

§ N.10 Sex Offenses

(For more information, see *Defending Immigrants in the Ninth Circuit*, Chapter 9, §§ 9.28, 9.32, www.ilrc.org/criminal.php)

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I. MINIMUM CONDUCT TO COMMIT THE OFFENSE

Before discussing offenses it's important to review how an immigration judge will evaluate a prior conviction. In 2013, the Supreme Court resolved an important issue in the "categorical approach," which governs how immigration (and federal criminal court) judges evaluate a prior conviction. The Court held that unless the minimum conduct to commit an offense triggers an immigration penalty, *no* conviction of the offense triggers the immigration penalty. *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013). For example, an offensive touching does not meet the definition of "crime of violence." If the minimum conduct to commit a crime is an offensive touching, then *no* conviction of the crime is a crime of violence. See *US v. Flores-Cordero*, 723 F.3d 1085 (9th Cir 2013). Before this, the offense would be held a crime of violence if the record of conviction showed use of actual violence in the particular case. See also *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*) (applying this rule to § 261.5(c)). As discussed in his Note, this rule will reduce the adverse immigration consequences of Cal. P.C. §§ 261.5, 647(b), 647.6, and misdemeanor 243.4.

An additional step occurs when a "divisible" statute sets out multiple elements in the alternative separated by the word "or," and at least one offense does and one does not trigger the immigration consequence. Here and here alone, an immigration judge may consult the individual's record of conviction, to determine which statutory elements made up the offense of conviction. Then the judge will apply the minimum conduct test to that offense. *Descamps v. U.S.*, 133 S.Ct. 2276 (2013).

This set of rules, called the categorical approach, governs an immigration judge's evaluation of whether an offense is the aggravated felony sexual abuse of a minor, a crime of violence, or a deportable crime of child abuse (although, as discussed at Part xx, there is some debate about how it is applied to child abuse). Note that in 2013 the Ninth Circuit held that the full categorical approach applies to moral turpitude determinations. *Olivas-Motta v. Holder*, 716 F3d 1199 (9th Cir 2013), overruling *Matter of Silva-Trevino*, 24 I&N Dec 687 (AG 2008). Thus the same "minimum conduct" test applies to moral turpitude as to other removal grounds.

II. POTENTIAL IMMIGRATION CONSEQUENCES OF SEX CRIMES

Conviction of an offense that involves sexual or lewd intent can have a range of immigration consequences. Quickly review this list to get a sense of the red flags. If the offense is not egregious, with careful pleading and effective advocacy it may be possible to avoid all or most of the above consequences.

Potential immigration consequences include:

- A. **“Rape” Aggravated Felony:** Conviction of sexual intercourse by force, threat, intoxication, or other means. No requirement of a particular sentence.¹
- B. **“Sexual Abuse of a Minor” Aggravated Felony:** Conviction of offenses involving certain sexual conduct or intent with persons under the age of 18. No sentence requirement.²
- C. **“Crime of Violence” Aggravated Felony:** Conviction of a technically defined “crime of violence,” if and only if a sentence of a year or more was imposed on any single count.³ See additional information at § N.9 *Violence, Domestic Violence and Child Abuse*.
- D. **Deportable “Crime of Child Abuse”:** In some areas ICE is charging that conviction of almost any offense with sexual intent where the victim is under age 18 is child abuse. No sentence requirement.⁴ See § N.9.
- E. **Deportable “Crime of Domestic Violence”:** Conviction of a “crime of violence” where the defendant and victim have a protected domestic relationship. No sentence requirement.⁵ See § N.9
- F. **Prostitution.** A person is *inadmissible* for prostitution if he or she engages in offering sexual intercourse, but not other lewd conduct, for a fee.⁶ A conviction under Cal. P.C. § 647(b) alone does not establish this conduct, because it requires only lewd conduct. Any § 647(b) conviction is a *crime involving moral turpitude*. Some convictions relating to running a prostitution business come within the prostitution *deportation grounds* or *aggravated felony*. See Part IV, *infra*.
- G. **Crime Involving Moral Turpitude (CIMT):** Some offenses with sexual or lewd intent may be held to be a CIMT. See this material and § N.7 *Moral Turpitude*. Note that a single CIMT conviction does not always cause inadmissibility or deportability:

¹ 8 USC § 1101(a)(43)(A), INA § 101(a)(43)(A).

² *Id.*

³ 8 USC § 1101(a)(43)(F), INA § 101(a)(43)(F).

⁴ 8 USC § 1207(a)(2)(F), INA § 237(a)(3)(F)(i).

⁵ 8 USC § 1227(a)(2)(E)(i), INA § 237(a)(2)(E)(i).

⁶ 8 USC § 1182(a)(2)(D), INA § 212(a)(2)(D).

⁶ 8 USC § 1182(a)(2)(D), INA § 212(a)(2)(D).

- ✚ A noncitizen is **deportable** if convicted of two CIMTs after admission unless they arose from the very same incident; or if convicted of one CIMT, committed within five years of admission, that has a maximum possible sentence of one year or more.⁷
- ✚ A noncitizen is **inadmissible** if convicted of one CIMT, unless it comes within one of two exceptions: (1) the petty offense exception: the person committed only one CIMT ever, the CIMT has a potential sentence of a year or less, and a sentence was imposed of six months or less; or (2) the youthful offender exception: the person was convicted as an adult of a single CIMT committed while under age 18, and at least five years have passed since the conviction and release from jail.⁸

H. Possession of Child Pornography: Conviction is an aggravated felony.⁹

I. Bars to Specific Forms of Relief: Even if an offense is not technically sexual abuse of a minor or a crime of violence, if under all the circumstances it involved serious violence or abuse it may be a discretionary bar to: asylum, permanent residence for asylees or refugees, a § 212(h) waiver for moral turpitude conviction/s, or DACA (deferred action for DREAMers). It could cause a refugee or asylee to lose their status. See more information at §N.17 *Relief*.

J. Adam Walsh Act Penalties for U.S. Citizens and Permanent Residents. A citizen or resident who was convicted of sexual conduct or solicitation, kidnapping, assault, or false imprisonment of a minor victim may be barred from filing a petition to help a close family member get a green card. If the offense included certain sexual conduct a delinquency disposition will have the same effect. See § N.13 *Adam Walsh Act*.

K. Criminal Penalties: Illegal Re-entry After Removal with Certain Priors. Illegal re-entry after removal (deportation) is the most commonly prosecuted federal felony in the United States. A prior conviction of felony “statutory rape” or sexual abuse of a minor increases the federal sentence by 12 levels. A prior conviction of an aggravated felony increases it by 6 levels.¹⁰ For more information see Box in Part III.C, below, and see § N.1 *Overview*.

⁷ 8 USC § 1227(a)(2)(A), INA § 237(a)(2)(A).

⁸ 8 USC § 1182(a)(2)(A), INA § 212(a)(2)(A).

⁹ 8 USC § 1101(a)(43)(I), INA § 101(a)(43)(I).

¹⁰ 8 USC § 1326, USSG § 2L1.2.

III. FORCIBLE SEX OFFENSES: Calif. P.C. §§ 261, 262, 243.4

Calif. P.C. §§ 261, 262 is an *aggravated felony* as rape regardless what sentence is imposed.¹¹ For immigration purposes rape is defined as sexual intercourse obtained by force, serious threat, incapacitation, or without consent. Any conviction under §§ 261, 262 is an aggravated felony.¹² The conviction also is a *crime involving moral turpitude*, a *crime of violence*, and if there was a domestic relationship, a *deportable crime of domestic violence*.

Alternate Plea: Calif. P.C. § 243.4. Section 243.4 can have serious immigration consequences, but it is not automatically an aggravated felony. A felony conviction of § 243.4 is a crime of violence, while a misdemeanor is not. Both are crimes involving moral turpitude.

- ***Felony § 243.4 is an aggravated felony, but only if a sentence of a year or more is imposed.*** A “crime of violence” is an aggravated felony if a sentence of a year or more is imposed on any single count.¹³ *Felony § 243.4* is a “crime of violence.”¹⁴ To avoid an aggravated felony, obtain a sentence of 364 days or less on each count. Misdemeanor § 243.4 is not a crime of violence, because the minimum conduct to commit the offense includes restraint not effected by force.¹⁵ Thus, while counsel should make every attempt in all misdemeanor cases to obtain 364 days or less, the offense is not an aggravated felony even with a one-year sentence imposed.
- ***Not aggravated felony rape.*** Because the minimum conduct to commit sexual battery requires no penetration, it should not be held rape. Still, keep evidence of penetration out of the record.
- ***Deportable crime of domestic violence, if the victim and defendant have a domestic relationship.*** A deportable crime of domestic violence is defined as (a) a “crime of violence” where (b) the defendant and victim share a certain domestic relationship.¹⁶ *Felony § 243.4* is a deportable crime of domestic violence regardless of sentence, if there is proof that the defendant and victim share a domestic relationship as defined under California law (which includes dating). Misdemeanor § 243.4 is not a crime of violence, and thus not deportable as a crime of violence. While currently the relationship must be established by facts in the record, courts might loosen this evidentiary restriction in the future. See § N.9 *Violence, Domestic Violence and Child Abuse*.
- ***Deportable conviction of child abuse, only if the record of conviction establishes victim was under age 18.*** See § N.9 (C).
- ***Crime involving moral turpitude (CIMT):*** Misdemeanor and felony § 243.4 are CIMTs.

¹¹ 8 USC § 1101(a)(43)(A) includes “rape” in the definition of aggravated felony.

¹² Also, third degree rape under a Washington statute that lacks a forcible compulsion requirement, where the victim did not consent, is “rape.” *U.S. v. Yanez-Saucedo*, 295 F.3d 991, 995-96 (9th Cir. 2002).

¹³ 8 USC § 1101(a)(43)(F), INA § 1101(a)(43)(F).

¹⁴ *Lisbey v. Gonzales*, 420 F.3d 930, 933 (9th Cir. 2005)(felony P.C. §243.4(a) is a crime of violence under 18 USC §16(b) because it contains the inherent risk that violent force will be used).

¹⁵ *U.S. v. Lopez-Montanez*, 421 F.3d 926, 928 (9th Cir. 2005). Although the “minimum conduct” test applies, as always counsel should obtain 364 days or less and if possible prevent the record of conviction from identifying actual violence.

¹⁶ 8 USC § 1227(a)(2)(E)(i), INA § 237(a)(2)(E)(i).

IV. LEWD INTENT OR SEXUAL CONDUCT WITH A MINOR

- A. Advantage of an Age-Neutral Offense
- B. Ninth Circuit Definitions: What to Avoid
- C. Plea Option: §§ 261.5(c), 288a(b)(1) (Minor under age 18)
- D. Plea Option: §§ 261.5(d), 288a(b)(2) (Minor under age 16)
- E. Plea Option: § 288(c), *not* 288(a) (Lewd Conduct)
- F. Plea Option: § 647.6(a) (Annoy/Molest)

A conviction of lewd intent or sexual conduct with a person under age 18 has several possible adverse immigration consequences. It could be classed as an:

- aggravated felony “sexual abuse of a minor”
- aggravated felony crime of violence
- deportable crime of child abuse
- deportable crime of domestic violence
- crime involving moral turpitude

With informed pleading in a non-egregious case, however, all or most of these immigration consequences might be avoided. For a more in-depth discussion of this aggravated felony, see *Defending Immigrants in the Ninth Circuit*, § 9.38 (www.ilrc.org/crimes).

A. Best Option: Age-Neutral Offense, with No Reference to Minor Age in the Record

A plea to an age-neutral offense (no element that the victim is under age 18) has two key advantages: under current law, it is not an aggravated felony as sexual abuse of a minor, or (as long as the record does not establish the victim’s minor age) a deportable crime of child abuse, in any U.S. jurisdiction. There is some risk that Congress will change this in the future. Still, with the right plea, this appears to be the best option for several reasons:

Not an aggravated felony as “sexual abuse of a minor” (“SAM”). Unless the minimum conduct to commit a criminal offense is a SAM aggravated felony, no conviction of the offense is an aggravated felony.¹⁷ See minimum conduct rule in Part I. Therefore no conviction of an age-neutral offense is SAM, because the offense can be committed against an adult.¹⁸ (Still, to protect against wrong decisions, counsel always should try to keep a minor victim’s age out of the record of conviction.)

In contrast, while offenses such as §§ 261.5 or 288(c) are not SAM in immigration proceedings that arise within the Ninth Circuit, they could be held SAM if either (a) the U.S. Supreme Court creates a different SAM definition, or (b) the client is placed in removal

¹⁷ *Nijhawan v. Holder*, 557 U.S. 29, 37, 129 S.Ct. 2294, 2300 (2009) (noting that SAM is subject to the categorical approach).

¹⁸ See *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9th Cir. 2012).

proceedings outside the Ninth Circuit, for example if he or she is transferred there for immigration detention, or voluntarily travels.

Not a deportable crime of child abuse. Conviction of an age-neutral offense with no reference to minor age in the record is not a crime of child abuse.¹⁹ In contrast, ICE will assert that virtually any offense is a deportable crime of child abuse if it has sexual conduct or lewd intent as an element, and minor age of the victim is either an element or in the reviewable record. Conviction of a deportable crime of child abuse will put an lawful permanent resident (LPR) or refugee into removal proceedings, which is a very serious consequence. It will bar an undocumented person from “ten year” and perhaps VAWA non-LPR cancellation. (See §N.17 *Relief Toolkit* for information about these forms of relief from removal.)

Legislative change? Although it has not become law, houses of Congress have approved provisions at times that would take “sexual abuse of a minor” outside of the minimum conduct rule, and would permit an immigration judge reviewing a sex offense to consider even evidence from outside the record of conviction to prove the victim’s age. A plea to a non-sexual offense, e.g. battery, would avoid this risk, but a plea to e.g. sexual battery would not.

Meanwhile, advise persons who have a current plea that technically is safe in the Ninth Circuit to become U.S. citizens as soon as is possible, *after* consulting expert immigration counsel. They should take advantage of the good law that exists in the Ninth Circuit now.

Possible Age-Neutral Pleas. Age-neutral offenses such as misdemeanor or felony P.C. §§ 32, 69, 136.1(b)(1), 236, 243(a), (d), (e), 243.4, 245, 314, or 647 are not aggravated felonies unless a sentence of a year or more was imposed for any single count, and in some cases not even then. To avoid a deportable crime of child abuse, be sure that the record of conviction, including the factual basis for the plea, does not establish that the victim was under age 18. See § N.3 *Record of Conviction*. These offenses may carry other adverse immigration consequences, e.g. moral turpitude; check the Chart at App. 10-III and the *California Quick Reference Chart*. See further discussion of these offenses in §N.9 *Violence, Domestic Violence*.

B. When is an Offense Against a Minor an Aggravated Felony, Moral Turpitude, or Deportable Offense?

It may be useful to refer to these definitions as you consider individual offenses. See additional information in the annotated *Chart of Sex Offenses* and the *Legal Summaries for Defendants* in the Appendices following this Note.

1. Definition of the “Sexual Abuse of a Minor” (“SAM”) Aggravated Felony

¹⁹ *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 516 (BIA 2008).

An offense is SAM only if the minimum conduct to commit the offense is.²⁰ In the Ninth Circuit, to constitute SAM, the minimum conduct to commit the offense must be either: (a) “knowingly engaging in a sexual act” with a person under age 16 and at least four years younger than the defendant; or (b) sexual conduct or lewd intent that is inherently harmful due to the minor’s young age.

a. “Knowingly engaging in a sexual act” with a minor who is under the age of 16 and at least four years younger than the defendant.

The Ninth Circuit adopted as a definition of SAM the elements of 18 USC §§ 2243, which are knowingly engaging in a sexual act, with a person under age 16 and at least four years younger than the defendant.²¹ “Sexual act” includes anal or genital penetration, or oral contact with genitals or anus, or touching genitals, not through clothing, with intent to arouse or harass.²²

“Knowingly” means that the defendant had the capacity to know he or she was engaging in sex, not that the defendant knew the age of the other party. The Ninth Circuit held that because § 261.5(d) does not have “knowing” sexual conduct as an element, no such conviction meets this scienter requirement, and therefore no § 261.5(d) conviction is SAM under this test.²³ Offenses such as §§ 288(c) and 647.6(a) do not meet this test because they do not require a “sexual act.”

b. Sexual or lewd conduct causing harm due to the young age of the minor

In a separate standard, courts have found that some conduct is *per se* sexual abuse of a minor due to the young age of the minor. No specific age difference or “knowing” conduct is required.

The Ninth Circuit held that sexual intercourse is not SAM if the minor is age 15, but is if the minor is age 13.²⁴ Recently the court held that intercourse with a 14-year-old minor is not necessarily SAM.²⁵ Because the minimum conduct to commit § 261.5(d) is with a minor just under the age of 16, no conviction of that offense is SAM under this test.²⁶

²⁰ The aggravated felony “sexual abuse of a minor” is a generic definition that is subject to the categorical approach. See *Nijhawan v. Holder*, 557 U.S. 29, 37, 129 S.Ct. 2294, 2300 (2009), citing with approval *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*). Under the categorical approach, a prior conviction will be evaluated solely based upon the minimum conduct to commit the offense. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (U.S. 2013). See Part I.

²¹ *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*).

²² Sexual act is defined at 18 USC § 2246(2). See *Estrada-Espinoza*, *supra*.

²³ *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1016 (9th Cir. 2009) (P.C. § 261.5(d) lacks this element of “knowing”).

²⁴ *Ibid.* (sexual conduct with a person just under sixteen is not SAM because not *per se* abusive); *U.S. v. Valencia-Barragan*, 600 F.3d 1132 (9th Cir. 2010) (sex with victim age 13 is categorically SAM).

²⁵ *U.S. v. Gomez*, 732 F.3d 971 (9th Cir. 2013) (Ariz. Rev. Stat. § 13-1405, version requiring victim under age 15, is not necessarily SAM) (mandate not yet issued on this opinion at this writing).

²⁶ While *Pelayo-Garcia* indicated that § 261.5(d) so that an immigration judge may look to the record to see the victim’s age, the Supreme Court subsequently clarified that to be divisible, the statute must set out separate elements in the alternative. See *Descamps v. U.S.*, *supra*. Section 261.5(d) does not set out separate, additional ages under the age of 16. A single offense is evaluated based on the minimum conduct to commit it. See *Moncrieffe v. Holder* and *Estrada-Espinoza supra*, and see Part I, *supra*.

Lewd conduct with a person under the age of 14, P.C. § 288(a), is automatically SAM. Lewd conduct with a minor aged 14 or 15, § 288(c)(1) is not necessarily SAM.²⁷

2. Crime Involving Moral Turpitude (“CIMT”)

Whether an offense is a CIMT is determined by the minimum conduct to commit the offense.²⁸ There is some uncertainty as to what definition will control when sex with a minor is a CIMT. Under either possible definition, it appears that offenses such as §§ 261.5(d), 646.7(a), should be held categorically *not* to involve moral turpitude.

Remember that a single CIMT conviction does not always cause inadmissibility and deportability. Your client might be able to accept one conviction. See Part I.G, *supra*.

Definition 1: Knowledge of minor age. If an element of the offense is that the defendant knew or should have known the minor was underage, an offense involving sexual conduct may be held a CIMT. The Board of Immigration Appeals applied this CIMT test to P.C. § 261.5(d) (CIMT if knew or should have known minor was under age 16), as well as to a Texas statute that penalized sexual conduct as mild as touching a breast through clothing with intent to arouse.²⁹

Note that this definition arose in the context of an administrative case that held that the full categorical approach does not fully apply to CIMT determinations, so that knowledge of the minor’s age did not need to be an element of the offense, and an immigration judge could simply take testimony from the noncitizen as to what he or she reasonably believed.³⁰ The Ninth Circuit subsequently overturned that administrative rule, and clarified that the full categorical approach applies to CIMTs.³¹ Therefore, the CIMT definition in the Ninth Circuit now requires that the *minimum conduct* to commit the offense is that the defendant knew or should have known that the person was underage, and does not permit an immigration judge to simply ask the person.

CIMT Definition 2: Harm to the victim. Earlier the Ninth Circuit held that moral turpitude inheres if the offense is inherently abusive or harmful to the other party. It found that

²⁷ *U.S. v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999) (P.C. § 288(a) is categorically SAM); *U.S. v. Castro*, 607 F.3d 566, 567-58 (9th Cir. 2010) (P.C. § 288(c) is not categorically SAM). While §288(c) prohibits conduct with lewd intent with either a 14- or 15-year-old minor, it appears that no offense is SAM. See *U.S. v. Gomez*, *supra*, finding that consensual sexual intercourse with a 14-year-old minor is not SAM.

²⁸ “Crime involving moral turpitude” is a generic term that is subject to the categorical approach. *Olivas-Motta v. Holder*, 716 F3d 1199 (9th Cir 2013), overruling *Matter of Silva-Trevino* (AG 2008) 24 I&N Dec 687. Under the categorical approach a prior conviction must be evaluated solely based on the minimum conduct to commit the offense. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). See “Box: Minimum Conduct” at the start of this Note.

²⁹ See *Matter of Silva-Trevino*, *supra* at 690-94 (AG 2008) (Texas P.C. 21.11(a)(1) prohibiting any touching, including touching breast through clothing, a person under the age of 17) and *Matter of Guevara-Alfaro*, 24 I&N Dec. 417 (BIA 2011) (sexual intercourse under P.C. § 261.5(d)), finding that these offenses are divisible for CIMT purposes based upon whether the person reasonably believed the victim was under-age.

³⁰ *Silva-Trevino*, *supra*.

³¹ *Olivas-Motta v. Holder*, *supra* (the categorical approach governs moral turpitude determinations, overruling *Silva-Trevino*, *supra*); *Moncrieffe v. Holder*, *supra* at 1684 (2013) (the minimum conduct required to commit the offense is the standard under the categorical approach).

the minimum conduct to commit §§ 261.5(d) or 647.6 is not necessarily harmful.³² Under the minimum conduct test, therefore, no conviction under these sections is a CIMT. While an immigration judge will apply the “know or should have known” definition, the Ninth Circuit might ultimately affirm this definition.

(It is unclear which definition will apply, because the Ninth Circuit might or might not defer to the Board of Immigration Appeals. Generally the court will defer to a reasonable precedent opinion by the Board defining conduct that involves moral turpitude.³³ The court has not yet considered whether the Board’s standard (Definition 1 above) is sufficiently reasonable that the court should defer and withdraw its own standard (Definition 2 above)).

3. Definition of a Deportable Crime of Child Abuse

Any offense with the element of lewd intent or conduct toward a person under the age of 18 will likely be charged as a deportable crime of child abuse. If the offense does not create the risk of serious harm to the minor – e.g. consensual conduct with an older teenager, a mild offense such as § 647.6(a) – there is a strong argument that the offense does not meet the BIA’s definition of child abuse because it does not involve the risk of exploitation or abuse.³⁴ There is no guarantee that this will win, however – and in the meantime the person may be fighting the issue while in immigration detention. Again, this mainly harms a permanent resident or refugee who was not already deportable, and a person who is otherwise eligible to apply for “ten year” cancellation. See §N.17 Relief.

An age-neutral offense that involves harm or risk of serious harm to the victim is a deportable crime of child abuse only if the reviewable record of conviction conclusively shows that the victim was under age 18.³⁵ To avoid a deportable crime of child abuse, bargain for an age-neutral offense and cleanse the record of reference to a minor victim. A plea to an offense against a “John Doe” might safely be coupled with a stay-away order from a specific minor.³⁶ (While immigration advocates have a very strong argument that the minimum conduct test should apply, so that *no* age-neutral offense is a deportable crime of child abuse, regardless of whether the record shows minor age of the victim, we ask you to act conservatively and keep a minor’s age out of the record.)

³² See *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007)(minimum conduct to commit § 261.5(d) is not a CIMT); and see *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1000 (9th Cir. 2008) (same for §647.6(a)), partially overruled on other grounds by *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (*en banc*).

³³ See *Marmolejo-Campos v. Holder*, *supra*, and see §N.7 Moral Turpitude.

³⁴ The Board of Immigration Appeals stated that a crime of child abuse includes “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...” *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 513 (BIA 2008); see also § N.9 Domestic Violence and Child Abuse.

³⁵ *Id.* at 516-17.

³⁶ *Ibid.*

4. Crime of Violence Aggravated Felony, and Deportable Crime of Domestic Violence

Conviction of a “crime of violence” has two potential immigration consequences:

A deportable “crime of domestic violence” is defined as a crime of violence against a victim who is protected under state domestic violence laws, which in California includes dating.³⁷ There is no sentence requirement. Currently the relationship must be proved by evidence in the reviewable record of conviction, but in future it is possible that other evidence might be permitted as well.

A crime of violence is an aggravated felony if a sentence of one year or more is imposed on any single count.³⁸ There does not need to be a domestic relationship. For suggestions on how to avoid a sentence of a year for immigration purposes while accepting over a year of custody, see §N.4 Sentences.

Definition and offenses. A crime of violence is defined for immigration purposes at 18 USC §16. A misdemeanor must have intent to use force as an element of the offense, under 18 USC §16(a). A felony may qualify through that definition, or because it is an offense that carries an inherent risk that violent force will be used in committing the offense, under §16(b). “Force” means aggressive, purposeful, violent force; it does not include negligent or reckless causation of injury, or intent to use *de minimus* force (offensive touching) or cause minor harm. Whether an offense is a crime of violence is determined by the minimum conduct to commit the offense, under the categorical approach.³⁹

To see if an offense is a crime of violence, see the California chart, or see discussion at § N.9 *Violence, Domestic Violence, Child Abuse*. Misdemeanor Cal. P.C. §§ 261.5(c) or (d), 288(c), and 647.6(a), are not crimes of violence, because they do not have intent to use violent force as an element. The Ninth Circuit held that § 243.4 is a crime of violence as a felony, but not as a misdemeanor.⁴⁰ Felony § 261.5(c) is not a crime of violence,⁴¹ and felony § 261.5(d) should not be either.⁴² However, the Ninth Circuit surprisingly held that P.C. § 288(c), conduct with lewd intent toward a 14- or 15-year-old by a person at least 10 years older, is a crime of violence under the “average case” analysis.⁴³ Other Circuit Courts of Appeals may have more conservative interpretations.

³⁷ 8 USC § 1227(a)(2)(E)(i), INA § 237(a)(2)(E)(i).

³⁸ 8 USC § 1101(a)(43)(F), INA § 101(a)(43)(F).

³⁹ See, e.g., *U.S. v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013), *Moncrieffe v. Holder*, *supra*.

⁴⁰ See *Lisbey v. Gonzales*, 420 F.3d 930, 933 (9th Cir. 2005)(felony) and *U.S. v. Lopez-Montanez*, 421 F.3d 926, 928 (9th Cir. 2005) (misdemeanor).

⁴¹ *Valencia-Alvarez v. Gonzales*, 439 F.3d 1046 (9th Cir. 2006).

⁴² *U.S. v. Christensen*, 559 F.3d 1092 (9th Cir. 2009) (sexual intercourse between a person under age 16 and a defendant at least four years older, prohibited by a Washington statute, is not a crime of violence)

⁴³ See *Rodriguez-Castellon v. Holder*, 733 F.3d 847 (9th Cir. 2013). The panel distinguished decisions finding that §261.5 is not a crime of violence, on the ground that § 261.5 is “consensual.” However, §288(c) also may be.

C. Annoying or Molesting a Child, Calif. P.C. § 647.6(a)

Summary: At least in proceedings arising within the Ninth Circuit, no conviction of §647.6(a) should be held to be sexual abuse of a minor, a crime of violence, or a crime involving moral turpitude, for purposes of both deportability and eligibility for admission or relief.

However, it will likely be charged as a deportable crime of child abuse, which is bad for permanent residents, refugees, and applicants for non-LPR cancellation. Also, if the person is brought into removal proceedings outside the Ninth Circuit, it may be charged as SAM.

Aggravated felony. The minimum conduct test applies to determining whether §647.6(a) amounts to an aggravated felony as sexual abuse of a minor (“SAM”).⁴⁴ The Ninth Circuit held that the minimum conduct to commit § 647.6(a) is not SAM, because it includes conduct that does not cause or threaten real harm. State decisions uphold conviction of §647.6(a) based on conduct such as touching the child’s shoulder, making faces, or taking photographs in public of a child, with no focus on sexual body parts.⁴⁵ Because the minimum conduct is not SAM, no conviction under § 647.6 should be held an aggravated felony as SAM.

However, advise the defendant that while the plea avoids a SAM conviction now, in the Ninth Circuit, the client still should be cautious. The client should check with an expert in this area before leaving the U.S., leaving the Ninth Circuit states, or having any voluntary contact with immigration authorities, e.g. renewing a 10-year green card. See Part II.A, *supra*

Deportable crime of child abuse. As with all other offenses involving lewd intent and a minor under the age of 18, counsel should assume that this conviction will make a permanent resident deportable. With a benign record of conviction, immigration counsel (if the client has any) can argue that this is not “abuse,” but there is no guarantee of winning.

Crime involving moral turpitude (CIMT). The minimum conduct to commit §647.6(a) also is not a crime involving moral turpitude. It is not a CIMT according to the Board of Immigration Appeals’ standard because it lacks an element requiring that the defendant knew or should have known that the victim was underage.⁴⁶ If instead the standard is reprehensible conduct or harm to the victim, it is not a CIMT because very mild and innocuous conduct is sufficient for conviction.⁴⁷ The Board might or might not apply its “knew or should have known the victim was under age 16” test for moral turpitude.

⁴⁴ See “Box: Minimum Conduct” at the start of this Note. Although § 647.6(a) prohibits annoying *or* molesting a child, the statute is not divisible because annoy and molest are synonymous. See *People v. Kongs*, 30 Cal. App. 4th 1741, 1749 (1994).

⁴⁵ *U.S. v. Pallares-Galan*, 359 F.3d 1088, 1101 (9th Cir. 2004) (§647.6(a) includes conduct that is not abusive or harmful enough to be SAM); see also conduct described in *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1000 (9th Cir. 2008) (§647.6(a) reaches conduct that does not involve moral turpitude).

⁴⁶ See discussion of this standard in *Matter of Silva-Trevino*, *supra* and *Matter of Alfaro*, *supra*, at Part B.2 above.

⁴⁷ The Ninth Circuit found that § 647.6(a) can be committed by conduct that is not harmful and thus not necessarily a CIMT. *Nicanor-Romero*, *supra*. See discussion of this standard in Part B.2, above.

D. Plea Option: Consensual Sexual Conduct with a Person under the Age of 18 or 16

1. Consider a plea to an age-neutral offense, keeping the victim's minor age out of the record of conviction

Fighting for a plea to an age-neutral offense may be well worth it, depending on the defendant's situation. The advantages are:

- While §261.5 is not the aggravated felony "sexual abuse of a minor" ("SAM") in immigration proceedings arising within the Ninth Circuit, it likely will be if the person travels or is detained outside the Ninth Circuit. In contrast, unless Congress changes the Immigration Act, an age-neutral offense never is SAM.
- Section 261.5 is very likely to be charged as a deportable crime of child abuse, whereas a conviction of an age-neutral offense cannot be, at least where the record of conviction does not establish the minor age of the victim. Avoiding a deportable conviction is especially important to a lawful permanent resident or refugee who is not already deportable for a conviction, and to an undocumented person who is otherwise eligible to apply for non-LPR cancellation.
- While the age-neutral offense may have other immigration consequences – e.g., crime involving moral turpitude -- it might be possible to avoid or lessen these consequences.

In some cases, however, it is not worth trading a reasonable § 261.5 plea for an age-neutral offense, especially if the age-neutral offense carries a significantly higher criminal penalty. Consult with an immigration expert if you are unsure.

2. Minor under age 18: Cal. P.C. §§ 261.5(b) or (c), 286(b)(1), 288a(b)(1), or 289(h)

Summary: In immigration proceedings arising within the Ninth Circuit, none of these should be held to be sexual abuse of a minor, a crime of violence, or a crime involving moral turpitude, for purposes of both deportability and eligibility for admission or relief.

However, they will likely be charged as a deportable crime of child abuse, which is bad for permanent residents, refugees, and applicants for non-LPR cancellation. Also, if the person is brought into removal proceedings outside the Ninth Circuit, these will likely be charged as SAM.

Not an aggravated felony as "sexual abuse of a minor" (SAM) in the Ninth Circuit. The minimum conduct to commit the above offenses involves consensual sex with a person just under the age of 18. This conduct does not meet either definition of SAM used in the Ninth Circuit, discussed at Part B.1, above. It is not an analogue to 18 USC § 2243 because the victim need only be under age 18. It is not *per se* abusive due to the young age of the minor for the same reason. See *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*).

There is a strong likelihood that these offenses would be held SAM in proceedings outside the Ninth Circuit, although there is no guarantee. The Board of Immigration Appeals

rule might govern. The Board found that violation of a Florida statute that prohibited sex between a defendant who is at least 24 years old, and a 16- or 17-year old is SAM. The Board found that the offense was inherently exploitative due to the “significant” age difference required by the statute.⁴⁸ The above offenses such as § 288a(b)(1) (oral sex) require no age difference at all, and § 261.5(c) requires only a three-year difference. Where there is a choice, § 288a(b)(1) is preferable due to this distinction and the risk of transfer outside the Ninth Circuit.

Crime involving moral turpitude. A § 261.5 conviction should not be held a crime involving moral turpitude (CIMT), although conceivably ICE would allege that it is. The Board held that sexual conduct with a minor is a CIMT if the defendant knew or should have known that the other party was underage.⁴⁹ For § 261.5 to be a CIMT under the categorical approach, this knowledge must be an *element* of the offense. See discussion at Part B.2, above. (ICE might argue that because §261.5(c) has a potential affirmative defense based on mistaken belief of age, this serves as an “element,” but these are not the same.)

If instead the Ninth Circuit’s CIMT standard, based on harm to the victim, is used, then §261.5(c) also is not a CIMT. The Ninth Circuit held that the minimum conduct to commit even § 261.5(d) is not a CIMT, because a person a day shy of his or her 16th birthday is not necessarily abused or harmed by this offense. See discussion at Part B.2, above.

A single CIMT conviction will not necessarily cause consequences. It will not cause inadmissibility if it is a misdemeanor, a sentence of six months or less was imposed, and the defendant has not committed any other CIMTs. It will not cause deportability if (a) the defendant committed the offense more than five years after being admitted to the U.S., or (b) the offense has a maximum sentence of less than one year (e.g., a six-month misdemeanor, attempt to commit a wobbler that was designated a misdemeanor). See §N.10 *Moral Turpitude*.

Likely to be charged as a deportable crime of child abuse. Because the minimum conduct to violate these offenses involves consensual sex with a person a day short of his or her 18th birthday, there are very strong arguments that this is not “child abuse.” At least some ICE offices may charge this as child abuse, however. Again, this is especially serious for an LPR or refugee who is not yet deportable, or an undocumented person who will apply for “ten year” cancellation. See Part V, *infra*, and see § N.17 *Relief*.

Not a crime of violence or crime of domestic violence. Not a crime of violence within the Ninth Circuit.⁵⁰ It is possible offenses prohibiting consensual sex with a person just under age 18 would be charged as a crime of violence outside the Ninth Circuit.

⁴⁸ *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006)(Fla. Stat. Ann. §794.05 is categorically sexual abuse of a minor).

⁴⁹ See discussion of this standard in *Matter of Silva-Trevino*, *supra* and *Matter of Alfaro*, *supra*, at Part B.2, above.

⁵⁰ See, e.g., *U.S. v. Christensen*, 559 F.3d 1092 (9th Cir. 2009) (Washington statute that prohibits sexual conduct with minor older than 13 and younger than 16 years of age is not necessarily a crime of violence).

3. Cal. P.C. §§ 261.5(d), 286(b)(2), 288a(b)(2) or 289(i)

Summary: At least in proceedings arising within the Ninth Circuit, no conviction of § 261.5(d) or similar offenses should be held to be sexual abuse of a minor or a crime of violence, nor a crime involving moral turpitude, whether for purposes of both deportability or eligibility for admission or relief. Outside the Ninth Circuit, it is likely that the opposite will be true.

The offense is very likely to be charged as a deportable crime of child abuse.

Note that a felony conviction of § 261.5(d) may serve as a serious sentence enhancement if the client ever is prosecuted for illegally re-entering the U.S. after removal. To prevent that, a better plea is to misdemeanor §261.5(d) or even felony § 288a(b)(2). See below.

Not an aggravated felony as “sexual abuse of a minor” (SAM) in the Ninth Circuit.

The minimum conduct to commit the above offenses involves consensual sex with a person just under the age of 16. This does not meet either definition of SAM used in the Ninth Circuit, as discussed at Part B.1, above. The offenses are not SAM as an analogue to 18 USC § 2243 because they do not require “knowingly” engaging in sexual conduct.⁵¹ They are not SAM based upon *per se* harm to a very young victim, because the Ninth Circuit held that consensual sex with a minor a day short of age 16 is not necessarily abusive in this way.⁵²

These offenses might well be held SAM in proceedings outside the Ninth Circuit, depending upon the law of the Circuit. A plea to §261.5(c) or other offense that requires the victim to be under the age of 18 rather than 16 would be safer than these, but an age-neutral offense would be best.

Not a crime involving moral turpitude. In the context of §261.5(d), the BIA has held that sexual conduct with a minor is a crime involving moral turpitude (“CIMT”) if the defendant knew or should have known that the other party was under age 16. Section 261.5(d) does not have such knowledge as an element. (As compared to § 261.5(c) it does not even have lack of such knowledge as an affirmative defense.⁵³) If instead the Ninth Circuit’s CIMT standard, based on risk of harm to the victim, is used, the court has held that the minimum conduct to commit § 261.5(d) is not a CIMT, because a person a day shy of his or her 16th birthday is not necessarily abused or harmed by this offense. See discussion at Part B.2, above.

Note that a single CIMT conviction will not necessarily cause consequences. It will not cause inadmissibility if it is a misdemeanor, a sentence of six months or less was imposed, and the defendant has not committed any other CIMTs. It will not cause deportability if (a) the defendant committed the offense more than five years after being admitted to the U.S., or (b) the offense has a maximum sentence of less than one year (e.g., a six-month misdemeanor, attempt to commit a wobbler that was designated a misdemeanor). See §N.10 Moral Turpitude.

⁵¹ See discussion of *Estrada-Espinoza*, *supra* (elements of 18 USC 2243 provide a definition of SAM) and *Pelayo-Garcia v. Holder*, *supra* (§ 261.5(d) does not require “knowingly” engaging in sex), in Part B.1, above.

⁵² See discussion of *Pelayo-Garcia*, *supra*, in Part B.1, above.

⁵³ *People v. Scott*, 83 Cal.App.4th 784 (Ct.App.4th 2000)

Will be charged as a deportable crime of child abuse. ICE offices are very likely to charge this offense as a deportable crime of child abuse. Again, this is especially serious for an LPR who is not yet deportable, or an undocumented person who will apply for “ten year” cancellation. See Part V, below, and see § N.17 Relief.

Not a crime of violence or crime of domestic violence in the Ninth Circuit. The Ninth Circuit found that consensual sex with a person age 15 is not necessarily a crime of violence.⁵⁴ It might be held a “crime of violence” outside the Ninth Circuit, however. See Part B.4, above.

E. Lewd Conduct with a Minor, Calif. P.C. §§ 288(c), not (a)

1. P.C. § 288(a), lewd act with a child under the age of 14, is *always* SAM

Any § 288(a) conviction will be held an aggravated felony as sexual abuse of a minor (“SAM”).⁵⁵ It also is a crime involving moral turpitude and a deportable crime of child abuse. In addition, it is a crime of violence, so that if the child is a member of the household, it will be a deportable crime of domestic violence, and/or if a sentence of a year or more is imposed, it will be an aggravated felony as a crime of violence.

2. P.C. § 288(c)(1), lewd act with a child who is 14 or 15 years old and at least 10 years younger than defendant, is *not* necessarily SAM, but a felony is a crime of violence

Summary. This may be a useful plea option. The offense is not the aggravated felony sexual abuse of a minor (SAM). In a controversial opinion the Ninth Circuit held that a *felony* §288(c) conviction is a crime of violence, although a misdemeanor conviction is not. Therefore, if a sentence of a year or more is received on any single count of felony §288(c), the offense will be an aggravated felony as a crime of violence.

Either a felony or misdemeanor will likely be charged as a deportable crime of child abuse. It should not be held a crime involving moral turpitude, but that might change.

Aggravated felony SAM. The Ninth Circuit held that the minimum conduct to commit § 288(c)(1) is not SAM because it includes conduct that is not physically or psychologically abusive to a minor of this age.⁵⁶ Section 288 includes “innocuous” touching, “innocently and warmly received”; the minor need not be aware of any lewd intent (which still is held SAM if the victim is under age 14).⁵⁷ Section 288(c)(1) could be held divisible between a minor who is age

⁵⁴ *United States v. Christensen*, *supra*.

⁵⁵ See *U.S. v. Baron-Medina*, 187 F.3d 1144, 1147 (9th Cir. 1999), reaffirmed in *U.S. v. Medina-Villa*, 567 F.3d 507, 514 (9th Cir. 2009).

⁵⁶ *U.S. v. Castro*, 607 F.3d 566, 567-58 (9th Cir. 2010), amending 599 F.3d 1050 (noting that § 288(c)(1) reaches conduct such as touching the 14- or 15-year-old through clothing, touching a part of the body that is not genitalia, or instructing a child to disrobe).

⁵⁷ *Baron-Medina*, *supra* at 1147 (examples of innocent-appearing behavior that is abusive under § 288(a) solely because the victim is under age 14).

14 versus age 15, which the statute lists in the alternative. Age 14 should be safe, but where possible it remains best to designate age 15 or leave the record vague between 15 and 14.⁵⁸

Aggravated felony crime of violence. Felony, but not misdemeanor, §288(c) will be an aggravated felony crime of violence if a sentence of a year or more is imposed on any single count. Under the “ordinary case” test, a Ninth Circuit panel held that in the ordinary case, the minor might resist and violence could ensue. The panel distinguished §261.5(d), which is not a crime of violence, by opining that that offense was consensual but § 288(c) usually is not.⁵⁹

V. OTHER OFFENSES: PROSTITUTION, PORNOGRAPHY, LEWD CONDUCT

A. Prostitution (For more information see *Defending Immigrants in the Ninth Circuit*, § 6.2)

1. “Engaging in Prostitution” Ground of Inadmissibility

A noncitizen is inadmissible, but not deportable, if he or she “engages in” a pattern and practice of prostitution.⁶⁰ A one-time experience is not sufficient to show this practice. While no conviction is required for this finding, a conviction for prostitution will serve as evidence. *Hiring* a prostitute under Calif. P.C. § 647(b) does not come within the “engaging in prostitution” ground of inadmissibility⁶¹ (but it is a crime involving moral turpitude, see below).

For immigration purposes, the definition of prostitution is restricted to offering sexual intercourse, as opposed to other sexual conduct, for a fee.⁶² Section 647(b) is a divisible statute under this definition, because it prohibits offering “any lewd act” for consideration. Counsel should plead to a specific lewd act other than intercourse, or to a “lewd act other than intercourse.” The conviction will be a CIMT.

Some immigrants are eligible for a discretionary “§ 212(h)” waiver of the prostitution and moral turpitude inadmissibility grounds, under 8 USC § 1182(h).⁶³

2. Prostitution as a Crime Involving Moral Turpitude (“CIMT”)

Regardless of whether intercourse or mere lewd acts are offered for a fee, prostitution is a CIMT for both the prostitute and the customer. Recently the Ninth Circuit held that all conduct

⁵⁸ The Ninth Circuit held that even sexual intercourse with a 14-year-old is not sexual abuse of a minor. *U.S. v. Gomez*, 732 F.3d 971 (9th Cir. 2013). Because the mandate has not issued at the time this Note was posted, we still advise pleading to age 15 where possible in case a petition for rehearing en banc is granted.

⁵⁹ See *Rodriguez-Castellon v. Holder*, 733 F.3d 847 (9th Cir. 2013).

⁶⁰ 8 USC § 1182(a)(2)(D), INA § 212(a)(2)(D).

⁶¹ *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008).

⁶² *Kepilino v. Gonzales*, 454 F.3d 1057 (9th Cir. 2006).

⁶³ Among other resources see Brady, “Update on INA § 212(h) Relief” at www.ilrc.org/crimes (scroll down).

under P.C. § 647(b) is a CIMT.⁶⁴ Some immigrants are eligible for a discretionary waiver of the prostitution and moral turpitude inadmissibility grounds under 8 USC § 1182(h).⁶⁵

3. Conviction for Running a Prostitution Business as an Aggravated Felony or a Deportable Offense

Deportable offense (other than the aggravated felony deportation ground). Federal conviction for importing noncitizens for any immoral purpose is a basis for deportability.⁶⁶

Moral Turpitude. An older case held that conviction under Calif. P.C. § 315 for keeping or residing in a place of prostitution or lewdness is a crime involving moral turpitude.⁶⁷ It is possible that a conviction for *living in* a place of prostitution under § 315 would be held not a CIMT.⁶⁸ If § 315 is unavoidable, try to plead to paying rent to live in such a place, or at least leave open that possibility by pleading to the language of the statute in the disjunctive.

Aggravated felony. Some federal offenses and state analogues that involve running prostitution or other sex-related businesses are aggravated felonies.⁶⁹ Because the federal definition of prostitution is limited to providing sexual intercourse for a fee, while Calif. P.C. § 315, keeping a place of prostitution or lewdness, includes providing other sexual conduct for a fee, § 315 either should not be an aggravated felony under this section, or should be divisible.⁷⁰ Plead conservatively to lewdness under P.C. § 315 to avoid the aggravated felony.

B. Child Pornography

A conviction of certain federal child pornography offenses (18 USC §§ 2251, 2251A, 2252) or analogous state offense is an aggravated felony. Possession of child pornography in violation of Calif. P.C. § 311.11(a) is an aggravated felony under this provision, and also is a “particularly serious crime” barring asylum and withholding of removal.⁷¹ In addition it is likely to be held a deportable crime of child abuse and a crime involving moral turpitude.

⁶⁴ *Rohit v. Holder*, 670 F.3d 1085 (9th Cir. 2012).

⁶⁵ See Brady, “Update on INA § 212(h) Relief,” *supra*.

⁶⁶ 8 USC § 1227(a)(2)(D)(iv), INA § 237(a)(2)(D)(iv).

⁶⁷ *Matter of P*, 3 I&N Dec. 20 (BIA 1947) (Calif. P.C. § 315, keeping a house of ill fame involves moral turpitude).

⁶⁸ In *Cartwright v. Board of Chiropractic Examiners*, 16 Cal.3d 762, 768 (Cal. 1976), the court concluded that P.C. § 315 is not a CIMT where resident paid rental to owner with knowledge or intent that the income contributed to illicit operation. Although state case law does not determine a CIMT for immigration purposes, this case provides an example of the type of conduct not involving moral turpitude that is punishable under the statute.

⁶⁹ See 8 USC § 1101(a)(43)(K), INA § 101(a)(43)(K).

⁷⁰ There is no Ninth Circuit, published decision on this issue, but see, e.g., *Depasquale v. Gonzales*, 196 Fed. Appx. 580, 582 (9th Cir. 2006) (unpublished) (prostitution under Hawaiian law covers more conduct than the federal definition under 8 USC § 1101(a)(43)(K)(i), which is limited to sexual intercourse for a fee) and *Prus v. Holder*, 660 F.3d 144, 146-147 (2^d Cir. 2011) (same for New York offense of promoting prostitution in the third degree).

⁷¹ *Matter of R-A-M-*, 25 I&N Dec. 657 (BIA 2012).

C. Lewd in Public, Indecent Exposure

1. Calif. P.C. § 647(a), Lewd in Public

Prevent Aggravated Felony, Deportable Crime of Child Abuse. The minimum conduct to commit this offense does not involve a minor, so no conviction ever should be charged as sexual abuse of a minor. But because of the risk that ICE would charge it as a crime of child abuse, counsel should state exclude any statement that a minor was present. This is a good alternate plea to avoid sexual abuse of a minor.

Crime Involving Moral Turpitude. Although this is very broadly defined to include, e.g., a married couple who touch a breast or buttocks in a park, this is a dangerous plea for CIMT purposes. This type of offense has been held a CIMT in several older cases where the encounter was homosexual, but not where the encounter was heterosexual. Under today's standards, this discriminatory interpretation of the law should not persist. However, recently a California Federal District Court held that § 647(a) is categorically a CIMT – citing the older cases that were based on homosexual activity, but not acknowledging or discussing this issue. *U.S. v. Nunez-Garcia*, 262 F. Supp. 2d 1073 (C.D. Cal. 2003). If a plea is required, the best language is “I engaged in lewd conduct in reckless disregard of the fact that another person might become aware and be *offended*.”

2. Calif. P.C. § 314(1), Indecent Exposure

Aggravated Felony; Deportable Crime of Child Abuse. If the record of conviction indicates that a minor was the victim, ICE will charge this as a deportable crime of child abuse. If the record does not so indicate, it is not. Immigration counsel will argue that regardless of the record of conviction, under the minimum conduct test this cannot be a crime of child abuse, but criminal defense counsel cannot rely upon this winning.

Regardless of information in the record, this conviction of an age-neutral offense will not constitute SAM. See, e.g., *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9th Cir. 2012) (no conviction under an age-neutral statute is sexual abuse of a minor).

Moral Turpitude. The Board of Immigration Appeals held that any conviction under P.C. § 314(1) is a CIMT, and counsel should assume this is the rule.⁷² Note, however, that the Ninth Circuit earlier had held that § 314 is divisible as a CMT, because it reaches erotic dancers performing for customers who wish to be there.⁷³ The BIA disagreed with this ruling on the grounds that this conduct no longer is prosecuted under § 314(1). Therefore, if a plea to § 314 cannot be avoided, it might not be held a CMT if the plea is specifically to erotic dancing for an appreciative audience.

⁷² *Matter of Corte Medina*, 26 I&N Dec. 79 (BIA 2013).

⁷³ *Ocegueda-Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010),

D. Failure to Register as a Sex Offender

Crime Involving Moral Turpitude. Assume that Calif. P.C. § 290(g)(1) will be held a CIMT in removal proceedings, based on Board of Immigration Appeals precedent. However, the Ninth Circuit has asked the Board to reconsider or better explain this position, given that the definition of a CIMT includes a scienter of at least recklessness, whereas § 290(g)(1) is a strict liability offense.⁷⁴ If this is pled to, counsel should state in the record that the failure was due to a mistake or forgetfulness, where that is possible.

Deportable for federal conviction for failing to register as a sex offender based on a state conviction. Effective July 27, 2006, a conviction under 18 USC § 2250 is a basis for deportability.⁷⁵ Section 2250 penalizes failure to register as a sex offender in any jurisdiction, including a state. It requires persons who have been convicted of any of a large number of sex offenses or false imprisonment involving minors to register in the jurisdictions of their conviction, incarceration, residence, or school within three business days after sentence or prior to release from custody, and within three days of changing address. Any noncitizen who violates this requirement may be convicted in federal court, and once convicted is deportable and disqualified from cancellation for non-LPRs. The conviction must occur on or after July 27, 2006. For more information see §N.13 *Adam Walsh Act* and see *Defending Immigrants in the Ninth Circuit*, § 6.22.

VI. IMMIGRATION RELIEF FOR DEFENDANTS AND VICTIMS

Impact of aggravated felony conviction. An aggravated felony conviction is a bar to most forms of relief, including LPR cancellation, non-LPR cancellation, asylum, VAWA relief for persons abused by USC or LPR parents or spouse, and in some cases family immigration, especially if a permanent resident is re-applying for a new green card through family. See § N.17 *Relief*. Relief that might be available includes a T or U visa, withholding of removal (an asylum-like provision), Convention Against Torture, and in some cases family immigration.

Spotting Relief. Besides reviewing the relief discussed below, complete the Questionnaire, and see two-page summaries of each of these forms of relief, at §N.17 *Relief Toolkit*. See also the Chart on Eligibility for Relief there.

“T” or “U” Visa for Victims. Noncitizen victims of alien trafficking who were forced into prostitution while under the age of 18, or any noncitizens who are victims of serious crimes such as assault, rape, incest, and domestic violence and are willing to participate in investigation or prosecution of the offender, may be able to apply for temporary and ultimately permanent status if they cooperate with authorities in an investigation, under the “T” or “U” visas. 8 USC §§ 1101(a)(15)(T), (U). There is a broad waiver for criminal convictions, which technically extends

⁷⁴ The BIA held that § 290(g)(1) is a CIMT in *Matter of Tobar-Lobo*, 24 I&N Dec. 143, 146 (BIA 2007). The Ninth Circuit asked it to reconsider the decision in *Pannu v. Holder*, 639 F.3d 1225 (9th Cir. 2011). See also *Efagene v. Holder*, 642 F.3d 918 (10th Cir. 2011); *Totimeh v. AG*, 666 F.3d 109 (3d Cir. 2012), refusing to apply *Tobar-Lobo*.

⁷⁵ 8 USC 1227(a)(2)(A)(v), INA § 237(a)(2)(A)(v), added by Adam Walsh Child Protection and Safety Act of 2006, HR 4472, PL 109-248, § 401 (July 27, 2006). See §N.13 *Adam Walsh Act*.

even to an aggravated felony conviction. For resources and sources of more information see § N.17 Relief and § N.18 Resources. See also Brady, Tooby, Mehr, Junck, *Defending Immigrants in the Ninth Circuit*, Chapter 11.

VAWA for Victims of Abuse by U.S. Citizen or LPR Spouse or Parent. An undocumented person who was abused by certain relatives can apply for a green card through immigration provisions of “VAWA,” the Violence Against Women Act. The relief is available to men and women. The lawful permanent resident (LPR) or U.S. citizen (USC) must have committed abuse against a spouse or child. The spouse-victim’s child, or the child-victim’s other parent, may also qualify for relief. Abuse includes a broad definition of psychological as well as physical abuse. To qualify for VAWA the person must have good moral character and must not be inadmissible, or else qualify for a waiver. See § N.17 Relief and see also *Defending Immigrants in the Ninth Circuit*, Chapter 11.

Special Immigrant Juvenile (SIJ) Status for Children in Dependency and Delinquency. Some undocumented minors can apply for SIJ if a dependency, delinquency or probate court finds that they cannot be returned to a parent due to abuse, neglect or abandonment. They must not be inadmissible for crimes. Juvenile delinquency dispositions generally do not cause inadmissibility, unless they relate to prostitution or drug trafficking. See § N.17 Relief.

LPR cancellation: This is a fairly lenient form of relief for long-time permanent residents, which can waive any ground of inadmissibility or deportability. Unfortunately, conviction of an aggravated felony is an absolute bar. A complex “stop-clock” provision applies. See discussion of LPR cancellation at § N.17 Relief.

Family immigration: An undocumented person might be able to immigrate through a family visa petition filed by an “immediate relative,” which is defined as a U.S. citizen who is the person’s spouse, child age 21 or older, or – if the person is unmarried and under 21 -- parent. An LPR who has become deportable similarly might be able to “re-immigrate” through a family visa petition. Only certain undocumented persons can do this. Please see Quick Test for Eligibility and other materials on family immigration at § N.17 Relief.

In addition the person must be admissible, or if inadmissible eligible for a waiver. While an aggravated felony is not a ground of inadmissibility, a conviction of a crime involving moral turpitude (CIMT) can be one, and many offenses relating to sex are CIMTs. A single CIMT conviction causes inadmissibility unless the person comes within either of two exceptions. These are (a) the petty offense exception (first CIMT committed, maximum possible sentence of a year or less, which includes a wobbler misdemeanor, and sentence imposed was six months or less) or (b) the youthful offender exception (committed only one CIMT, the while under the age of 18, and conviction as an adult or resulting imprisonment ended at least five years before submitting the application). See § N.7 Moral Turpitude. If the defendant’s single CIMT conviction comes within one of these exceptions, the defendant can apply to adjust status on the family visa petition, and does not need to apply for a waiver of inadmissibility.

The applicant also can assert that the conviction is not a CIMT. Consensual sexual conduct with a minor is not a CIMT if the defendant reasonably believed that the victim was not under

age 18. See Part B.2, *supra*. If the defendant had such a reasonable belief, put a statement to that effect in the record of conviction; this is likely to mean that the offense will be held not a CIMT. Continue to evaluate any past convictions. If the defendant's reasonable belief is not in the record of conviction, she also can ask for a chance to prove this reasonable belief to the immigration judge through testimony in removal proceedings.

If the person is inadmissible for CIMT, he or she might be able to apply for a discretionary "§ 212(h) waiver" of the CIMT inadmissibility ground, under 8 USC § 1182(h). See discussion of § 212(h) at § N.17 *Common Forms of Relief* (Chart and "212(h) Waiver").

Withholding of Removal, Convention Against Torture. Even with an aggravated felony conviction, an undocumented person may be able to apply for withholding of removal if she can prove that it is probable that she will be persecuted on the basis of race, religion, social group, etc. if returned to the home country. She cannot apply if this is a "particularly serious crime," however. Sex crimes that involve non-consensual sexual conduct, or any conduct with a very young victim, are likely to be held particularly serious crimes. A noncitizen may apply for protection under Convention Against Torture if she can show that for whatever reason, the government or a force the government cannot or will not control would torture her. If she already has been persecuted or tortured, this may suffice for these applications. For further information see §N.17 *Relief*, and see *Defending Immigrants in the Ninth Circuit* (www.ilrc.org), Chapter 11.

PRACTICE AIDS: SEX OFFENSES

Practice Aid 10-I Checklist of Safer Pleas

I. Defense Strategies for Offenses related to Sexual Conduct with Minor

- a) **Plead to age-neutral offense**, e.g. §§ 136.1(b)(1), 236, 240, 243, 243.4, 245, 314, 647 with a sentence of less than 1 year on any single count; check for other immigration consequences.
✓ Sanitize record to exclude a minor victim's age or any domestic relationship.

- b) **If pleading to an age-specific statute, carefully craft the record of conviction** to avoid an aggravated felony as Sexual Abuse of a Minor ("SAM"). Assume it will be charged as deportable crime of child abuse.

- *LPR Defendant: Besides SAM, offense may be deportable crime of child abuse, or CIMT. Some but not all LPRs are eligible for relief such as LPR cancellation or family immigration.*

- *Undocumented defendant: It may be CIMT, and as child abuse may bar eligibility for Non-LPR Cancellation or Temporary Protected Status.*

- ✓ **Plea to § 647.6(a)** avoids SAM in Ninth Circuit
- ✓ **Plea to § 288(c)** avoids SAM in Ninth Circuit (if possible, plead to age 15 not 14), but get 364 days or less on a felony to avoid crime of violence aggravated felony
- ✓ **Plea to P.C. §§ 261.5(c), (d)** avoids SAM in Ninth Circuit
- ✓ **All of these offenses may be charged as deportable crime of child abuse.**
- ✓ **Appear not to be crimes involving moral turpitude**
- ✓ **Assume these will be treated as SAM if client goes outside the Ninth Circuit**
- ✓ **Try to avoid a sentence of a year or more on any single count**, in case defendant is transferred outside the Ninth Circuit where this offense might be a "crime of violence," especially felony § 261.5(d). Felony §288(c) is a crime of violence.

c) Avoid Automatic Aggravated Felonies

- X **P.C. § 288(a)**, lewd conduct with child under 14, is SAM
- X **Rape** is intercourse by force, threat, or incapacitation, regardless of sentence, includes §§ 261, 262. Instead plead to P.C. § 243.4, 245(a), with sentence imposed of 364 days or less on each count.
- X **Crime of violence** (e.g. sexual battery, sex with person age 13 or younger, PC 245) with a sentence of 1 year or more imposed for any single count is an aggravated felony
- X **Possession of child pornography** is an aggravated felony

Warning: A conviction that is not "SAM" in the Ninth Circuit may become SAM if your client leaves the Ninth Circuit. The instructions above and in this Note are designed to prevent an offense from being an aggravated felony as sexual abuse of a minor (SAM) under current law in immigration proceedings within the Ninth Circuit. In immigration cases arising outside of Ninth Circuit states, a broader definition of SAM may apply, e.g. one that includes consensual sex between a 17-year-old and 24-year-old. Or, the Supreme Court may decide to create its own definition of SAM in the future. Further, a felony involving sex with a minor might be held a "crime of violence" outside the Ninth Circuit, and thus be an aggravated felony if a sentence of a year or more is imposed.

Warn the defendant that any offense that involves sexual or lewd conduct or intent with a minor has the potential to be held an aggravated felony in these circumstances. The defendant must get expert legal consultation before leaving Ninth Circuit states, leaving the U.S., or having any contact with the government (e.g. renewing a 10-year green card or applying for status or naturalization).

II. Prostitution Offenses

- X **Inadmissible:** Engaging in pattern of prostitution (providing sexual intercourse, as opposed to lewd conduct, for fee) is inadmissible offense even without conviction. A conviction under §647(b) is not sufficient without other evidence. A john is not included in the prostitution inadmissibility ground.
- X **Deportable:** Federal conviction for importing foreign prostitutes is deportable offense. Conviction for running prostitution business may be aggravated felony.
- X **Moral Turpitude:** Any conviction under P.C. § 647(b), for being a prostitute or a john, involving intercourse or other lewd conduct, is a crime involving moral turpitude (CIMT). If possible, plead to non-CIMT offense such as disturbing the peace, trespass, or loitering, with a record clear of any mention of prostitution.
- X **Aggravated Felony:** Some federal offenses and state analogues relating to running a prostitution business are aggravated felonies. "Prostitution" means sexual intercourse, not lewd conduct, for a fee.

Practice Aid 10-II:

LEGAL SUMMARIES TO HAND TO THE DEFENDANT

The majority of noncitizens are unrepresented in removal proceedings. Further, many immigration defense attorneys and immigration judges are not aware of all defenses relating to crimes, and they might not recognize the defense you have created. This paper may be the only chance for the defendant to benefit from your work.

1. *Please give a copy of the applicable paragraph/s to the Defendant, with instructions to present it to an immigration defense attorney or the Immigration Judge. Please include a copy of any **official documents** (e.g. plea form) that will support the defendant's argument.*
2. *Please give or mail a second copy to the defendant's immigration attorney, friend, or relative, or mail it to the defendant's home address. Authorities at the immigration detention center may confiscate the defendant's documents. This will provide a back-up copy accessible to the defendant.*

The applicable summary should be given to defendant convicted of an **age-neutral offense** where the victim was under age 18, or convicted of Cal. P.C. §§ **261.5, 288(c), or 647.6(a)**

* * * * *

Conviction of an Age-Neutral Offense

This paper was given to me by my attorney and pertains to a possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Sexual Abuse of a Minor. The categorical approach applies to the definition of sexual abuse of a minor. *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*). Under this approach, unless the minimum conduct to commit an offense meets the federal, generic definition at issue, no conviction of the offense does. This test applies to deportability as well as eligibility for relief. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684, 1692 (2013) (because the minimum conduct to commit the offense is not an aggravated felony, Mr. Moncrieffe is eligible to apply for LPR cancellation). Therefore, a conviction for an age-neutral offense (i.e., one that does not have as an element that the victim is a minor) never constitutes an aggravated felony as sexual abuse of a minor, because the minimum conduct to commit the offense may involve an adult victim. *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9th Cir. 2012). Evidence from the record of conviction that indicates minor age may not be used to hold that the offense was sexual abuse of a minor. *Moncrieffe, Sanchez-Avalos*.

Deportable crime of child abuse. Similarly, an age-neutral offense never constitutes a conviction of a crime of child abuse, regardless of whether the individual's reviewable record of conviction contains evidence that the victim was under age 18, and regardless of whether the issue is deportability or eligibility for relief. A "crime of child abuse" is a generic offense subject to the categorical approach. See, e.g., *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 516-17 (BIA 2007). The BIA interpreted this to mean that an age-neutral statute can be a deportable crime of child abuse, but only if the record of conviction conclusively establishes that the victim was a minor. It found that the following evidence insufficient to establish that an age-neutral, Washington state conviction involved a minor victim: a no-contact order involving a minor (because this does not establish that the minor was the victim), and a restitution order to the "child victim," because restitution in Washington is established by a preponderance of the evidence and so was not part of the "conviction." *Ibid*. Therefore, if the record in this case does not establish a minor victim, the offense is not deportable child abuse.

Moreover, since *Velazquez-Herrera*, the Supreme Court clarified that in immigration proceedings, the categorical approach permits an immigration judge to evaluate a prior conviction based only on the minimum conduct to commit the element of the offense, and not on any other information in the record. *Moncrieffe, supra*. *Moncrieffe* thus partially overruled *Velazquez-Herrera*: under *Moncrieffe*, no conviction of an age-neutral statute is a crime of child abuse *even if* the record establishes a minor victim, because the minimum conduct to violate the statute includes an adult victim.

Crimes involving moral turpitude. The same categorical approach applies in determining whether an offense is a crime involving moral turpitude. *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir 2013), partially overruling *Matter of Silva-Trevino* (AG 2008) 24 I&N Dec 687). In considering whether an age-neutral offense is a crime involving moral turpitude, an immigration judge may not consider information in the record that indicates that the victim was a minor.

Age-Specific Offenses as Crimes Involving Moral Turpitude
P.C. §§ 261.5 and similar offenses, 288(c), 647.6(a)

* * * * *

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

No conviction of the above-referenced offenses is a crime involving moral turpitude. The administrative definition of a crime involving moral turpitude includes some offenses involving sexual conduct, if the defendant knew or should have known the other party was underage. *Matter of Silva-Trevino*, 24 I&N Dec 687 (AG 2008); *Matter of Alfaro*, 24 I&N Dec. 417 (BIA 2011). In *Alfaro*, the BIA found that Cal. P.C. § 261.5(d), consensual sex with a person under the age of 16 where the defendant is at least age 21, does not have *as an element* that defendant knew or had reason to know that the defendant was under-age. *Alfaro*, at p. 424. *Alfaro* held that it was controlled by *Silva-Trevino*, which had held that the categorical approach does not fully apply to moral turpitude determinations, so that knowledge of the minor’s age does not need to be an element of the offense and an immigration judge may simply take testimony from the noncitizen as to what he or she reasonably believed about the age of the other party.

The Ninth Circuit subsequently held that *Silva-Trevino* was wrongly decided and that the full categorical approach applies to moral turpitude determinations. *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir 2013). Under the categorical approach, an immigration judge must evaluate a prior conviction based solely on the minimum conduct required to commit the elements of the offense. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *U.S. v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013). Using this standard, no conviction under § 261.5(d) meets the Board’s moral turpitude definition, because § 261.5 lacks the element of knowing or having reason to know that the other party is under-age. The same is true for similar offenses such as §§ 286, 288a, etc. Similarly, §§ 288(c) and 647.6(a) have no element relating to reasonable belief about the age of the victim, and cannot be a crime involving moral turpitude under the Board’s test.

The Ninth Circuit has employed a different definition of when this conduct constitutes moral turpitude, which is if the offense necessarily causes harm to the minor. The court held that moral turpitude does not inhere in the minimum conduct to commit P.C. § 261.5(d). *Quintero-Salazar v. Keisler*, 506 F.3d 688, 693 (9th Cir. 2007). The court made the same finding for P.C. § 647.6(a). *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1000-1001 (9th Cir. 2008) (minimum conduct to violate § 647.6(a) is does not involve moral turpitude), partially overruled to the extent that it stated *in general* that moral turpitude determinations are not governed by *Chevron* principles, by *Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009) (*en banc*). See also *U.S. v. Pallares-Galan*, 359 F.3d 1088 (9th Cir. 2004) (minimum conduct to violate 647.6(a) is not sexual abuse of a minor because it includes conduct that is not harmful). The Ninth Circuit has not yet determined whether it will defer to the administrative “knew or should have known” definition, or keep its own “harm to the victim” definition. It will not defer to the Board’s definition if it finds that the definition is so unreasonable as to be impermissible. See *Marmolejo-Campos, supra*. In any case, no conviction of §§ 647.6(a) or 261.5(d) is a crime involving moral turpitude, regardless of which test is applied.

**Immigration Consequences of Cal. P.C. §§ 261.5(b), (c), or (d),
286(b)(1) or (2), 288a(b)(1) or (2), 289(h) or (i)**

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Sections 261.5(b), (c), or (d) of the California Penal Code prohibit consensual sex with a minor under the age of 18 or 16. No conviction of these offenses is an aggravated felony as sexual abuse of a minor, a crime involving moral turpitude, or a crime of violence. This is true for purposes of deportability as well as eligibility for relief or status. While this summary will refer to §261.5, the same analysis applies to the above-cited offenses that, like § 261.5, prohibit consensual sexual conduct with a minor under the age of 18 or 16.

No conviction of Calif. P.C. § 261.5(b)-(d) is an aggravated felony as sexual abuse of a minor, for any immigration purpose. The categorical approach applies to the definition of sexual abuse of a minor. *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*). Under the categorical approach, unless the minimum conduct required to commit the elements of the criminal offense match all of the elements of the applicable federal, generic definition in the removal ground, *no* conviction of the offense comes within the removal ground. This is true both for purposes of deportability and for applications for lawful status, relief, or admission. See *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684, 1692 (2013) (because the minimum conduct to commit the offense does not meet the definition of aggravated felony, Mr. Moncrieffe is eligible to apply for LPR cancellation); *Estrada-Espinoza, supra*; see also *U.S. v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013) (interpreting *Moncrieffe* in definition of crime of violence);

The Ninth Circuit employs two definitions of sexual abuse of a minor (“SAM”). First, an offense is SAM if it matches the elements of 18 USC §§ 2243, which are knowingly engaging in a sexual act, with a person under age 16 and at least four years younger than the defendant. *Estrada-Espinoza, supra*. “Sexual act” includes anal or genital penetration, or oral contact with genitals or anus, or touching genitals, not through clothing, with intent to arouse or harass. 18 USC § 2246(2). “Knowingly” means that the defendant had the capacity to know he or she was engaging in sex, not that the defendant knew the age of the other party. See *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1016 (9th Cir. 2009). Section 261.5(b) and (c) do not meet this test because they do not have as an element that the minor is under age 16. *Estrada-Espinoza, supra*. Section 261.5(d) does not meet this test because “knowingly” engaging in sexual conduct is not an element. *Pelayo-Garcia, supra*. Therefore, *no* conviction under either section is SAM under this test, regardless of information in the record of conviction or of the allocation of the burden of proof or document production. (Note that while *Pelayo-Garcia* suggests that an immigration judge could consult the record of conviction to see the age of the minor in the particular offense, the Supreme Court subsequently clarified that the correct test is the minimum conduct to commit the offense.)

In a separate, second test, the Ninth Circuit holds that some conduct is sexual abuse of a minor, because it is *per se* harmful due to the young age of the minor. No specific age difference or “knowing” conduct is required. The court held that the minimum conduct to commit P.C. § 261.5(d), which is consensual intercourse with a person just under the age of 16, is not SAM

under this test because it is not necessarily harmful. *Pelayo-Garcia, supra*. Subsequently the Supreme Court established that if the minimum conduct to commit an offense is not an aggravated felony, no conviction of the offense is. *Moncrieffe, supra*. Therefore, no conviction under §§ 261.5(b), (c), or (d) is SAM under this test, either.

No conviction of Calif. P.C. §§ 261.5(b), (c), or (d) is a crime involving moral turpitude, for any immigration purpose. The categorical approach also applies to moral turpitude determinations. *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013), partially overruling *Matter of Silva-Trevino*, 24 I&N Dec 687 (AG 2008). Under the categorical approach, an immigration judge must evaluate a prior conviction based solely on the minimum conduct that must be proved for a conviction of the offense. The same analysis applies regardless of whether the issue is deportability or eligibility for relief. *Moncrieffe, supra*. Thus, unless the minimum conduct that must be proved for a conviction involves moral turpitude, no conviction of an offense is a crime involving moral turpitude.

The administrative definition of a crime involving moral turpitude includes some offenses involving sexual or lewd conduct, if the defendant knew or should have known the other party was underage. *Matter of Silva-Trevino*, 24 I&N Dec 687 (AG 2008); *Matter of Alfaro*, 24 I&N Dec. 417 (BIA 2011). Section 261.5 does not have as an element that the defendant knew or had reason to know that the minor was underage. See, e.g., discussion in *Matter of Alfaro*, at 424. Under the Supreme Court's "minimum conduct" test, therefore, no conviction under §261.5 is a crime involving moral turpitude. *Moncrieffe, supra*. (Note that *Alfaro* itself was not decided under the categorical approach, but rather under the procedural approach set out in *Matter of Silva-Trevino, supra*, which permitted an immigration judge to hold a factual inquiry into the underlying conduct of the offense in a moral turpitude determination. In *Olivas-Motta, supra*, the Ninth Circuit overruled use of the *Silva-Trevino* approach.)

The Ninth Circuit employs a different definition of moral turpitude in this context, which is that moral turpitude inheres if the offense is inherently abusive or harmful to the minor. The court specifically found that the minimum conduct to commit §261.5(d) is not necessarily harmful and not a CIMT. *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007). Under the Supreme Court's "minimum conduct" test, therefore, no conviction under §261.5 is a CIMT, for deportability or eligibility for relief. The Ninth Circuit has not held that it will defer to the definition in *Silva-Trevino*.

No conviction of Calif. P.C. §§ 261.5(b), (c), or (d) is a crime of violence, for any purpose. A crime of violence, defined at 18 USC §16, is an aggravated felony if a sentence of a year or more is imposed. Neither a felony nor misdemeanor conviction of §§ 261.5(b), (c), or (d) is a crime of violence. See *Valencia-Alvarez v. Gonzales*, 439 F.3d 1046 (9th Cir. 2006) (felony consensual sex with a minor under the age of 18 is not a crime of violence); *U.S. v. Christensen*, 559 F.3d 1092 (9th Cir. 2009) (felony consensual sex with a minor age 14 or 15 is not a crime of violence because it does not inherently involve a substantial risk of "purposeful, violent and aggressive" conduct, citing *Begay v. United States*, 533 U.S. 137 (2008 INA § 101(a)(43)(F)). . Therefore even if a sentence of a year or more is imposed, the offense is not an aggravated felony conviction under INA § 101(a)(43)(F).

* * * * *

Immigration Consequences of Cal. P.C. §647.6(a)

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

Section §647.6(a) of the California Penal Code provides that annoying or molesting a minor under the age of 18 is a misdemeanor.

No conviction of Calif. P.C. § 647.6(a) is an aggravated felony as sexual abuse of a minor, for any immigration purpose. The categorical approach applies to the definition of sexual abuse of a minor. *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*). Under the categorical approach, the minimum conduct to commit an offense must trigger the immigration consequence in order for any conviction of the offense to do so. Therefore, unless the elements of the criminal offense require for guilt all of the elements of the applicable federal, generic definition in the removal ground, *no* conviction of the offense comes within the removal ground. This is true both for purposes of deportability, and for applications for lawful status or relief. See *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (because the minimum conduct to commit the offense does not meet the definition of aggravated felony, Mr. Moncrieffe is eligible to apply for LPR cancellation); *U.S. v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013) (interpreting *Moncrieffe* in definition of crime of violence).

The Ninth Circuit held that the minimum conduct to commit § 647.6(a) is not SAM, because the statute has been used to prosecute conduct that does not cause or threaten real harm. State decisions uphold conviction of § 647.6(a) based on conduct such as touching the minor's shoulder, making faces, or taking photographs in public of a minor, with no focus on sexual body parts. *U.S. v. Pallares-Galan*, 359 F.3d 1088, 1101 (9th Cir. 2004); see also description of behavior in *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1000 (9th Cir. 2008). Under the categorical approach, because the minimum conduct is not SAM, no conviction under § 647.6 is an aggravated felony as SAM.

No conviction of Calif. P.C. §647.6(a) is a crime involving moral turpitude, for any immigration purpose. The categorical approach also applies to moral turpitude determinations. *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013), partially overruling *Matter of Silva-Trevino*, 24 I&N Dec 687 (AG 2008). Under the categorical approach, an immigration judge must evaluate a prior conviction based solely on the minimum conduct that must be proved for a conviction of the offense. *Moncrieffe, supra*.

The administrative definition of a crime involving moral turpitude includes some offenses involving sexual conduct with a minor, if the defendant knew or should have known the other party was underage. *Matter of Silva-Trevino*, 24 I&N Dec 687 (AG 2008); *Matter of Alfaro*, 24 I&N Dec. 417 (BIA 2011). Under this definition, no conviction under §647.6(a) meets the BIA's definition, because § 647.6(a) does not require proof that the defendant knew or had reason to know that the other party is under-age. (Go to next page)

Moreover, the Ninth Circuit specifically found that the minimum conduct to commit §647.6(a) is not a crime involving moral turpitude because it can include the mild, non-explicit behavior described above. *Nicanor-Romero v. Mukasey*, 523 F.3d 992 (9th Cir. 2008), partially overturned for other reasons by *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (*en banc*). The Ninth Circuit will accord *Chevron* deference to a published, on-point decision by the BIA that is “permissible” in its reasoning and conclusion, but the BIA has not published an opinion that addresses an offense such as § 647.6.

* * * * *

Immigration Consequences of Cal. P.C. § 288(c)

This paper was given to me by my attorney and pertains to possible legal defense. I request that you do not take this paper away from me. I do not admit alienage by submitting this paper. If I am charged with being an alien, I submit the following statement.

No conviction of Calif. P.C. § 288(c) is an aggravated felony as sexual abuse of a minor. The categorical approach applies to the definition of sexual abuse of a minor. *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*). Under this approach, the minimum conduct to commit an offense must trigger the immigration consequence in order for any conviction of the offense to do so. Therefore, unless the elements of the criminal offense require for guilt all of the elements of the applicable federal, generic definition at issue, *no* conviction of the offense comes within the removal ground. This is true both for purposes of deportability, and for applications for lawful status or relief. See *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684, 1692 (2013) (because the minimum conduct to commit the offense does not meet the definition of aggravated felony, Mr. Moncrieffe is eligible to apply for LPR cancellation); see also *U.S. v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013). The Ninth Circuit held that the minimum conduct to commit P.C. § 288(c), for lewd conduct with a minor aged 14 or 15, does not meet the definition of the aggravated felony sexual abuse of a minor. *U.S. v. Castro*, 607 F.3d 566, 567-58 (9th Cir. 2010). Therefore, no conviction of § 288(c) is sexual abuse of a minor.

No conviction of Calif. P.C. § 288(c) is a crime involving moral turpitude. The categorical approach also applies to moral turpitude determinations. *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013), partially overruling *Matter of Silva-Trevino*, 24 I&N Dec 687 (AG 2008). Under the categorical approach, an immigration judge must evaluate a prior conviction based solely on the minimum conduct that must be proved for a conviction of the offense. *Moncrieffe, supra*.

The administrative definition of CIMT includes some offenses involving sexual conduct, if the defendant knew or should have known the other party was underage. *Matter of Silva-Trevino*, 24 I&N Dec 687 (AG 2008); *Matter of Alfaro*, 24 I&N Dec. 417 (BIA 2011). Under this definition, no conviction under § 288(c) is a crime involving moral turpitude, because § 288(c) does not require proof that the defendant knew or had reason to know that the other party is under-age. Further, because the Ninth Circuit found that §288(c) is not necessarily harmful (*Castro, supra*), it should not be found a CIMT under that standard. See, e.g., discussion of standard in *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007) (considering §261.5(d)).

* * * * *

App. 10-III – For Criminal Defenders in the Ninth Circuit: Immigration Effect of Selected Sex Offenses¹

OFFENSE	AGGRAVATED FELONY -Sexual abuse of a minor (SAM) ² -Crime of violence (COV) if 1 yr sentence imposed on any single count ³	DEPORTABLE conviction for: -Child Abuse ⁴ -Domestic Violence ⁵	CIMT conviction (Crime Involving Moral Turpitude) ⁶
<p>Sex with V under age 18 and at least 3 yrs younger than D;</p> <p>Sex with V under age 16 where D is at least age 21 –</p> <p>Calif. P.C. § 261.5(c), (d)</p>	<p>Age-neutral offense is preferable, in that it avoids SAM in all Circuits.⁷ But if that is not possible or advisable, plead to 261.5.</p> <p>- Neither (c) nor (d) is SAM for any purpose in immigration proceedings in the Ninth Circuit, because minimum conduct is not SAM.⁸ But might be held SAM in some other Circuit, especially (d).</p> <p>- Neither (c) nor (d) is COV⁹, altho as always it is best to get 364 or less on each count in case different result in another Circuit.</p>	<p>Assume will be charged as a deportable crime of child abuse, especially (d), altho D might litigate this issue and win.¹⁰</p> <p>Not a COV, so not a deportable crime of domestic violence, in Ninth Circuit.</p>	<p>Not a CIMT because lacks element that D knew or should have known victim a minor. Possible ICE still might charge as CIMT.¹¹</p> <p><i>If client will be removed and might return illegally:</i> In a prosecution for illegal re-entry after removal, felony 261.5(d) is a bad prior. Better plea to felony 261.5(c), misdo 261.5(d) or any misdo, or if necessary felony 288a(b)(1).¹²</p>
<p>Consensual sex with V age 14, age 13 (other states' statutes)</p>	<p>Age 13 is SAM¹³ Age 14 is not SAM.¹⁴</p> <p>Age 13 is COV, 14 should not be</p>	<p>YES, deportable crime of child abuse</p> <p>YES, domestic violence if COV</p>	<p>May be CIMT</p>
<p>Lewd, V age 14 or 15</p> <p>P.C. § 288(c)</p>	<p>NO not SAM (altho where possible ID a V age 15).¹⁵</p> <p>Held a COV – avoid 1-yr sentence, where possible plead specifically to 15- rather than 14-year-old V¹⁶</p>	<p>YES, deportable crime of child abuse</p>	<p>Not a CIMT</p>
<p>Lewd, V under 14</p> <p>P.C. § 288(a)</p>	<p>YES as SAM.¹⁷ Assume COV.</p>	<p>Yes, deportable crime of child abuse.</p>	<p>Yes</p>
<p>Annoy/molest a child—</p> <p>P.C. § 647.6(a)</p>	<p>NO not SAM because minimum conduct is not.¹⁸ Not COV.</p>	<p>ICE may charge as deportable child abuse.</p>	<p>Not CIMT¹⁹</p>
<p>Sexual battery</p> <p>P.C. § 243.4(a)</p>	<p>Not SAM, but as always keep minor age of V out of record.²⁰</p> <p>Felony is a COV; Misdo is not.²¹ Obtain 364 days or less on each count to avoid an agg felony.</p>	<p>If COV and domestic relationship, it is a deportable crime of DV</p> <p>If record shows that V is a child, may be (wrongly) charged as deportable crime of child abuse.²²</p>	<p>Yes CIMT</p>

OFFENSE	AGGRAVATED FELONY Conviction: -SAM, COV or Rape	DEPORTABLE Conviction	Conviction of CRIME INVOLVING MORAL TURPITUDE
Alternate Pleas: Age-Neutral Offenses P.C. §§ 32, 236, 243, 245, 314, 647, 136.1(b)(1)	Some are agg felonies as COV, but only if a sentence of a year or more is imposed. Age-neutral offense is <i>not</i> SAM, but still, keep age out of the record	See comments to § 243.4(a), <i>supra</i> For these offenses generally, see <i>Calif. Quick Reference Chart</i> and see <i>Note: Violence, Child Abuse</i>	§ 32 is CIMT if principal offense is. Felony §236 is CIMT, misdo is not. §243(a), (e) is not CIMT and (d) should not be. Assume § 245 is but this is being litigated. § 136.1 (b)(1) arguably is not.
Rape P.C. §§ 261, 262	-YES, as Rape. ²³ Includes by force, threat, intoxication; -Rape is a COV.	Consider § 243.4, 245, and other offenses	Yes CIMT
Indecent exposure P.C. § 314	-Not a COV -Shd not be SAM, but keep minor age out of record. See n. 20.	To avoid deportable child abuse, keep minor age out of record	Assume that it is a CMT. Small chance that a plea to exotic dancing for willing audience would avoid ²⁴
Lewd in public P.C. § 647(a)	Not SAM, but keep minor age out of the record. See n. 20.	Shd not be child abuse, but keep minor age out of record	Will be charged as CIMT
Working as a prostitute P.C. § 647(b)	NO	<i>Inadmissible</i> if paid for intercourse. Plead to other lewd conduct for pay. ²⁵	Yes CIMT
Soliciting a prostitute P.C. § 647(b)	NO	Not inadmissible for prostitution If record shows prostitute under age 18, deportable crime of child abuse	Yes, all of § 647(b) is CIMT ²⁶
Managing a prostitution business	YES ²⁷	YES, if noncitizen prostitutes. ²⁸	Yes CIMT
Possession of Child Pornography P.C. § 311.11(a)	YES ²⁹	NO unless charged as child abuse	Yes CIMT
Failure to Register as Sex Offender P.C. § 290(g)(1)	NO	Yes if a federal conviction based on state failure ³⁰	YES CIMT, but Ninth Circuit likely to overturn in the future ³¹

ENDNOTES

¹ This chart was compiled by Katherine Brady, Senior Staff Attorney, Immigrant Legal Resource Center.

² A conviction of an offense that is “sexual abuse of a minor” (SAM) is an aggravated felony, regardless of sentence imposed. INA § 101(a)(43)(A), 8 USC § 1101(a)(43)(A). As discussed below, no conviction under Cal. P.C. §§ 261.5(c), (d), 288(c), or 647.6(a) is SAM for any purpose in immigration proceedings that arise within the Ninth Circuit. However, if the person travels to, or is transferred in immigration detention to, another Circuit, different definition may apply in immigration proceedings held there. See §N.10 Sex Offenses in the *California Quick Reference Chart & Notes* at www.ilrc.org/crimes.

This endnote will review the “categorical approach” (the method by which an immigration judge evaluates a prior conviction) and will set out the two definitions of SAM employed by the Ninth Circuit.

The categorical approach: minimum conduct to violate the statute. An immigration judge (or federal criminal court judge) will use the “categorical approach” to evaluate whether a prior conviction is sexual abuse of a minor (“SAM”) or has other consequences. The Supreme Court recently clarified that a judge is limited to evaluating the conviction based solely on the minimum conduct required to violate the statute, and may not consider information in the individual’s record of conviction or underlying facts that go beyond the bare elements of the offense. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). If the minimum conduct to commit the offense does not trigger the immigration consequence, no conviction of the offense triggers that consequence, regardless of whether the question is deportability or eligibility for relief. *Ibid* at 1692.

Some criminal statutes are “divisible,” meaning that they prohibit multiple offenses by setting out different elements described in the alternative, where at least one of these offenses does, and one does not, trigger an immigration consequence (e.g., burglary of a “building or a vehicle”). In this case, the immigration judge may look to certain documents from the record of conviction to see if they establish which of these *statutory elements* (again, not underlying facts) were the subject of the conviction in the particular case. Once that is established, the judge will evaluate the conviction based on the minimum conduct required to commit those elements. *Moncrieffe, supra*; *Descamps v. U.S.*, 133 S.Ct. 2776 (2013); see also *U.S. v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013).

SAM Test 1: Abuse based on the young age of the victim. One SAM definition provides that some lewd or sexual offenses are inherently abusive, and therefore SAM, if the minor is very young. The older the minor, the more explicit the conduct needs to be in order to amount to abuse. The Ninth Circuit found that Cal. P.C. §288(a), lewd conduct toward a minor under age 14, is SAM, but §288(c), lewd conduct toward a minor age 14 or 15, is not. See *U.S. v. Medina-Villa*, 567 F.3d 507, 511-512 (9th Cir. 2009) (§288(a)) and *U.S. v. Castro*, 607 F.3d 566, 567-58 (9th Cir. 2010) (§288(c)).

The Ninth Circuit held that consensual intercourse is not abuse when the minor is “just under the age of 16,” and therefore the minimum conduct to commit §261.5(d) is not SAM under this test. *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1016 (9th Cir. 2009). Note that while *Pelayo-Garcia* indicated that an immigration judge could consult the record in a §261.5(d) conviction to determine the actual age of the victim in the particular case, the Supreme Court subsequently overturned that approach and clarified that the court must look only to the minimum conduct required to commit the offense. See discussion of *Moncrieffe, supra*; *Descamps, supra*; *Estrada-Espinoza, supra v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*); and see discussion at Part I of §N.10 Sex Offenses, and see also discussion of the same approach applied to §261.5(c) in. Therefore no conviction under §§ 261.5(c) or (d) is SAM under the “age of the victim” test, for any immigration purpose. The Ninth Circuit found SAM where a statute prohibited intercourse with a minor age 13 or younger (*U.S. v. Valencia-Barragan*, 600 F.3d 1132, 1134 (9th Cir. 2010)), but not with a minor age 14 (*U.S. v. Gomez*, -F.3d- (9th Cir. Oct. 7, 2013)).

The minimum conduct to commit P.C. § 647.6(a), annoying or molesting a child, is not SAM, because that includes non-explicit, annoying behavior towards a person a day under the age of 18. *U.S. v.*

Pallares-Galan, 359 F.3d 1088 (9th Cir. 2004). Therefore no §647.6(a) conviction is SAM, under the minimum conduct test set out in *Moncrieffe*, *supra*.

SAM Test 2: Analogue to 18 USC § 2243. In a second test, the Ninth Circuit held that at least in cases involving consensual sex with older teenagers, the definition of SAM is set out in 18 USC § 2243, which prohibits knowingly engaging in sexual conduct, with a person under the age of 16 and at least four years younger than the defendant. *Estrada-Espinoza v Mukasey*, 546 F.3d 1147, 1159 (9th Cir. 2008) (en banc). Because the minimum conduct to commit § 261.5(c) is with a minor under age 18, no conviction of that offense is SAM under this test. *Ibid.* Although §261.5(d) meets the age requirements, the Ninth Circuit found that the minimum conduct to commit §261.5(d) also is not SAM, because the federal statute requires “knowingly” engaging in a sexual act, while § 261.5 entirely lacks this scienter requirement. *Pelayo-Garcia*, 589 F.3d at 1016. Therefore no conviction of §261.5(d) is SAM under this test, either.

³ Conviction of a “crime of violence” (COV), as defined at 18 USC § 16, is an aggravated felony if and only if a sentence of a year or more is imposed. INA § 101(a)(43)(F), 8 USC § 1101(a)(43)(F). See further discussion at §N.9 *Violence, Domestic Violence, Child Abuse* at www.ilrc.org/crimes.

⁴ A noncitizen is deportable based upon conviction of a “crime of child abuse, child neglect, or child abandonment” that occurred after admission and after 9/30/96. 8 USC § 1227(a)(2)(E)(i), INA § 237(a)(2)(E)(i). ICE is likely to charge any offense as a deportable crime of child abuse if it has sexual or lewd conduct or intent as elements, and a victim under the age of 18 as an element or a fact in the record of conviction. While immigration counsel have arguments that, e.g., a 15-, 16-, or 17- year old having consensual sex with a boyfriend or girlfriend is not “child abuse,” ICE may fight this. See definition of child abuse at *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 507-10 (BIA 2008), *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) and at § N.9 *Domestic Violence and Child Abuse*.

Under recent Supreme Court precedent that requires an offense to be evaluated based on the minimum conduct to commit it (see n. 2, above), an “age-neutral” statute that does not have a minor victim as an element never should constitute sexual abuse of a minor; however, ICE might litigate this. See further discussion in *Defending Immigrants in the Ninth Circuit*, § 6.15, and see Practice Aid 10-II Legal Summaries for Defendants in §N.10 *Sex Offenses*.

⁵ Conviction of a “crime of domestic violence” (a “crime of violence” committed against a victim with whom the defendant shares or shared a certain domestic relationship) is a basis for deportability under INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i). (So is a civil or criminal court finding of any violation of a stay-away order, or many other portions of DV protective orders.) See §N.9 *Violence, Domestic Violence, Child Abuse*.

⁶ Conviction of one or more crimes involving moral turpitude (CIMTs) can cause deportability or inadmissibility. INA §§ 212(a)(2), 237(a)(2), 8 USC §§ 1182(a)(2), 1227(a)(2). In some cases a single conviction will not cause one or both of these consequences. See §N.7 *Crimes Involving Moral Turpitude*. The Ninth Circuit held that CIMTs will be evaluated using the categorical approach described in n. 2, which is the “minimum conduct to violate the statute” standard. *Olivas-Motta v. Holder*, 716 F3d 1199 (9th Cir 2013), overturning *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008).

⁷ While many California offenses such as §261.5 are safe at this time in proceedings held within the Ninth Circuit, age-neutral offense is preferable because it will not be held to be SAM in any immigration context, including in proceedings begun outside the Ninth Circuit, or if the Supreme Court imposes a different interpretation of the statute. Further, if the record of conviction does not identify a victim of minor age, the conviction is not a deportable crime of child abuse.

⁸ See note 2.

⁹ *U.S. v. Christensen*, 559 F.3d 1092 (9th Cir. 2009).

¹⁰ A noncitizen is deportable based upon conviction of a “crime of child abuse, child neglect, or child abandonment” that occurred after admission and after 9/30/96. See n. 4, *supra*. Immigration counsel, if there is any, can argue that having consensual sex with a 15-, 16-, or 17-year-old is not exploitative and

therefore not “child abuse,” since the Ninth Circuit in SAM cases found that it is not inherently harmful. See n. 4. However, ICE may fight this and federal courts might defer.

¹¹ *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008) held that explicit sexual conduct with a minor is a crime involving moral turpitude (“CIMT”), if the perpetrator *knew or had reason to know that the victim was under-age*. Because § 261.5 does not have as an element required for guilt that the defendant knew or should have known the victim was under-age, it should not be held to involve moral turpitude. ICE might assert that because §261.5(c) has an affirmative defense of lack of knowledge, this should hold the same weight as an element. Immigration counsel, if any, has strong arguments that these are not equivalent, but the litigation could take time during which the client might be detained. Section 261.5(d) has no such defense and therefore is not CIMT under this test.

(Note that *Silva-Trevino* and another case, *Matter of Alfaro*, 25 I&N Dec. 417 (BIA 2011) (concerning §261.5(d)) were decided under a rule that has been overturned, which was that the categorical approach did not apply to CIMT determinations. For example, in *Alfaro* the immigration judge acknowledged that “know or reason to know” is not an element of § 261.5(d), but still was instructed simply to ask the immigrant whether he had had such knowledge. *Alfaro, supra* at 424. The Ninth Circuit partially overruled *Silva-Trevino* and *Alfaro* to hold that the full categorical approach, which is limited to consideration of the minimum conduct to violate the statute, applies to CIMT determinations. See discussion of *Olivas-Motta, supra*, at n. 4.)

The Ninth Circuit has not yet decided whether to defer to the Board’s test of “know or reason to know” the age of the victim, versus its own CIMT test based on potential harm to the victim. See discussion in §N.10 Sex Offenses. Under its test, the court held that the minimum conduct to commit §§ 261.5(d) does not involve moral turpitude because it is not necessarily harmful. *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007).

¹² Illegal re-entry after removal (deportation), 8 USC § 1326, is the most commonly prosecuted felony in the United States. A prior *felony* “statutory rape” conviction supports a 12-level increase in sentence for this offense, while a prior aggravated felony conviction supports a 6-level increase. See U.S. Sentencing Guidelines § 2L1.2, and §N.10 Sex Offenses. At least in the Ninth Circuit, the offenses suggested in the chart are neither aggravated felonies nor felony statutory rape, whereas felony § 261.5(d) will be held felony statutory rape.

¹³ *U.S. v. Valencia-Barragan*, 600 F.3d 1132, 1134 (9th Cir. 2010) (Wash. Rev. Code § 9A.44.076(1), consensual sex with a victim under age 14 is categorically (automatically) SAM).

¹⁴ In *U.S. v. Gomez*, -F.3d- (9th Cir. 2013) the court held that a version of an Arizona statute that prohibits consensual sex with a person under age 15 is not SAM. (At this writing, time has not elapsed to file a petition for rehearing en banc.)

¹⁵ The Ninth Circuit found that Calif. P.C. § 288(c)(1) is not categorically SAM. *U.S. v. Castro*, 607 F.3d 566, 567-58 (9th Cir. 2010). This is divisible between 14 and 15 year olds, but under the trend of cases (and certainly if *US v. Gomez, supra*, becomes final), it appears that § 288(c) with a 14-year-old is not SAM. Still, where possible avoid the issue by identifying a 15-year-old.

¹⁶ Recently the Ninth Circuit held that § 288(c)(1) is automatically a crime of violence. *Rodriguez-Castellon v. Holder*, -F.3d- (9th Cir. Oct. 22, 2013). This would appear to conflict with *U.S. v. Christensen*, 559 F.3d 1092 (9th Cir. 2009), which held that felony consensual sex with a person who is 14 years old, under a Washington statute, is not necessarily a crime of violence. *Rodriguez-Castellon* did not discuss *Christensen*. Using the “ordinary case” analysis for whether an offense qualifies as a crime of violence under 18 USC § 16(b), the court found that while there was no information available about this, common sense and holdings from other circuits establish that consensual sex between a minor age 13 or 14 and a person ten years older is inherently likely to lead to violence. A petition for rehearing was denied.

¹⁷ *U.S. v. Medina-Villa*, 567 F.3d 507, 511-512 (9th Cir. 2009) (P.C. § 288(a) is categorically SAM)

¹⁸ *U.S. v. Pallares-Galan*, 359 F.3d 1088 (9th Cir. 2004) (minimum conduct to violate 647.6(a) is not SAM, see examples of such conduct at p. 1101). For examples of other non-egregious conduct that violates §647.6(a), see *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1000-1001 (9th Cir. 2008) (minimum conduct to violate § 647.6(a) is not a CIMT), and see next endnote.

¹⁹ See *Nicanor-Romero*, *supra* (minimum conduct to violate § 647.6(a) is not a CIMT). The Ninth Circuit *en banc* partially overruled *Nicanor-Romero* to the extent that *Nicanor-Romero* stated *in general* that moral turpitude determinations are not governed by the traditional principles of administrative deference. *Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009) (*en banc*). Section 647.6(a) also is not a CIMT under the Board of Immigration Appeals' separate definition, because it does not have as an element that the defendant knew or should have known that the other party was under-age. See discussion at n. 11, *supra*.

²⁰ Conviction under an age-neutral statute never is SAM. *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9th Cir. 2012). Keeping the minor's age out of the record will prevent the conviction from being a deportable crime of child abuse.

²¹ Compare *U.S. v. Lopez-Montanez*, 421 F.3d 926, 928 (9th Cir. 2005) (minimum conduct to commit P.C. § 243.4(a) is not a crime of violence under 18 USC § 16(a) standard) with *Lisbey v. Gonzales*, 420 F.3d 930, 933-934 (9th Cir. 2005) (felony § 243.4(a) is a crime of violence under 18 USC §16(b)).

²² *Matter of Velazquez-Herrera*, *supra*, provides that an age-neutral offense may be held a crime of child abuse if under the modified categorical approach the record of conviction establishes that the victim was a minor. While this should be held reversed by subsequent Supreme Court decisions, ICE might litigate it. See discussion at n. 4, *supra*.

²³ A conviction of "rape" is an aggravated felony, regardless of sentence imposed. INA § 101(a)(43)(A), 8 USC § 1101(a)(43)(A). See, e.g., *Castro-Baez v. Reno*, 217 F.3d 1057 (9th Cir. 2000) (Cal. P.C. § 261(a)); see also *U.S. v. Yanez-Saucedo*, 295 F.3d 991 (9th Cir. 2002) (Wash. Rev. Code § 9A.44.060 is rape where lack of consent is clear, despite no forcible component).

²⁴ See discussion of *Matter of Corte-Medina*, 26 I&N Dec. 79 (BIA 2013) and *Nunez v. Holder*, 594 F.3d 1124, 1138 (9th Cir. 2010) in §N.10 Sex Offenses.

²⁵ See INA § 212(a)(2)(D), 8 USC § 1182(a)(2)(D). Prostitution is defined as offering sexual intercourse for hire. Plead to some other specific lewd conduct to prevent this finding. Conviction is a CIMT.

²⁶ *Rohit v. Holder*, 670 F.3d 1085 (9th Cir. 2012).

²⁷ Conviction of some offenses involving running prostitution or other sex-related businesses are aggravated felonies. See INA § 101(a)(43)(I), (K); 8 USC §§ 101(a)(43)(I), (K). These include child pornography, owning, controlling, etc. a prostitution business, or transporting prostitutes.

²⁸ Deportable under INA § 237(a)(2)(D)(iv), 8 USC § 1227(a)(2)(D)(iv) for conviction of 8 USC § 1328.

²⁹ Calif. P.C. § 311.11(a) is an aggravated felony under 8 USC § 1101(a)(43)(K), and a particularly serious crime barring asylum, withholding of removal. *Matter of R-A-M-*, 25 I&N Dec. 657 (BIA 2012).

³⁰ Conviction after admission and after July 27, 2006 of 18 USC § 2250 is a deportable offense under 8 USC 1227(a)(2)(A)(v). See further discussion in *Defending Immigrants in the Ninth Circuit*, § 6.22.

³¹ *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007) (Calif. P.C. § 290(g)(1) is a CIMT); but see *Efagene v. Holder*, 642 F.3d 918 (10th Cir. 2011), *Totimeh v. AG*, 666 F.3d 109 (3d Cir. 2012) (simple failure to register as a sex offender is not a CIMT; decline to defer to *Tobar-Lobo*); and see *Pannu v. Holder*, 639 F.3d 1225 (9th Cir. 2011) (remand case to BIA to reconsider *Tobar-Lobo*).