that conviction of any consensual sexual conduct with a minor is a CIMT if the defendant knew or should have known that the victim was under age 18. *Matter of Silva-Trevino,* 24 I&N Dec. 687 (A.G. 2008). Where possible counsel should *include in the record*, for example on the plea form, a statement that the defendant reasonably believed that the victim was age 18 (or older). Without that finding, the IJ may conduct a factual inquiry into whether the defendant knew or should have known the victim was under age 18. Assuming that the IJ finds the defendant knew or should have known the victim was under 18 in this inquiry, immigration counsel will argue that the *Silva-Trevino* standard itself is unreasonable if it is interpreted to mean that even this relatively innocuous sexual conduct with a minor, which under this statute does not require lewd intent, is a CIMT. While normally the Ninth Circuit will give *Chevron* deference to the BIA's determination of what conduct amounts to a CIMT, it will not do so if the decision is so unreasonable as to be impermissible. See discussion of deference and moral turpitude in *Marmolejo-Campos v. Holder,* 558 F.3d 903 (9th Cir. 2009) (en banc). However, this argument is likely to lose before an Arizona immigration judge and might or might not win at the Ninth Circuit, and the client probably will be detained during the appeals.

While there is no guarantee, it is possible that in the future the law will change in ways that benefit a defendant with a vague record of conviction. First, the Ninth Circuit might join other circuits and decline to follow the *Silva-Trevino* rule that permits an IJ to inquire into the underlying facts to determine if there is a CIMT, in the face of a vague record of conviction. If that occurs, a vague record that does *not* state that the defendant knew or had reason to know the victim was under 18 will prevent the offense from coming within the CIMT deportation ground. Second, as discussed above, the Ninth Circuit might decline to defer to the *Silva-Trevino* substantive test, that even very innocuous sexual conduct with a person whom the perpetrator knows or should know is a minor is a CIMT. Other circuit courts of appeal have rejected one or both aspects of *Silva-Trevino*. *See e.g. Jean-Louis v. AG of the United States,* 582 F.3d 462 (3d Cir. 2009). Earlier the Ninth Circuit had held that even consensual sexual intercourse with a person under the age of 16 is not necessarily moral turpitude. *Quintero-Salazar v. Keisler,* 506 F.3d 688 (9th Cir. 2007) (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). Again, while a defendant should raise these arguments, he or she is likely to be detained for the time until the Ninth Circuit makes a decision.

Aggravated Felony: Sexual abuse of a minor. *Non-consensual sexual contact with a person over the age of 15***.** This will not be an aggravated felony as sexual abuse of a minor as long as the record either specifies that the victim was 18 or older (but see Aggravated Felony: Crime of Violence below) or at least does not specify that the victim was under the age of 18 (conviction will not come within the aggravated felony deportation ground, but might be an aggravated felony for purposes of bars to relief from removal; see "Burden of Proof" at beginning of these annotations). If the record specifies that the victim was younger than age 18, immigration counsel can still argue that the conviction is not an aggravated felony, but this is likely to lose before Arizona immigration judges.

Non-consensual sex meets the test for "sexual abuse" because it is likely to be considered to cause emotional or physical harm to the victim. See discussion of "harm" test in *United States v. Medina-Villa*, 567 F.3d 507 (9th Cir. 2009). (Further, see discussion below of this offense as a crime of violence, deportable crime of child abuse and crime of domestic violence, and crime involving moral turpitude.)

Regarding proof that the victim was a minor, it is likely that Arizona immigration judges will find that a record of conviction that specifies that the victim was under 18 will prove the victim was a minor. Earlier law held that if an offense requires only that the victim be over age 15, evidence in the record that the victim was some other specific age could not be considered. *See, e.g.*, *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc), *Rivera-Cuartas v. Holder*, 605 F.3d 699 (9th Cir. 2010). In 2011 the Ninth Circuit held that an IJ may consider a fact from the record of conviction that is not literally an element of the offense, as long as the fact is *necessary to establish* an element of the offense. *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) *(en banc*)*, overruling in part Estrada-Espinoza, supra;* see Practice Advisories on *Aguila-Montes de Oca* at www.ilrc.org/crimes. ICE will argue that because a statement of the victim's specific age is necessary to establish that the age was over 15, such evidence from the record can be considered. Immigration counsel will contest this and might win at the Ninth Circuit, but criminal defense counsel must assume that Arizona immigration judges will agree with ICE and that the defendant will be detained during any appeals. (Note that currently ICE is arguing that an immigration judge can consider a specific age of the victim set out in record, even where the statute of conviction has *no* element of age, so that the age of the victim would be necessary to prove an element of the offense. See discussion of ARS § 13-1405.)

Consensual sexual conduct with a person under the age of 15, if the contact involves only the female breast. Criminal defense counsel must assume conservatively that this will be held to be sexual abuse of a minor. To preserve arguments against this in immigration proceedings, criminal defense counsel should have the record of conviction indicate that the victim was age 14, or at least not indicate that the victim was age 13 or younger.

Immigration counsel will point out that while the Ninth Circuit has held that conduct with lewd intent with a person age 13 or younger is sexual abuse of a minor, and that conduct with lewd intent with a victim age 15 or older is not necessarily sexual abuse of a minor, the court has not ruled on the offense of sexual contact with a victim who is age 14 or 15. Compare, e.g., *United States v. Baron-Medina*, 187 F.3d 1144, 1147 (9th Cir. 1999) (lewd act with a victim under age 14 is sexual abuse of a minor) with *U.S. v. Castro*, 607 F.3d 566, 567-58 (9th Cir. 2010) (lewd act with a 14- or 15-year old victim is not categorically SAM). In fact, the Ninth Circuit has held that even sexual intercourse with a 15-year-old is not necessarily sexual abuse. *Pelayo-Garcia v. Holder,* 589 F.3d 1010 (9th Cir. 2009) (sexual conduct with a person just under sixteen is not *per se* abusive). In light of that standard, immigration counsel will argue that touching the breast of a 14-year-old should not be held necessarily to be sexual abuse of a minor.

The reasoning in these cases is as follows. Sexual contact with a person under age of 14 has been held to constitute sexual abuse of a minor on the grounds that using young children for sexual gratification is inherently abusive and harmful. *United States v. Baron-Medina*, 187 F.3d 1144, 1147 (9th Cir. 1999). The Ninth Circuit has recognized, however, that the older the teenager, the less likely it is that some form of consensual contact will cause psychological harm. *See United States v. Baza-Martinez,* 464 F.3d at 1015 (9th Cir. 2006) (noting that, under *Baron-Medina*, section 288(a) punishes "abuse" "because it requires use of young children, implying harmful or injurious conduct" (internal quotation marks omitted)); *United States v. Lopez-Solis*, 447 F.3d 1201, 1206 (9th Cir. 2006) ("The age affects

whether the conduct the statutory rape law covers constitutes 'abuse.'"); see also *Valencia v. Gonzales,* 439 F.3d 1046, 1051 (9th Cir. 2006) (noting that the age of the victim affects whether a statute is categorically a "crime of violence"). In addition, ARS § 13-1404 does not require that the act be committed for sexual gratification or with lewd intent. Given the mild nature of the sexual contact, the relatively older age (age 14, not 13) of the victim, and the lack of requirement of intent for sexual gratification, there is a viable argument that the offense is not sexual abuse of a minor.

However, immigration judges in Arizona may not accept this argument, and counsel may have to appeal it to the Ninth Circuit, while the immigrant remains in detention. For this reason, criminal defense counsel should avoid this plea.

Aggravated Felony: Crime of Violence. *Nonconsensual sexual contact with a person at least 15 years old.* 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, a felony conviction 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.

Consensual sexual contact with a person under age 15, if the contact is limited to the female breast. While ICE may aggressively charge this as a crime of violence if there is a sentence of 365 days, immigration counsel have strong arguments that it should not be a crime of violence.

Other Grounds: Crime of Child abuse. *Nonconsensual sexual contact with a person at least 15.* Criminal defense counsel should make every effort to keep the victim's age from the record of conviction, if the victim is under the age of 18. If the reviewable record shows that the victim was under 18, the offense will be held a deportable crime of child abuse; if it does not, the offense should not be held a deprtable crime of 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). The Board held that even if being a minor is not an element of the offense, if minor age is conclusively established by the record of conviction, the conviction can be held a crime of child abuse.

Consensual sexual contact with a person under the age of 15. In this case, the age of the victim is proved, but immigration counsel have a strong argument that mild sexual contact with a 14-year-old is not per se harmful.

Other Grounds: Crime of DV: 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.

24. **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: The statute describes three offenses, none of which require threat, duress or deceit. In order of the potential severity of immigration consequences, the offenses are sexual intercourse or oral sex with (1) a victim who is 15 – 18 years of age; (2) a victim under the age of 15; or (3) a victim who is 15 – 18 years of age where the perpetrator is a parent or guardian. Each offense must be considered separately. In some circumstances the first offense might have no immigration consequences; the second offense will have some immigration consequences but might escape an aggravated felony; and the third offense will have all possible immigration consequences.

If the record establishes that the offense is a class 2 felony because the perpetrator is in a parental or guardianship relationship, it is likely that the offense will be held sexual abuse of a minor

Crime Involving Moral Turpitude (CMT): Sexual conduct between a parent or guardian and a child always will be considered a CIMT. Consensual sexual conduct with a person under the age of 15 or 18 may or may not be a CIMT. 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, in *Matter of Silva-Trevino*, 24 I&N Dec. 687, 705 (A.G. 2008), the Attorney General found that any offense in which an adult engages in intentional sexual contact with a person who the defendant knew or should have known was a minor will constitute a crime involving moral turpitude. Under *Silva-Trevino*, the immigration judge may hold a hearing and question the defendant (now respondent) as to whether he knew or should have known that the victim was under-age. If in fact the defendant was not aware, it would be best to put evidence of this in the criminal record, in hopes of creating a record that the immigration judge would feel constrained to accept. If this is not possible, counsel should make a vague record as to the defendant's knowledge of the victim's age. Counsel also should keep the record vague and avoid an adverse record of conviction (e.g., a younger victim, greater age difference, or other adverse factor).

Aggravated Felony: Sexual Abuse of a Minor.

Victim 15-18 years of age: The Ninth Circuit held in *Rivera-Cuartas v. Holder*, 605 F.3d 699 (9th Cir. 2010) that a conviction for sexual conduct with a minor under 13-1405 is not categorically an aggravated felony since it does not match the generic definition of "sexual abuse of a minor" found at 18 U.S.C. § 2243 and it includes conduct that would not qualify as "physical or psychological abuse," particularly against an older adolescent. The generic definition of "sexual abuse of a minor" is set out in 18 U.S.C. § 2243, which requires that the victim be between the ages of 12 and 16 and at least four years younger than the defendant. Since the Arizona statute is lacking these elements, a conviction under § 13-1405 should not categorically constitute an aggravated felony as "sexual abuse of a minor." However, if the record of conviction shows that the victim is 15 and the defendant is 4 years older, ICE may claim that *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc) partially overturned *Rivera-Cuartas* such that it is an aggravated felony. Defense counsel should try to cleanse the record of any mention of the age of the victim or defendant at the time of the offense.

Victim under 15: If the record indicates that the victim is 14, immigration counsel may have arguments that it is not sexual abuse of a minor. But if the record indicates the victim is 13 or younger, it will be sexual abuse of a minor. If counsel must plead to this subsection, try to keep the record vague as

to the victim's age; this will help in terms of deportability but client may not be able to establish eligibility for relief since he carries the burden.

Victim is 15-18 and defendant is a parent/guardian: Assume that this will always be considered sexual abuse of a minor. Better to keep the record vague between this and a victim under 15 to leave at least some argument that it's not sexual abuse of a minor.

Other Grounds: **Child Abuse.** Possibly. See Note: Domestic Violence. The BIA has held that "child abuse" includes an intentional or negligent act or omission that "constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation. At a minimum, this definition encompasses convictions for offenses involving the infliction on a child of physical harm, even if slight; mental or emotional harm, including acts injurious to morals; sexual abuse, including direct acts of sexual contact, but also including acts that induce (or omissions that permit) a child to engage in prostitution, pornography, or other sexually explicit conduct; as well as any act that involves the use or exploitation of a child as an object of sexual gratification or as a tool in the commission of serious crimes, such as drug trafficking." Moreover, as in the "sexual abuse of a minor" context, the term "crime of child abuse" refers to an offense committed against an individual who is under 18 years of age. Child abuse need not be committed by the child's parent or by someone acting in loco parentis.

Immigration counsel can argue that consensual sexual intercourse or oral sexual contact with an older adolescent does not necessarily cause harm or injury, and is not use or exploitation. Defense counsel should avoid any references to nonconsensual or violent conduct and should attempt to exclude the age of a young minor from the record of conviction. Sexual conduct with a child 15 or under will likely be found an offense involving "child abuse." *Jimenez-Juarez v. Holder*, 635 F.3d 1169, 1171 (9th Cir. 2011) (the act of touching the sexual or other intimate parts of the victim when the victim is either 14 or 15 years old is categorically a crime of child abuse).

25. **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 did not involve penetration; *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 likely 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 felony 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.**

26. **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 did not involve penetration, *and* obtained a sentence imposed of 364 days or less. See discussion of sexual assault, *supra.*

Other Grounds: Domestic Violence. Conviction will cause deportability as a "crime of domestic violence." 8 USC § 1227(a)(2)(E). See Note: Safer Pleas for alternatives.

27. **Molestation of a Child, ARS §13-1410**

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. See discussion at ARS 13-1404, *supra.*

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)(i).

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. Many offenses with the element of lewdness or sexual gratification are 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," criminal defense counsel should assume that it will be found to involve moral turpitude.

Aggravated Felony: If the record of conviction establishes that 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). Immigration counsel would have strong arguments against this because the age of the victim is not "actually required" in order to convict the defendant of any element of this age-neutral offense. *United States v. Aguila-Montes de Oca,* 655 F.3d 915, 937 (9th Cir. 2011) (en banc). However, because ICE is bringing this issue up on appeal to the Ninth Circuit, defense counsel should always attempt to sanitize the record of conviction of information that the victim was under 18 years of age. Even assuming the government proved minor age of the victim, immigration counsel will argue that since the victim is not required to be aware of the conduct, the offense is not *per se* harmful to a minor victim.

Domestic Violence/Child abuse: Though unlikely, this offense could potentially be charged as stalking under the domestic violence ground of removal. It could also be charged as a deportable crime of child abuse, if the record shows that the victim is a minor. Immigration counsel would have strong arguments against a child abuse charge if the age of the victim was not "actually required" in order to convict the defendant of this age-neutral offense. *United States v. Aguila-Montes de Oca,* 655 F.3d 915, 937 (9th Cir. 2011) (en banc). However, defense counsel should always attempt to leave the age of a minor victim out of the record of conviction. Even assuming the government proved minor age of the victim, immigration counsel will argue that since the victim is not required to be aware of the conduct, the offense is not *per se* harmful to a minor victim.

29. Criminal Trespass, ARS §§ 13-1502-3

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.

Crime Involving Moral Turpitude (CMT): This should not be a CMT but it may depend on the circumstances of the offense. Simple trespass is not a CIMT because there is no intent to commit CMT in commission of trespassing. *Matter of Esfandiary*, 16 I&N Dec. 659, 661 (BIA 1979) (conviction for malicious trespass required finding of an intent to commit petty larceny). However if the record of conviction or even police reports or other documents indicate that the person intended to commit larceny or another offense that is a CIMT, ICE may assert that it can use this information to find that the offense is a CIMT. While immigration counsel will rightly argue that intent to commit a further crime is neither an element of trespass, nor a fact that would be necessary to prove an element of trespass in a particular case, the immigration judge might wrongly hold for the government.

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 remaining 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): Maybe. See supra Criminal Trespass in the Third Degree.

Aggravated Felony: No, only punishable as misdemeanor.

30. 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. The BIA has held that entry of an occupied dwelling with intent to commit any offense is a CMT. *Matter of Louissaint,* 24 I&N Dec. 754 (BIA 2009). However, immigration counsel can argue that A1 is not a CMT if the record fails to show that the dwelling was occupied or that there was an intent to commit an offense therein. Mere unlawful entry under A2, and probably A3, is not a CMT. A4 and A5 are probably CMTs. Leave record open to possibility of A2.

Also, if the record of conviction or even police reports or other documents indicate that the person intended to commit larceny or another offense that is a CIMT, ICE may assert that it can use this information to find that the offense is a CIMT. While immigration counsel will rightly argue that intent to commit a further crime is neither an element of trespass, nor a fact that would be necessary to prove an element of trespass in a particular case, the immigration judge might wrongly hold for the government.

31. <u>Possession of Burglary Tools,</u> 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." However, as a practical matter many immigration judges are categorically finding this to be a CMT.

A1. The issue is the intent within the burglary the person intends to commit. Burglary under 13-1506, 13-1507, and 13-1508 may not be 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 of conviction or other evidence establishes that the intent is to commit theft or another CMT. (To determine whether an offense may be found turpitudinous in immigration court, see *Matter of Silva-Trevino,* 24 I&N Dec. 687 (A.G. 2008).) This may also be found a CMT if the burglary was of an occupied dwelling, regardless of whether the underlying intent involved theft. *Matter of Louissaint,* 24 I&N Dec. 754 (BIA 2009)

A2. This should not be a CMT since there is no element in this section requiring an intent to commit a CMT. See *Matter of S-, id.* However, in practice, some immigration judges may find it to be a CMT.

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.

32. 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 may avoid this as well.

Crime Involving Moral Turpitude: This is a divisible statute. The key is to avoid a record or any evidence demonstrating that the client pleaded to an offense with an intent 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*, 1 I. & N. Dec. 403 (BIA 1943); *Matter of M*, 9 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 undesignated 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." (To determine whether an offense may be found turpitudinous in immigration court, see *Matter of Silva-Trevino,* 24 I&N Dec. 687 (A.G. 2008).) 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 undesignated 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.

The Ninth Circuit has also held that *attempted* commercial burglary in which the defendant entered a store with the intent to shoplift is not a CMT. *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1109 (9th Cir. 2011). Counsel can avoid a CMT by creating a factual basis that the defendant merely entered the store lawfully with intent to commit a theft. This is a good alternative to theft or shoplifting since even police reports or other documents showing that defendant actually committed theft should not

convert this into a CMT. *Hernandez-Cruz v. Holder*, 651 F.3d 1110-1111 (police reports showing that defendant actually took merchandise cannot deprive defendant of the benefit of his plea bargain).

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.

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). However, the Arizona burglary statutes are broader than the generic definition of burglary for at least four reasons:

1) ***Unlawful entry.*** Although Arizona burglary appears to require that the defendant "enter or remain unlawfully," the definition of this phrase includes a lawful entry of a business with an intent to steal merchandise. ARS § 13-1501(2). Therefore, immigration counsel can argue that a conviction under any of the three burglary statutes cannot be held an aggravated felony as "burglary" unless the record of conviction shows an unlawful entry. *United States v. Aguila-Montes de Oca,* 655 F.3d 915 (9th Cir. 2011) (en banc)

2) ***"Structure."*** The Arizona definition of "structure" includes vending machines and vehicles, which do not fit the generic burglary definition. *See* ARS § 13-1501(12); *U.S. v. Snellenberger,* 548 F.3d 699 (9th Cir. 2008) (en banc). Also, the Arizona definition of "residential structure" includes both movable and unmovable structures, the latter of which does not fit the generic definition of "burglary." See *United States v. Terrell*, 593 F.3d 1084, 1092-93 (9th Cir. 2010) cert. denied, 131 S. Ct. 2094, 179 L. Ed. 2d 895 (U.S. 2011).

3) ***"In or on."*** While the generic definition of "burglary" requires an entry "into" a structure, Arizona burglary includes entries both "in and on" a structure. Thus, a person could be convicted of burglary for walking on the roof of a structure or for sitting on the seat of a motorcycle that was subsequently stolen. *State v. Ortiz,* No. 2 CA-CR 2008-0372, 2009 WL 1863883, at *3 (Ariz. Ct. App. Jun. 29, 2009) (affirming § 13-1506(A)(1) conviction for defendant who "remained unlawfully on a motorcycle with the intent to commit theft of that motorcycle").

4) ***"Yard."*** Since generic burglary requires entry into a structure, an entry into a fenced residential or commercial yard is not an aggravated felony as burglary. *U.S. v Wenner*, 351 F.3d 969 (9th Cir. 2003) (Wash. burglary). Note that entry into a residential yard may be charged as an aggravated felony crime of violence.

Based on these distinctions, counsel can structure pleas in the following ways:

A1. Counsel can: 1) plead to lawful entry of a business or leave the record vague as to whether the entry was unlawful; 2) plead to entry of a vehicle or an unknown nonresidential structure; 3) plead to

entry "on" the structure or include both the "in or on" language in the plea; and 4) plead to entry of a "fenced commercial yard" or "fenced commercial or residential yard."

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. If the entry was of a locked vehicle with an underlying intent to commit theft, however, it may be removable as an aggravated felony for attempted theft with a sentence of 365 days or more. *Ngaeth v. Mukasey*, 545 F.3d 796, 802 (9th Cir. 2008). Counsel should avoid references in the plea to a locked vehicle and an intent to commit theft.

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. The Ninth Circuit has held that a conviction for entering a locked vehicle with the intent to commit theft constitutes an aggravated felony if the sentence is 365 days or more. *Ngaeth v. Mukasey*, 545 F.3d 796, 802 (9th Cir. 2008). Therefore, a plea to A2 in which the underlying intent involved theft would likely be an aggravated felony. 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. *United States v. Becker,* 919 F.2d 568 (9th Cir. 1990); *Lopez–Cardona v. Holder,* 662 F.3d 1110 (9th Cir. 2011); *United States v. Ramos-Medina*, 682 F.3d 852, 855 (9th Cir. 2012). 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* 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 avoid a reference to § 13-3601and 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.

<u>Burglary in the Second Degree</u>, 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." (To determine whether an offense may be found turpitudinous in immigration court, see *Matter of Silva-Trevino,* 24 I&N Dec. 687 (A.G. 2008).) The BIA has also found that burglary of an occupied dwelling is a CMT regardless of the underlying crime. *Matter of Louissaint,* 24 I&N Dec. 754 (BIA 2009). However, the definition of a "residential structure" under Arizona law includes dwellings that are not occupied. ARS § 13-1501(11). Counsel should attempt to plead to burglary of an unoccupied dwelling or leave the record vague as to whether the residence was occupied at the time of the burglary.

Aggravated Felony as Burglary: *See* ARS §13-1506.

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.

Aggravated Felony as Attempted Theft. Conviction of an attempt to commit an offense involving theft may be an aggravated felony if a sentence of one year or more is imposed. The Ninth Circuit has held that a conviction for entering a locked vehicle with the intent to commit theft constitutes an aggravated felony if the sentence is 365 days or more. *Ngaeth v. Mukasey*, 545 F.3d 796, 802 (9th Cir. 2008). Therefore, any plea in which a "substantial step" is taken in order to commit theft may be an aggravated felony. Defense counsel should avoid reference to entry of any "locked" structure and 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.

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). However, a class 2 for residential structure will likely be found a CMT regardless of the underlying crime. *Matter of Louissaint,* 24 I&N Dec. 754 (BIA 2009) (burglary of an occupied dwelling is categorically a CMT). 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"). The fact that possession of a weapon is an element of the offense may lead some immigration judges to analogize it to residential burglary in that is more likely to invite a violent defensive response from the resident. *Matter of Louissaint,* 24 I&N Dec. 754, 758 (BIA 2009).

Aggravated Felony: See § 13-1506. However, 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 avoid a reference to § 13-3601 and 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.

33. 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. Gonzales*, 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 that 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 §13-3601 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.

34. <u>Criminal littering or polluting</u>, 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.

35. 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.

36. Reckless burning, ARS § 13-1702.
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), aff'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)) or if the act is "reprehensible" (*Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). 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). Baseness and depravity should be held equivalent to "reprehensible."

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). It should also not be found an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i) as an offense "described in" the federal criminal statute since the federal statute requires "maliciously" damaging or destroying property, which is not equivalent to recklessness. *See Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012)

37. 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: This may be held an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i) *regardless of the length of sentence.* In *Matter of Bautista,* 25 I&N Dec. 616 (BIA 2011), the BIA found

that a conviction under a New York arson statute was an offense "described in" 18 U.S.C. § 844(i) even though it lacked an element of interstate commerce since such an element was purely jurisdictional. Since § 1101(a)(43)(E)(i) does not require a sentence of 365 days, *any* conviction could be an aggravated felony even with a sentence of less than one year. However, a sentence of one year or more will also trigger an aggravated felony as a crime of violence. 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).

If a conviction under this statute cannot be avoided, defense counsel should obtain 364 days or less sentence in order to leave immigration counsel arguments that the Arizona statute is broader than 18 U.S.C. § 844(i). If a sentence of one year is imposed, immigration counsel can try to 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 with a sentence of one year or more, leave the record vague as to the owner of the structure or property. Alternate plea: Reckless Burning §13-1702.

38. 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: This may be held an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i) *regardless of the length of sentence.* In *Matter of Bautista,* 25 I&N Dec. 616 (BIA 2011), the BIA found that a conviction under a New York arson statute was an offense "described in" 18 U.S.C. § 844(i) even though it lacked an element of interstate commerce since such an element was purely jurisdictional. Since § 1101(a)(43)(E)(i) does not require a sentence of 365 days, *any* conviction could be an aggravated felony even with a sentence of less than one year. However, a sentence of one year or more will also trigger an aggravated felony as a crime of violence. 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).

If a conviction under this statute cannot be avoided, defense counsel should obtain 364 days or less in order to leave immigration counsel arguments that the Arizona statute is broader than 18 U.S.C. § 844(i). If a sentence of one year is imposed, immigration counsel can try to 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 with a sentence of one year or more, leave the record vague as to the owner of the structure or property. Alternate plea: Reckless Burning §13-1702.

39. 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.

40. 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). A plea to C3 will likely be found an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i) *regardless of the length of sentence. Matter of Bautista,* 25 I&N Dec. 616 (BIA 2011) (conviction under a New York arson statute was an offense "described in" 18 U.S.C. § 844(i) even though it lacked an element of interstate commerce since such an element was purely jurisdictional). Since § 1101(a)(43)(E)(i) does not require a sentence of 365 days, *any* conviction under C3 could be an aggravated felony even with a sentence of less than one year. A sentence of one year or more will also trigger an aggravated felony as a crime of violence. 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). See § 13-1704.

41. 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, regardless of whether the amount appears in the record of conviction. *See Nijhawan v. Holder,* 129 S. Ct. 2294 (2009). 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 not plead to A5, as receiving stolen property under a similar California statute has been held to be an aggravated felony under 8 U.S.C. § 1101(a)(43)(G). *Matter of Cardiel,* 25 I&N Dec. 12 (BIA 2009); *Verdugo-Gonzalez v. Holder*, 581 F.3d 1059, 1060 (9th Cir. 2009). However, immigration counsel may have an argument that A5 is broader than the California statute since A5 includes not only "knowing" but "having reason to know" that the property was stolen. Defense counsel should avoid any reference to the client "knowing" that the property was stolen or else leave the language of the plea vague.

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 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, regardless of whether the amount appears in the record of conviction. *See Nijhawan v. Holder,* 129 S. Ct. 2294 (2009). 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). Subsections A2, A4, A5 and A6 do not have an element to deprive; however, an intent to permanently deprive could be inferred from the record of conviction or other documents. A5 could be analogized to receiving stolen property, which is not a CMT unless it involved a permanent taking. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). A6 could be a CMT because an intent to permanently deprive may be inferred.

IMPORTANT: Recent case law has altered the process by which immigration judges decide whether an offense is a CMT. *See Matter of Silva-Trevino,* 24 I&N Dec. 687 (A.G. 2008). While judges were previously restricted to the record of conviction in determining whether a state offense qualified as a CMT, currently *any* evidence – including police reports, presentence investigations, and even the defendant's own testimony – may be considered in the finding of whether a conviction constitutes a CMT under a divisible statute. As a practical consequence, many Arizona immigration judges are using documents outside of the record to find that a conviction for Theft under § 13-1802 is categorically a CMT, particularly with *pro se* respondents. Therefore, defense counsel should conservatively assume that a plea in which the intent to deprive is left vague between a permanent and temporary taking will be found a CMT.

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.

42. 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. Divisible. A conviction for unlawful use of means of transportation is not categorically 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).

43. 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 CMTs. 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

44. 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 can make the difficult argument that if the record of conviction does not show that the theft was completed, and the record does not preclude the possibility that the person might have had a momentary intent to deprive but then changed his or her mind, it is not a CIMT. In *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1103 (9th Cir. 2011), the Ninth Circuit held that a person who enters a store with an intent to commit theft and then changes his mind and leaves has not committed a CMT. *Id*. at 1109 ("To harbor an inchoate intent to commit a crime, never acted upon, simply does not 'shock society's conscience'"). Both A4 and A5 involve situations in which a person may initially manifest an intent to shoplift by transferring merchandise from one container to another or concealing merchandise before abandoning the plan and leaving the store without committing the necessary "taking" for a CMT. *See Sulavka v. State*, 223 Ariz. 208, 212, 221 P.3d 1022, 1026 (Ct. App. 2009) (the act of removing an item from the shelf and concealing it, without more, is sufficient for a shoplifting conviction). While Arizona shoplifting requires a more substantial step towards theft than the statute in *Hernandez-Cruz*, defense counsel should leave open the option of a plea to A4 or A5 in order to allow immigration counsel to argue that the offense is not a CMT.

In addition, immigration counsel may argue that the statute is divisible because it does not require intent to permanently as opposed to temporarily deprive. For instance, the statute may reach a person who intends to "borrow" the object from the store and return it. Again, this is a difficult argument.

Note that a first moral turpitude offense that is a misdemeanor cannot cause deportability or inadmissibility 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.**

IMPORTANT: Recent case law has altered the process by which immigration judges decide whether an offense is a CMT. *See Matter of Silva-Trevino,* 24 I&N Dec. 687 (A.G. 2008). While judges were previously restricted to the record of conviction in determining whether a state offense qualified as a CMT, currently *any* evidence – including police reports, presentence investigations, and even the defendant's own testimony – may be considered in the finding of whether a conviction constitutes a CMT under a divisible statute. As a practical consequence, many Arizona immigration judges are using

documents outside of the record to find that a conviction for Shoplifting under § 13-1805 is categorically a CMT, particularly with *pro se* respondents. Therefore, defense counsel should conservatively assume that a plea in which the intent to deprive is left vague between a permanent and temporary taking will be found a CMT.

Aggravated Felony: Shoplifting will likely 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.

Immigration counsel can argue that a shoplifting conviction does not necessarily involve a "taking" for aggravated felony purposes since transferring merchandise from one container to another or concealing merchandise would not require the defendant to actually leave the store with the merchandise. See CMT; *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1103 (9th Cir. 2011). However, the argument that shoplifting is not an aggravated felony may not be as strong as for CMTs since a conviction under A4 or A5 could constitute a "substantial step" such that the offense could be charged as "attempted theft" under 8 USC § 1101(a)(43)(U); *Ngaeth v. Mukasey*, 545 F.3d 796, 802 (9th Cir. 2008) (entry of a locked vehicle with an underlying intent to commit theft constitutes a "substantial step" for purposes of an aggravated felony for attempted theft).

45. 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., Planes v. Holder*, 652 F.3d 991, 998 (9th Cir. 2011); *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). This is true regardless of whether the amount of loss appears in the record of conviction. *See Nijhawan v. Holder,* 129 S. Ct. 2294 (2009). 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.

46 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. Sections A1 and A3 contain an element of intent to deprive and as such are aggravated felonies.

Counsel should avoid a plea to A5, as receiving stolen property under the California statute has been held to be an aggravated felony under 8 U.S.C. § 1101(a)(43)(G). *Matter of Cardiel,* 25 I&N Dec. 12 (BIA 2009); *Verdugo-Gonzalez v. Holder*, 581 F.3d 1059, 1062 (9th Cir 2009). However, immigration counsel may have an argument that A5 is broader than the California statute since A5 includes not only "knowing" but "having reason to know" that the property was stolen. Defense counsel should avoid any reference to the client "knowing" that the property was stolen or else leave the language of the plea vague.

CMT. A2 and A4 should not categorically 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). In practice, however, many immigration judges may find these to be CMTs.

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). However, receipt of stolen property is not a CMT unless it involved a permanent taking. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). Defense counsel should strive to indicate on the record that there was no intent to deprive, or that the taking was only temporary. Under current law, a vague record is not sufficient.

IMPORTANT: Recent case law has altered the process by which immigration judges decide whether an offense is a CMT. *See Matter of Silva-Trevino,* 24 I&N Dec. 687 (A.G. 2008). While judges were previously restricted to the record of conviction in determining whether a state offense qualified as a CMT, currently *any* evidence – including police reports, pre-sentenced investigations, and even the defendant's own testimony – may be considered in the finding of whether a conviction constitutes a CMT under a divisible statute. As a practical consequence, many Arizona immigration judges are using documents outside of the record to find that a conviction for Theft of Means of Transportation under § 13-1814 is categorically a CMT, particularly with *pro se* respondents. Therefore, defense counsel should conservatively assume that a plea in which the intent to deprive is left vague between a permanent and temporary taking will be found a CMT.

47 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 will be an aggravated felony as a crime of violence or a theft crime. See Robbery, **§ 13-1902**. *United States v. Taylor*, 529 F.3d 1232, 1237 (9th Cir. 2008) (armed robbery under Arizona law involves the threat or use of force and is therefore a crime of violence).

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*, 21 I&N Dec. 330 (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).

48. 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 strong arguments that the statute is divisible since a conviction 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)); *State of Arizona v. Thompson,* 194 Ariz. 295 (1999) (MVD employee was convicted for including false information on an otherwise genuine document).

Aggravated Felony as Fraud or Deceit: Yes, if it involved a loss to the victim or victims of more than $10,000, regardless of whether the amount of loss appears in the record of conviction. *See* 8 USC §1101(a)(43)(M); *Nijhawan v. Holder,* 129 S. Ct. 2294 (2009). Regarding proof of $10,000 loss, see Note: Fraud.

49 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). However, immigration counsel can argue that this is not categorically an aggravated felony since the device can be used to create documents that do not fall within the generic definition of a "forged document." *Vizcarra-Ayala v. Mukasey,* 514 F.3d 870 (9th Cir. 2008).

Aggravated Felony as Fraud. Yes, if the loss to the victim or victims exceeds $10,000 , regardless of whether the amount of loss appears in the record of conviction. *See* 8 USC §1101(a)(43)(M); *Nijhawan v. Holder,* 129 S. Ct. 2294 (2009). Regarding proving a loss exceeding $10,000, see Note: Fraud.

50. 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, regardless of whether the amount of loss appears in the record of conviction. *See* 8 USC §1101(a)(43)(M); *Nijhawan v. Holder,* 129 S. Ct. 2294 (2009). Regarding proving a loss exceeding $10,000, see Note: Fraud.

51. 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 CMTs 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, regardless of whether the amount of loss appears in the record of conviction. *See* 8 USC §1101(a)(43)(M); *Nijhawan v. Holder,* 129 S. Ct. 2294 (2009). Regarding proving a loss exceeding $10,000, see Note: Fraud.

52. 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. The Ninth Circuit has 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.

Crime Involving Moral Turpitude (CMT): A very vague record of conviction may prevent this from being a CMT. See *Tijani v. Holder*, 628 F.3d 1071, 1078 (9th Cir. 2010) ("identity theft is a crime that may not involve fraud"). 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. However, counsel should assume that immigration judges will find this to be a CMT.

Also, under *Matter of Silva-Trevino, supra,* the immigration judge might elect to look beyond the record of conviction to determine the underlying conduct.

In practice, immigration judges are more likely to find this is not a CMT if the factual basis states that the identity was used for employment purposes and involved a fictitious person. Whenever possible, defense counsel should specifically plead to this as a factual basis; if this is not possible, plead to the generic language of the statute.

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, regardless of whether the amount of loss appears in the record of conviction. *See* 8 USC §1101(a)(43)(M); *Nijhawan v. Holder,* 129 S. Ct. 2294 (2009). 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, regardless of whether the amount of loss appears in the record of conviction. *See* 8 USC §1101(a)(43)(M); *Nijhawan v. Holder,* 129 S. Ct. 2294 (2009). 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. *See e.g. Tijani v. Holder*, 628 F.3d 1071, 1075 (9th Cir. 2010) (even though statute does not have an element of an intent to defraud, fraud is implicit in the nature of the offense). A safer plea would be to theft, without designating section A3, and with a sentence of less than a year.

53. <u>Smuggling</u>, 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." However, defense counsel should make it clear in the plea that the offense was committed as an act of "self-smuggling" in order to give immigration counsel arguments that the offense should not be removable..

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 Matter of Vo,* 25 I&N Dec. 426 (BIA 2011); 9 U.S. Dep't of State, (FAM) § 40.21(a), n.2.4(a)(4). However, defense counsel should make it clear in the plea that the offense was committed as an act of "self-smuggling" in order to give immigration counsel an argument that it is not a CMT.

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.

Immigration counsel may be able to argue that the statute is overbroad because the mens rea for 13-2319 is negligence while the mens rea for 8 U.S.C. § 1101(a)(43)(N) requires recklessness or higher. Additionally, 8 U.S.C. § 1101(a)(43)(N) requires that the smuggling be in furtherance of the alien's unlawful presence in the U.S., while 13-2319 does not contain such a requirement. While these arguments have had some success in Arizona immigration courts, there is no guarantee that they will work with all immigration judges.

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.

54. 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, with the added element of a pecuniary benefit. In *Navarro-Lopez v. Gonzales,* 503 F.3d 1063 (9th Cir. 2007) (en banc) (overturned on other grounds), the Ninth Circuit found that a conviction for accessory after the fact was not categorically 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. 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.

55. 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 or which contains a false statement or false information; 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, regardless of whether the amount appears in the record of conviction. *See Nijhawan v. Holder,* 129 S. Ct. 2294 (2009). 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.

56. 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) (overturned on other grounds). 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.

57. 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 in the second degree could potentially be charged as an aggravated felony under 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. Escape in the first degree could be charged as obstruction of justice 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. The Ninth Circuit has held that escape from custody that occurs either before or after the initiation of judicial proceedings does not meet the definition of obstruction of justice. *Salazar-Luviano v. Mukasey*, 551 F.3d 857, 862-63 (9th Cir. 2008). Many convictions under this statute occur as a result of defendants who are sentenced to a work release program and fail to appear, which should not qualify as obstruction of justice since no pending judicial proceedings existed at the time of the offense. But the BIA has recently broadened the definition of obstruction of justice to include "an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice, irrespective of the existence of an ongoing criminal investigation or proceeding." *Matter of Valenzuela-Gallardo,* 25 I&N Dec. 838 (BIA 2012). In light of the BIA's expanded definition, counsel should assume that a conviction with a one-year sentence will be found an aggravated felony.

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.

58. <u>Failure to Appear</u>, 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.

59. 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 careful pleading, this may not constitute a CMT, although immigration judges would likely find it to be so. 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 specifically to an offensive touching under §13-1203(A)(3), 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. Therefore, any conviction with an actual sentence of 365 days or longer will likely be found an aggravated felony as a "crime of violence."

However, immigration counsel have strong arguments that *Estrada-Rodriguez* may no longer be good law. Two months after the Ninth Circuit issued *Estrada-Rodriuez,* the Arizona Court of Appeals issued a decision clarifying that the only logical interpretation of the statute is that A1 may only be committed by the use of force while A2 may only be committed through non-forcible means that pose a risk of injury to the police officer. *See State v. Lee*, 176 P.3d 712, 715 (Ariz. Ct. App. 2008); *see also State v. Lopez*, 163 Ariz. 108, 114, 786 P.2d 959, 965 (1990). Therefore, A2 is categorically *not* an aggravated felony crime of violence. Counsel should plead to the language of A2; however, until *Estrada-Rodriguez* is overturned, most immigration judges will assume they are bound by it, and this remains a dangerous plea if a sentence of one year or more is imposed.

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)(S). *See Matter of 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").

60. 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 misdmeanor; for a felony, it is a class 5 felony.

Summary. Hindering can be a 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 felony if a ***sentence of a year or more is imposed*** and it can also be a CMT. 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, can be 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.

However, the BIA has held that that accessory after the fact 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); *Matter of Valenzuela-Gallardo,* 25 I&N Dec. 838 (BIA 2012). While the BIA held in *Matter of Espinoza*, 22 I&N 889 (BIA 1999) that misprision is not obstruction of justice even if a one-year sentence is imposed, that decision relied on the absence of a specific intent in the federal misprision statute. *Matter of Valenzuela-Gallardo,* 25 I&N Dec. at 841 ("[t]his element—the affirmative and intentional attempt, with specific intent, to interfere with the process of justice—demarcates the category of crimes constituting obstruction of justice"). Since Hindering requires "the intent to hinder the apprehension, prosecution, conviction or punishment of another," it will likely be found analogous to accessory after the fact, rather than misprision.

The Ninth Circuit and the BIA currently disagree on whether obstruction of justice requires "active interference with proceedings of a tribunal or investigation." *See Hoang v. Holder*, 641 F.3d 1157, 1161 (9th Cir. 2011); *Matter of Valenzuela-Gallardo,* 25 I&N Dec. 838 (BIA 2012). Hindering does not require that there be an ongoing investigation or prosecution in order to be convicted under the statute. Therefore, counsel should attempt to plead to a factual basis that suggests there was no ongoing investigation or prosecution at the time of the offense in hopes that the Ninth Circuit's position will ultimately prevail. But for the time being, counsel should assume that *any* Hindering conviction with a sentence of one year or more will be an aggravated felony.

There may also be some dispute about whether a Hindering offense that was committed *during* a police investigation, but *before* a formal judicial proceeding was commenced qualifies as an obstruction of justice. *Compare Salazar-Luviano v. Mukasey*, 551 F.3d 857, 863 (9th Cir. 2008) (escape that occurred after arrest but *before* the commencement of any judicial proceedings is not obstruction of justice), with *Hoang v. Holder*, 641 F.3d 1157, 1165 (9th Cir. 2011) (obstruction of justice includes offense in which defendant "provided assistance to an individual who was subject to a pending judicial proceeding or ongoing police investigation"). Defense counsel should create a factual basis that leaves open the possibility that the Hindering offense was committed before a police investigation was initiated.

Crime Involving Moral Turpitude. The Ninth Circuit has held that accessory after the fact under California law is not categorically a crime involving moral turpitude. *Navarro-Lopez v. Gonzales,* 503 F.3d 1063 (9th Cir. 2007) (en banc) (overturned on other grounds). It also recently held that a misprision of a felony under federal law is not a CMT because it does not require a specific *intent* to conceal or obstruct justice, but only *knowledge* of the felony. *Robles-Urrea v. Holder*, 678 F.3d 702, 710 (9th Cir. 2012). But since Hindering requires "the *intent* to hinder the apprehension, prosecution, conviction or punishment of another," it may be found a CMT under *Robles-Urrea*. However, the BIA has held that accessory after the fact is only a CMT if the underlying offense in which the principal engaged is a CMT. *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011). Therefore, counsel should assume that Hindering will be a CMT but attempt to plead to accessory of a non-CMT offense in order to leave immigration counsel arguments against this.

IMPORTANT: Recent case law has altered the process by which immigration judges decide whether an offense is a CMT. *See Matter of Silva-Trevino,* 24 I&N Dec. 687 (A.G. 2008). While judges

were previously restricted to the record of conviction in determining whether a state offense qualified as a CMT, currently *any* evidence – including police reports, presentence investigations, and even the defendant's own testimony – may be considered in the finding of whether a conviction constitutes a CMT under a divisible statute.

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.

61. 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.

Crime Involving Moral Turpitude (CMT): Yes, corrupt intent to influence. *See, e.g., Matter of H-*, 6 I&N Dec. 358, 361 (BIA 1953).

Aggravated Felony: No. Bribery of a public servant under ARS § 13-1602 is not an aggravated felony under 8 USC §1101(a)(43)(R) as an offense relating to commercial burglary, even with a year's sentence. *Matter of Gruenangerl,* 25 I&N Dec. 351 (BIA 2010). The BIA has also declined to find that bribery of a public servant is an aggravated felony as obstruction of justice under 8 USC §1101(a)(43)(S). *Id.* 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).

62. 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.

Crime Involving Moral Turpitude (CMT): Yes, corrupt intent to influence. *See, e.g., Matter of H-*, 6 I&N Dec. 358, 361 (BIA 1953).

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).

63. Perjury, ARS § 13-2702.
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.

64. 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). Because an immigration judge may elect to look beyond a vague record of conviction under *Matter of Silva-Trevino, supra*, counsel should attempt to plead specifically to false swearing of a non-material fact. If that is not possible, 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 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. Even though there is no requirement of materiality, immigration judges may look to the record of conviction to determine whether the defendant's false statement was material. *See United States v. Aguila-Montes de Oca,* 655 F.3d 915, 940 (9th Cir. 2011) (en banc).

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, regardless of whether the amount appears in the record of conviction. *See Nijhawan v. Holder,* 129 S. Ct. 2294 (2009). Because "deceit" is not well-defined, it is possible that a conviction under §13-2703 would be held an aggravated felony under this category. Regarding proof of $10,000 loss to the victim, see Note; Fraud.

65. 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. 8 U.S.C. § 1101(a)(43)(S).

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.

66. Interfering with judicial proceedings, ARS § 13-2810
A. A person commits interfering with judicial proceedings if such person knowingly:

1. Engages in disorderly, disrespectful or insolent behavior during the session of a court which directly tends to interrupt its proceedings or impairs the respect due to its authority; or
2. Disobeys or resists the lawful order, process or other mandate of a court; or
3. Refuses to be sworn or affirmed as a witness in any court proceeding; or
4. Publishes a false or grossly inaccurate report of a court proceeding; or
5. Refuses to serve as a juror unless exempted by law; or
6. Fails inexcusably to attend a trial at which he has been chosen to serve as a juror.
B. Interfering with judicial proceedings is a class 1 misdemeanor.

Summary: Unlikely to trigger immigration consequences EXCEPT A2 is likely deportable for violating a DV protective order. 8 U.S.C. § 1227(a)(2)(E)(ii).

Crime Involving Moral Turpitude: While possible, it is unlikely that any subsection will be found a CMT. *See Blanco v. Mukasey*, 518 F.3d 714, 719 (9th Cir. 2008) ("[w]hen the only 'benefit' the individual obtains is to impede the enforcement of the law, the crime does not involve moral turpitude").

Aggravated Felony: An offense relating to obstruction of justice with a sentence of one year or more is an aggravated felony under 8 U.S.C. § 1101(a)(43)(S). However, since the maximum sentence under the statute is six months, this offense should never be an aggravated felony.

Other – Domestic Violence: Under 8 U.S.C. § 1227(a)(2)(E)(ii), a noncitizen who engages in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury is deportable. The Ninth Circuit has interpreted this broadly to include most convictions under protection orders. *Alanis-Alvarado v. Holder*, 558 F.3d. 833, 836 (9th Cir. 2009); *Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011). While a straight plea to this offense may be safe (particularly if no subsection is cited), any citation or reference in the plea to DV or §§ 13-3601, 13-3601.01, or 13-3602 will likely trigger deportability. Use of Telephone to Annoy, ARS § 13-2916 is a better option.

67. <u>Disorderly Conduct</u>, 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: Some immigration judges have held this to be deportable as a crime of domestic violence with a § 13-3601 tag, although immigration counsel have strong arguments against this. 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.

68. 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. See *Blanco v. Mukasey*, 518 F.3d 714, 719 (9th Cir. 2008) (falsely identifying oneself to law enforcement is not a CMT since fraudulent intent only inheres when the individual employs false statements to obtain something tangible).

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.

69. 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 or other evidence reveals that the unlawful conduct involves moral turpitude. *See Matter of Silva-Trevino,* 24 I&N Dec. 687 (A.G. 2008). 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.

70. 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, stalking, or violation of a protection order charge, if prosecutor is willing, to avoid deportability under the DV grounds. With a vague record of conviction it may have few immigration consequences. It might also be a substitute charge in a sympathetic statutory rape case.

Aggravated felony: Not as a crime of violence, since the offense carries a maximum sentence of six months.

Crime involving moral turpitude: Possibly, if the offense involved threats. Defense counsel should try to plead to an intent to annoy or offend and avoid any mention of threats to inflict physical harm.

Other grounds: If the record shows that the victim had a domestic relationship with the defendant (either by § 13-3601 or other evidence in the record) and the offense involved threats with an intent to terrify, intimidate, or threaten, this may be deportable as a domestic violence offense or a stalking offense under 8 USC §1227(a)(2)(E)(i). However, it is still a better alternative than §13-2923,

Stalking. Defense counsel should try to plead to an intent to annoy or offend and avoid any mention of threats to inflict physical harm.

71. 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. However, in practice, some immigration judges may find it to be 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)(i). 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.

72. 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 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"); *Marmolejo-Campos v. Holder,* 558 F.3d 903 (9th Cir. 2009) (en banc). 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. Gonzales,* 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 under 8 USC § 1227(a)(2)(E)(ii) if the conduct involved a violation of the DV protective order.

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. If the offense is 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.

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.

73. 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.

74. Weapons misconduct, ARS § 13-3102(A)(1-15)

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 may be able to 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 "prohibited 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

Crime Involving Moral Turpitude (CMT): Possibly. See A3.

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 a 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 an (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 her 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.

Crime Involving Moral Turpitude (CMT): Probably not. Mere possession of a weapon with no malice or intent to harm is not a CMT. *Matter of Rainford*, 20 I. & N. Dec. 598 (BIA 1992).

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.

Crime Involving Moral Turpitude (CMT): Probably.

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 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. *See Prakash v. Holder,* 579 F.3d 1033 (9th Cir. 2009) (soliciting a violent act poses a substantial risk that physical force will be used against another even if the actual violence may occur after the solicitation itself); *Matter of Guerrero,* 25 I&N Dec. 631 (BIA 2011).

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."

75. 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.

Firearms Ground: Negligently discharging a firearm in is a deportable firearms offense within 8 U.S.C. § 1227(a)(2)(C). *Valerio-Ochoa v. U.S.*, 241 F.3d 1092 (9th Cir. 2001) (violation of Cal. Pen. Code § 246.3 for discharging a firearm in a grossly negligent manner is a deportable firearms offense pursuant to 8 U.S.C. § 1227).

76. Prostitution, ARS § 13-3214

It is unlawful for a person to knowingly engage in prostitution. A person who violates this section is guilty of a class 1 misdemeanor, except that a person who has previously been convicted of three or more violations of this section and who commits a subsequent violation of this section is guilty of a class 5 felony.

Crime Involving Moral Turpitude (CMT): Engaging in prostitution will likely be held a CMT. *Matter of W,* 4 I&N Dec. 401 (BIA 1951). The Ninth Circuit has also held that soliciting a prostitute is a CMT. *Rohit v. Holder*, 670 F.3d 1085, 1090 (9th Cir. 2012)

Aggravated Felony: No. Although running a prostitution business or transporting a prostitute for commercial advantage is an aggravated felony, the elements of the statute are limited to an individual who engages in prostitution. 8 U.S.C. § 1101(a)(43)(K).

Other Grounds – Prostitution: Divisible. Under 8 U.S.C. § 1182(a)(2)(D), a person who is coming to the U.S. to engage in prostitution, or who has engaged in prostitution within ten years of the date of application for admission is inadmissible. However, the Department of State requires an act of sexual *intercourse* in order to meet the definition of "prostitution." 22 C.F.R. § 40.24(b) (2006). The Arizona statute is broader since a person may be convicted under § 13-3214 for engaging in sexual contact, oral sexual contact, or sadomasochistic abuse. ARS § 13-3211(8); *Kepilino v. Gonzales*, 454

F.3d 1057, 1061 n. 2 (9th Cir. 2006). Additionally, a single conviction under this statute might not trigger inadmissibility since the Dept. of State definition requires "elements of continuity and regularity, indicating a pattern of behavior or deliberate course of conduct…as distinguished from the commission of casual or isolated acts." 22 C.F.R. § 40.24(b) (2006). Counsel should plead to acts other than sexual intercourse and avoid references to prior prostitution convictions.

77. Possession, use, production, sale or transportation of marijuana, ARS §13-3405

***NOTE:* On July 14, 2011, the Ninth Circuit prospectively overturned *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), which had held that a single state drug possession conviction expunged pursuant to "rehabilitative relief" would not trigger removability as a controlled substance offense. *See Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc). Therefore, a single conviction received on or after July 14, 2011 for simple possession, possession of paraphernalia, or another minor drug offense can no longer be eliminated for immigration purposes by obtaining a set aside under ARS § 13-907.**

A single conviction for simple drug possession or possession of paraphernalia offense entered prior to July 14, 2011 may still be eliminated for immigration purposes under § 13-907 as long as the defendant did not violate probation. See *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009). However, a conviction for use or under the influence of drugs will trigger removability as a controlled substance offense even if the conviction occurred prior to July 14, 2011. *See Nunez-Reyes v. Holder*, 646 F.3d at 695 (overruling *Rice v. Holder,* 597 F.3d 952 (9th Cir.2010)).

Note also that a TASC disposition in certain Arizona counties 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 has 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. See *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2586, 177 L. Ed. 2d 68 (2010); *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 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 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 drug possession or possession of marijuana that occurred prior to July 14, 2011 can be eliminated by state "rehabilitative relief" such as ARS § 13-907 as long as the defendant did not violate probation prior to the offense being set aside. *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009).

b. <u>Use</u>

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 conviction for use of marijuana may NOT be eliminated by state "rehabilitative relief" even if it occurred prior to July 14, 2011. *See Nunez-Reyes v. Holder*, 646 F.3d 684, 695 (9th Cir. 2011) (en banc) (overruling *Rice v. Holder*, 597 F.3d 952 (9th Cir. 2010)).

A2. Possession of marijuana for sale.

Crime Involving Moral Turpitude: Yes, because it involves drug trafficking. *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997).

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: No. A conviction for an "offer" to transport for sale, sell, transfer, or import is analogous to a solicitation offense, which does not constitute an aggravated felony. *See Rosas-Castaneda v. Holder*, 655 F.3d 875, 885 (9th Cir. 2011). In *Rosas-Castaneda,* the Ninth Circuit even found that a charging document and plea agreement that showed a conviction for Attempted Transport for Sale under ARS § 13-3405(A)(4) was not categorically an aggravated felony since "[n]either document in the record of conviction produces any specific information that definitively rules out the possibility that Rosas was convicted of a solicitation offense. *Id.* at 886. However, a transcript of a plea colloquy that did not specifically mention an "offer" to transport for sale, sell, transfer, or import would likely trigger removal for an aggravated felony. While a plea to the generic solicitation statute of § 13-1002 is much safer in avoiding an aggravated felony, defense counsel who cannot otherwise avoid a drug trafficking offense should plead to § 13-3405(A)(4) and specify "offer" in the factual basis.

If pleading to this statute, counsel could also plead to "transfer," which is defined as furnishing, delivering or giving away marijuana. ARS § 13-3401(37). This will provide immigration counsel with an additional argument that the offense is not an aggravated felony; see Part d, *infra*. However, a plea to "offer" is the better option.

Other Grounds: 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). However, the Ninth Circuit has found that a conviction under a "specific" solicitation statute, such as that contained in ARS §§ 13-3405(A)(4), 13-3407(A)(7), or 13-3408(A)(7) would render a noncitizen removable for an offense relating to a controlled substance. *See Rosas-Castaneda v. Holder*, 655 F.3d 875, 885 (9th Cir. 2011); *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009). Therefore, counsel should attempt to plead their client to the generic solicitation statute under ARS § 13-1002.

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.

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.

78. 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:* On July 14, 2011, the Ninth Circuit prospectively overturned *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), which had held that a single state drug possession conviction expunged pursuant to "rehabilitative relief" would not trigger removability as a controlled substance offense. *See Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc). Therefore, a single conviction received on or after July 14, 2011 for simple possession, possession of paraphernalia, or another minor drug offense can no longer be eliminated for immigration purposes by obtaining a set aside under ARS § 13-907.**

A single conviction for simple drug possession or possession of paraphernalia offense entered prior to July 14, 2011 may still be eliminated for immigration purposes under § 13-907 as long as the defendant did not violate probation. See *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009). However, a conviction for use or under the influence of drugs will trigger removability as a controlled substance offense even if the conviction occurred prior to July 14, 2011. *See Nunez-Reyes v. Holder*, 646 F.3d at 695 (overruling *Rice v. Holder,* 597 F.3d 952 (9th Cir.2010)).

Note also that a TASC disposition in certain Arizona counties 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.

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.

Some unpublished BIA decisions have held that, even though the Arizona narcotics schedule contains drugs that do not appear on the federal schedule, the Arizona legislature "intended to" track the federal list of illegal drugs such that an Arizona drug conviction is removable regardless of whether a controlled substance is identified. See *In Re: Ramon Roberto Huerta-Flores A.K.A. Roberto Huerta*, : A092 444 014 - ELO, 2010 WL 5808899 (BIA Aug. 27, 2010). Therefore, counsel should not assume that a controlled substance conviction with an unidentified drug will be safe.

Generic solicitation under ARS § 13-1002 is a good alternate plea. 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 exception discussed below involving 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 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.

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. A conviction for use of a narcotic or dangerous drug may NOT be eliminated by state "rehabilitative relief" even if it occurred prior to July 14, 2011. *See Nunez-Reyes v. Holder*, 646 F.3d 684, 695 (9th Cir. 2011) (en banc) (overruling *Rice v. Holder*, 597 F.3d 952 (9th Cir. 2010)).

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 (although the BIA has held in an unpublished decision that this is unnecessary since the Arizona legislature intended to mimic the federal schedule).

.

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 (although the BIA has held in an unpublished decision that this is unnecessary since the Arizona legislature intended to mimic the federal schedule).

Controlled Substance Conviction Causing Deportability and Inadmissibility. Yes, if the record shows a federally recognized controlled substance (although the BIA has held in an unpublished decision that this is unnecessary since the Arizona legislature intended to mimic the federal schedule).
.

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 (although the BIA has held in an unpublished decision that this is unnecessary since the Arizona legislature intended to mimic the federal schedule).

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 (although the BIA has held in an unpublished decision that this is unnecessary since the Arizona legislature intended to mimic the federal schedule).

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 transfer the drug.

These mainly are divided into trafficking offenses, and offering to commit a trafficking offense (solicitation). A conviction for an "offer" to transport for sale, sell, transfer, or import is analogous to a solicitation offense, which does not constitute an aggravated felony. *See Rosas-Castaneda v. Holder*, 655 F.3d 875, 885 (9th Cir. 2011). In *Rosas-Castaneda,* the Ninth Circuit even found that a charging document and plea agreement that showed a conviction for Attempted Transport for Sale under ARS § 13-3405(A)(4) was not categorically an aggravated felony since "[n]either document in the record of conviction produces any specific information that definitively rules out the possibility that Rosas was convicted of a solicitation offense. *Id.* at 886. However, a transcript of a plea colloquy that did not specifically mention an "offer" to transport for sale, sell, transfer, or import would likely trigger removal for an aggravated felony. While a plea to the generic solicitation statute of § 13-1002 is much safer in avoiding an aggravated felony, defense counsel who cannot otherwise avoid a drug trafficking offense should plead to § 13-3405(A)(4) and specify "offer" in the factual basis.

Even if defense counsel can avoid an aggravated felony by pleading to an "offer" to transport for sale, sell, transfer, or import, this will still be found to be a deportable drug conviction. *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009).

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 (although the BIA has held in an unpublished decision that this is unnecessary since the Arizona legislature intended to mimic the federal schedule).

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 (although the BIA has held in an unpublished decision that this is unnecessary since the Arizona legislature intended to mimic the federal schedule).

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 (although the BIA has held in an unpublished decision that this is unnecessary since the Arizona legislature intended to mimic the federal schedule).

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

Crime Involving Moral Turpitude: Yes

Aggravated Felony: No. A conviction for an "offer" to transport for sale, sell, transfer, or import is analogous to a solicitation offense, which does not constitute an aggravated felony. *See Rosas-Castaneda v. Holder*, 655 F.3d 875, 885 (9th Cir. 2011). In *Rosas-Castaneda,* the Ninth Circuit even found that a charging document and plea agreement that showed a conviction for Attempted Transport for Sale under ARS § 13-3405(A)(4) was not categorically an aggravated felony since "[n]either document in the record of conviction produces any specific information that definitively rules out the possibility that Rosas was convicted of a solicitation offense. *Id.* at 886. However, a transcript of a plea colloquy that did not specifically mention an "offer" to transport for sale, sell, transfer, or import would likely trigger removal for an aggravated felony. While a plea to the generic solicitation statute of § 13-1002 is much safer in avoiding an aggravated felony, defense counsel who cannot otherwise avoid a drug trafficking offense should plead to § 13-3405(A)(4) and specify "offer" in the factual basis.

Controlled Substance Grounds. 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). However, the Ninth Circuit has found that a conviction under a "specific" solicitation statute, such as that contained in ARS §§ 13-3405(A)(4), 13-3407(A)(7), or 13-3408(A)(7) would render a noncitizen removable for an offense relating to a controlled substance. *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009). Therefore, counsel should attempt to plead their client to the generic solicitation statute under ARS § 13-1002.

Also, this conviction will cause inadmissibility by giving the government "reason to believe" the person is or assists a trafficker.

79. 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: Probably. The Ninth Circuit has held that ARS § 13-3415 is categorically 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). However, the BIA recently held that a waiver of inadmissibility may be available for a conviction of paraphernalia that relates to a single offense of simple possession of 30 grams or less of marijuana . *Matter of Martinez-Espinoza,* 25 I&N Dec. 118 (BIA 2009). This suggests that a conviction for paraphernalia could also fit into the similar exception to deportability if it involved 30 grams or less of marijuana, although the BIA has thus far rejected this argument. Counsel should assume conservatively that a conviction for paraphernalia will always trigger the controlled substance ground of removability, although arguments may be available.

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: Probably. 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). The BIA recently held that a waiver of inadmissibility may be available for a conviction for paraphernalia that relates to a single offense of

simple possession of 30 grams or less of marijuana. See *Matter of Martinez-Espinoza,* 25 I&N Dec. 118 (BIA 2009). However, since subsection B involves delivering or manufacturing paraphernalia, it may be less likely to relate to a single offense of simple possession.

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). The BIA recently held that a waiver of inadmissibility may be available for a conviction for paraphernalia that relates to a single offense of simple possession of 30 grams or less of marijuana. See *Matter of Martinez-Espinoza,* 25 I&N Dec. 118 (BIA 2009). However, since it may be difficult to argue that advertisements for paraphernalia would only relate to a single offense of simple possession of 30 grams or less of marijuana, counsel should assume that this will be categorically a controlled substance offense.

80. Child or Vulnerable Adult Abuse, ARS § 13-3623

A. Under circumstances likely to produce death or serious physical injury, any person who causes a child or vulnerable adult to suffer physical injury or, having the care or custody of a child or vulnerable adult, who causes or permits the person or health of the child or vulnerable adult to be injured or who causes or permits a child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is endangered is guilty of an offense as follows:

1. If done intentionally or knowingly, the offense is a class 2 felony and if the victim is under fifteen years of age it is punishable pursuant to section 13-705.
2. If done recklessly, the offense is a class 3 felony.
3. If done with criminal negligence, the offense is a class 4 felony.

B. Under circumstances other than those likely to produce death or serious physical injury to a child or vulnerable adult, any person who causes a child or vulnerable adult to suffer physical injury or abuse or, having the care or custody of a child or vulnerable adult, who causes or permits the person or health of the child or vulnerable adult to be injured or who causes or permits a child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is endangered is guilty of an offense as follows:

1. If done intentionally or knowingly, the offense is a class 4 felony.
2. If done recklessly, the offense is a class 5 felony.
3. If done with criminal negligence, the offense is a class 6 felony.

Crime Involving Moral Turpitude (CMT): Divisible. A CMT generally requires an intentional or at least reckless *mens rea. Matter of Fualaau*, 21 I&N 475 (BIA 1996); *Matter of Sweetster,* 22 I&N Dec. 709 (BIA 1999). Where possible, counsel should plead to a *mens rea* of negligence and that defendant "permitted" the injury, if any, rather than "caused" it.

Aggravated Felony: Possibly as a "crime of violence" if the defendant receives a sentence of 365 days or more. 8 U.S.C. 1101(a)(43)(F). A crime of violence requires the intentional use of force, and ICE may argue that causing a person to suffer physical injury with an intentional *mens rea* meets this definition. Counsel should attempt to secure a sentence of less than 365 days. If this is not possible, try to plead to a *mens rea* of recklessness or negligence or to "permitting" the injury to occur, rather than "causing" it.

Other Grounds – Domestic Violence/Child Abuse: A noncitizen may be deportable for conviction of a crime of domestic violence, child abuse, child neglect, or child abandonment. 8 U.S.C. § 1227(a)2)(E)(i). To qualify as a crime of domestic violence, the record of conviction must demonstrate that the offense is a "crime of violence" and was committed against a person who would be included in the DV statute located at § 13-3601. If the record reflects that the offense was committed recklessly or negligently, it will not be deportable as a crime of domestic 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); *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).

If the record establishes that the victim is a child, it is likely that a conviction under the statute will be found to fall within the broad definition of child abuse, neglect, or abandonment established by the Board of Immigration Appeals. *See Matter of Velasquez-Herrera,* 24 I&N Dec. 503 (BIA 2008). However, the Ninth Circuit has found that a statute that includes only the *possibility* of harm, with no actual physical or emotional injury, does not categorically fall within the definition of a "crime of child abuse." *Pacheco-Fregozo v. Holder*, 576 F.3d 1030 (9th Cir. 2009); *Jimenez-Juarez v. Holder*, 635 F.3d 1169, 1171 n.2 (9th Cir. 2011) (affirming the holding of *Pacheco-Fregozo* that an offense that creates only potential harm to a child falls outside the scope of the BIA's definition of a crime of child abuse). Following *Pacheco-Fregozo,* the BIA held that the crime of unreasonably placing a child in a situation that poses a threat of injury to the child's life or health is categorically a crime of child abuse under 8 USC § 1227(a)(2)(E)(i) even though no proof of actual harm or injury to the child is required. *Matter of Soram,* 25 I&N Dec. 378 (BIA 2010). Therefore, case law of the Ninth Circuit and the BIA is currently at odds.

Counsel should conservatively assume that a conviction under the statute will be categorically deportable as a crime of child abuse; however, immigration counsel can argue that it is broader than the generic definition since ARS § 13-3623 reaches conduct in which the child is endangered but not actually injured. Defense counsel should attempt to plead to endangerment language and avoid any mention of actual harm or injury to the victim whenever possible.

81. Unlawful Copying or Sale, ARS § 13-3705

A. A person commits unlawful copying or sale of sounds or images from recording devices by knowingly:

1. Manufacturing an article without the consent of the owner.

2. Distributing an article with the knowledge that the sounds thereon have been so transferred without the consent of the owner.
3. Distributing or manufacturing an article on which sounds or images have been transferred which does not bear the true name and address of the manufacturer in a prominent place on the outside cover, box, jacket or label.
4. Distributing or manufacturing the outside packaging intended for use with articles which does not bear the true name and address of the manufacturer in a prominent place on the outside cover, box, jacket or label.
5. Transferring or causing to be transferred to an article any performance, whether live before an audience or transmitted by wire or through the air by radio or television without the consent of the owner and with the intent to obtain commercial advantage or personal financial gain.
6. Distributing an article with knowledge that the performance on the article, whether live before an audience or transmitted by wire or through the air by radio or television, has been transferred without the consent of the owner.
H. Unlawful copying or sale of sounds or images involving one hundred or more articles containing sound recordings or one hundred or more articles containing audiovisual recordings is a class 3 felony. Unlawful copying or sale of sounds or images involving ten or more but less than one hundred articles containing sound recordings or ten or more but less than one hundred articles containing audiovisual recordings is a class 6 felony. Unlawful copying or sale of sounds or images involving less than ten articles containing sound recordings or less than ten articles containing audiovisual recordings is a class 1 misdemeanor.

Summary: This statute is increasingly being used to prosecute illegal downloads and the sale of bootleg music and videos. Since there is little case law on point, immigration judges may find that it constitutes a CMT, although counsel may have arguments to the contrary, particularly if the plea is to A1, A2, or A6. A sentence of 365 days or more may trigger an aggravated felony for counterfeiting.

Crime Involving Moral Turpitude (CMT): Probably. The BIA has found that trafficking in counterfeit goods is a CMT due to the inherently fraudulent nature of the offense and the theft of another's work. *Matter of Kochlani*, 24 I&N Dec. 128 (BIA 2007). Immigration counsel can argue that merely copying music or videos for one's own use is not inherently turpitudinous, but this argument is undercut by the fact that "distributing" and "manufacturing" under the statute are defined to include commercial advantage or financial gain. Therefore, since all of the subsections appear to involve a commercial element, it is likely that the statute will be categorically held a CMT.

Aggravated Felony: An offense relating to counterfeiting in which the sentence imposed is 365 days or more will be an aggravated felony. 8 U.S.C. § 1101(a)(43)(R); *Yong Wong Park v. AG of the United States*, 472 F.3d 66 (9th Cir. 2006) (trafficking in counterfeit goods under 18 U.S.C. § 2320 is an aggravated felony). The Ninth Circuit has defined "counterfeiting" as "knowingly us[ing] or possess[ing] counterfeit bills with the intent to defraud." *Albillo-Figueroa v. INS*, 221 F.3d 1070, 1073 (9th Cir. 2000). Immigration counsel can argue that the statute is categorically not an aggravated felony since it is missing the element of an intent to defraud, although ICE may argue that fraud is implicit within the statute. Immigration counsel could also argue that only representations on paper (e.g. securities and bills) fall within the generic definition of counterfeiting. However, the safest route is to secure a sentence of one year or less; if this is not possible, attempt to plead to A1, A2, or A6, since A3, A4, and A5 may be more likely to resemble an intent to counterfeit. If the loss to the victim is $10,000 or more, ICE may also charge as an aggravated felony for fraud under 8 U.S.C. § 1101(a)(43)(M).

82. 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): Probably not. The BIA has held that the offense of driving a vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle is a crime involving moral turpitude. *Matter of Ruiz-Lopez,* 25 I&N Dec. 551 (BIA 2011). While § 28-622.01 includes only the element of flight, the statute at issue in *Ruiz-Lopez* required both fleeing from law enforcement *and* reckless disregard for the lives or property of others. Therefore, defense counsel should try to avoid any mention of injury or damage to property that could suggest a "wanton or willful disregard for the lives or property of others."

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.

83. 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 *mens rea* of mere negligence. 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.

84. 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.

85. 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.
4. While the person is ordered by the court or required pursuant to section 28-3319 by the department to equip any motor vehicle the person operates with a certified ignition interlock device, does either of the following: (a) While under arrest refuses to submit to any test chosen by a law enforcement officer pursuant to section 28-1321, subsection A; (b) Commits a violation of section 28-1381, section 28-1382 or this section.

Crime Involving Moral Turpitude (CMT):

A1. Yes, if the record of conviction or other documents (including police reports) reflect that defendant was driving. *Marmolejo-Campos v. Holder,* 558 F.3d 903 (9th Cir. 2009) (en banc). The offense may not be 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. *See 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.

There may also be an argument that, in order to be a CMT, the evidence must demonstrate that defendant "actually knew" (rather than "should have known") that his license was suspended. *Marmolejo-Campos v. Holder,* 558 F.3d at 912. For instance, under Arizona law, mailing notice of suspension or revocation of a license to the defendant's last known address satisfies the "should have known" statutory element. *State v. Gonzales*, 206 Ariz. 469, 471 (2007). However, immigration counsel can argue that the Arizona definition of "should have known" is analogous to a *mens rea* of negligence, which is not sufficient for a CMT. *State v. Hyde*, 921 P.2d 655, 678 (Ariz. 1996); *Perez-Contreras*, 20 I&N Dec. 615, 618-19 (BIA 1992). Counsel should try to avoid pleading to actual knowledge that defendant knew her license had been suspended, canceled, revoked, or refused.

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. While this subsection does not have a *mens rea* sufficient to be a CMT, in practice, many immigration judges are finding it to be. Counsel should conservatively assume that it will be found a CMT. (See also "Other Grounds").

A4. Maybe. While there is no case law on point, ICE may argue that the "knowing" element for this subsection is similar to that of A1 and that the offense is therefore a CMT. Counsel can argue that the subsection is more akin to A2 since no culpable mental state is required but should conservatively assume that it will be found 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. A conviction under A3 may trigger a charge of removability for child abuse under 8 U.S.C. § 1227(a)(2)(E)(i). See *Matter of Soram,* 25 I&N Dec. 378 (BIA 2010) (the crime of unreasonably placing a child in a situation that poses a threat of injury to the child's life or health is categorically a crime of child abuse under 8 USC § 1227(a)(2)(E)(i) even though no proof of actual harm or injury to the child is required). However, immigration counsel can argue that since the statute includes only the *possibility* of endangerment, with no actual physical or emotional injury, it does not fall within the definition of a "crime of child abuse." *Pacheco-Fregozo v. Holder*, 576 F.3d 1030 (9th Cir. 2009); *Jimenez-Juarez v*. *Holder*, 635 F.3d 1169, 1171 n.2 (9th Cir. 2011) (affirming the holding of *Pacheco-Fregozo* that an offense that creates only potential harm to a child falls outside the scope of the BIA's definition of a crime of child abuse). Defense counsel should attempt to plead to endangerment language and avoid any mention of actual harm or injury to the victim whenever possible.

Also, 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.