§ N.12 Firearms Offenses

(For more information, see Defending Immigrants in the Ninth Circuit, §§ 6.1, 9.18, www.ilrc.org/crimes)

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Overview: Almost any conviction relating to a firearm will cause a permanent resident to be deportable. In addition, certain offenses that relate to firearms or ammunition are aggravated felonies. However, in many cases counsel still can bargain for an immigration-neutral plea, or at least avoid an aggravated felony. Please read this Note carefully, as it reflects extensive changes to California weapons statutes effective January 1, 2012.

Be sure to look at **Appendix II**, which presents a lot of the material presented here in a Chart format.

I. Immigration Consequences of Firearms Convictions

See *§ N.1 Overview* for a further discussion of deportability, inadmissibility, and defense priorities depending upon the defendant's immigration status.

A. Deportable (Including Aggravated Felonies)

A ***lawful permanent resident, refugee, or someone with a student, employment or other visa*** can be put in removal proceedings if he or she is deportable. There ICE (immigration prosecution) has the burden to prove that a conviction really is a deportable offense, based only upon the statutory elements of the crime and official documents from the person's record of conviction. See *§N.3 Record of Conviction.*

A firearms conviction might cause deportability as follows:

1. Virtually every offense with a firearm as an element is a deportable firearms offense.[1] Under current law, the same is true of any offense where a firearm is not an element, but is identified in the record of conviction and was necessary to prove an element in that case, e.g. to prove the element of a "weapon." (In 2013 the Supreme Court might change this rule, and permit only statutory elements to be considered.[2])

2. Many violent offenses are crimes involving moral turpitude ("CIMT"). Either two CIMT convictions anytime after admission (which did not arise from the same incident), or one CIMT committed within five years after admission that has a potential sentence of at least one year, will cause deportability.[3]

3. Some firearms offenses are aggravated felonies, either under the firearms category (e.g. trafficking in firearms), or as a "crime of violence" with a sentence of a year or more imposed. See Part IV, *infra.*

4. A firearms offense could be a deportable crime of domestic violence,[4] defined as a "crime of violence" where it is established that the victim and defendant had a relationship protected under state DV laws. If the victim of an offense has such a relationship, and the offense may be a crime of violence, see *§N.9 Violence, Child Abuse* for strategies.

5. An offense can be held a deportable crime of child abuse if the record of conviction shows that the victim was under the age of 18, and if the offense poses a significant risk of causing the victim physical or emotional harm. To prevent this, keep a minor victim's age out of the record of conviction.[5]

Note on the firearms deportation ground. The firearms deportation ground is dangerous, but the deportable person still might be eligible for some relief. If the firearms offense also is an aggravated felony or a CIMT, you must consider those consequences. But if the person is ***only*** deportable under the firearms ground, or is deportable for that plus one CIMT that comes within the petty offense exception to the CIMT ground of inadmissibility, there are some advantages. Being deportable under the firearms ground does not automatically "stop the clock" for the seven years required for LPR cancellation. See *§ N.17 Relief.* There is no automatic "firearms" ground of inadmissibility, family immigration or other relief may be possible. See next section.

B. Inadmissibility Grounds and Bars to Relief

1. Inadmissible

[1] 8 USC § 1227(a)(2)(C), INA § 237(a)(2)(C). See this Note.
[2] See discussion in *§ N.3 Record of Conviction* of the pending U.S. Supreme Court case *Descamps v. United States*. The Court is expected to hold that a prior conviction can be evaluated only by its statutory elements and not by additional information in the record.
[3] 8 USC § 1227(a)(2)(A), INA § 237(a)(2)(A). See *§ N.7 Crimes Involving Moral Turpitude.*
[4] 8 USC § 1227(a)(2)(E)(i), INA § 237(a)(2)(E)(i). See *§ N.9 Violent Crimes, Child Abuse.*
[5] *Ibid.*

There is no "firearms," or even "aggravated felony," ground of inadmissibility. Therefore a firearms conviction *per se* will not, e.g., stop someone from immigrating with a family visa. Instead, the risk is that a firearms offense be a ***crime involving moral turpitude ("CIMT")*** and cause inadmissibility under that ground. In some cases a waiver of CIMT inadmissibility may be available, although these can be hard to get.

A noncitizen is inadmissible based on just one conviction of a CIMT, *unless* the conviction comes within either the "petty offense" or "youthful offender" exception. If it does, the person is not inadmissible for CIMTs, and no waiver is needed.

- *The petty offense exception* applies if the person has committed just one CIMT, the sentence imposed was six months or less, and the maximum possible sentence is a year or less. Besides a "regular" misdemeanor, a felony reduced to a misdemeanor comes within this exception, if it is a first CIMT and no more than six months was imposed. See *§N.4 Sentence* for definition of sentence.

- *The youthful offender exception* applies if the person committed just one CIMT, was under the age of 18 at the time, was convicted in adult court, and the conviction and any resulting imprisonment took place more than five years before the current application. See *§N.7 Crimes Involving Moral Turpitude* for further discussion.

2. Other Bars to Various Forms of Relief

Along with the grounds of inadmissibility, there are other bars to obtaining status or relief. See *§N.17 Relief*, Chart on Crimes Bars to Relief. Any ***aggravated felony*** conviction serves as a bar to many kinds of applications, including LPR and non-LPR cancellation, asylum, VAWA relief for victims of domestic violence, TPS, and others.

Although deportation grounds usually do not affect undocumented people, conviction of an offense described in any deportation ground is a bar to ***non-LPR cancellation***, e.g. for undocumented persons who have lived here for ten years or more. So is a conviction of one CIMT unless the maximum possible sentence is *less than* one year (note that this is different from the petty offense exception) and no more than six months was imposed.

Conviction of a ***"particularly serious crime"*** is a bar to winning asylum, as well as a basis to terminate status as an asylee, so that the person will go to removal proceedings. This includes any aggravated felony, and other offenses depending upon factors such as sentence imposed and threat of violence to persons.

Absent a showing of extraordinary hardship, conviction of a ***"violent or dangerous"*** offense is a bar to asylum, as well as a bar to a refugee, asylee or family immigrant who must get a waiver of inadmissibility in order to become a permanent resident.

See Chart at *§N.17 Relief* for discussion of other bars, e.g. one felony or two misdemeanors for TPS, or a "significant misdemeanor" for DACA for young people.

C. Burden of Proof and Vague Record of Conviction: *Young v. Holder*

Overview. Just as in criminal proceedings, there are burdens of proof in immigration proceedings. In September 2012 the Ninth Circuit changed (as in, make worse) the burden for immigrants who need to apply for relief from removal or for immigration status. *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc). The upshot is that in many cases defenders must be careful to create a specific plea to a "good" offense, rather than creating a record that is vague on key points.

Discussion. Many criminal statutes are divisible, meaning that they include some offenses that have an immigration consequence and others that don't. *Young* is being interpreted to mean that when an immigrant is applying for status or relief (as opposed to defending against having her status taken away based on a deportation ground) she must produce a specific record of conviction to show that the conviction is *not* a bar to relief. Before *Young*, a vague record of conviction preserved eligibility for relief.

> **Example:** Lawful Permanent Resident (LPR) Lois was convicted under Cal. P.C. § 27500, which automatically makes her deportable under the firearms ground. She wants to apply for LPR Cancellation as a defense to removal. Conviction of any aggravated felony is a bar to this relief.
>
> Section 27500 is divisible as an aggravated felony: it prohibits both selling (an aggravated felony) and giving (probably not an aggravated felony) a firearm to certain persons. If Lois pled guilty specifically to giving a firearm, the conviction will not be an aggravated felony. But if she pled vaguely to the language of § 27500, or to "selling or giving," the conviction will be a bar as an aggravated felony, because she will not be able to prove that it was for giving the firearm. (Before *Young*, that vague record would have been sufficient.)

Note that the burden is reversed when it comes to whether a person is deportable. ICE (immigration prosecutors) must prove that a permanent resident, refugee, or other person with lawful status is ***deportable*** (should have their status taken away). ICE must produce documents from the reviewable record of conviction to show that a conviction under a divisible statute comes within the deportation ground. If the record of conviction is vague as to the elements of the offense of conviction, ICE cannot meet its burden.

> **Example:** Let's say that LPR Lois instead had pled to P.C. § 17500, assault while possessing a weapon. This is a divisible statute for purposes of the firearms deportation ground, because it includes firearms and other weapons. ICE charges Lois with being deportable under the firearms ground. If Lois pled specifically to a weapon that is not a firearm, *or* if she created a vague record that did simply not specify the weapon, ICE cannot prove she is deportable under the firearms ground.

For further discussion of *Young* and burdens of proof, and how to effectively create a "vague" record of conviction, see *§ N.3 Record of Conviction*.

II. Pleas that Avoid All or Most Immigration Consequences

The following offenses should not be held aggravated felonies (but as always, ***try to get 364 days or less on any one count***). They should not be held deportable or inadmissible offenses, unless the record shows a victim under age 18, which may make the offense a deportable crime of child abuse.

- Possession of ammunition, P.C. § 30210[6]
- Possession of a non-firearm weapon, e.g., dagger, brass knuckles, blackjack P.C. §§ 21310, 21710, 22210.
- Possession of an antique firearm; state in the record that it is an antique. Identifying a firearm as an antique always will defeat the firearms deportation ground.[7]
- Brandishing/exhibiting a non-firearm weapon in a rude manner, §417(a)(1).[8] If (a)(1) is not possible, create a vague record with no mention of a firearm under § 417(a); this will prevent ICE from proving an LPR is deportable.
- Simple assault or battery where the record shows de minimus touching, e.g. P.C. § 243(a), 243(e)[9]
- Probably misdemeanor or felony battery with injury where the record shows de minimus touching, P.C. § 243(d).[10]
- Public fighting, P.C. § 415
- See P.C. § 17500, discussed in Part III, *infra*, which may have no immigration consequences.
- Section 246.3, negligent firing a BB gun or firearm, is not a firearms offense with a specific plea to a BB gun (and a vague plea will prevent ICE from proving a permanent resident is deportable for firearms).[11] Regardless of type of weapon, it should not be a COV or a CIMT because it is committed with negligence.[12]

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[6] Ammunition is not included in the definition of "firearm" under 18 USC § 921(a)(3), which is the definition that applies to the firearms deportation ground at 8 USC § 1227(a)(2)(C).
[7] Antique firearms are not included in the applicable definition of firearms at 18 USC § 921(a)(3). Section 921(a)(16) provides that antiques are firearms made in 1898 or before, plus certain replicas.
[8] See, e.g., *Matter of G.R.*, 2 I&N Dec. 733, 738-39 (1946), *People v. Sylva*, 143 Cal. 62, 76 P. 814 (1904).
[9] Section 243(e) with de minimus touching is neither a crime of violence, a crime of domestic violence, nor a crime involving moral turpitude. See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006).
[10] Section 243(d) can be committed with the same de minimus conduct as 243(e), discussed *supra.* For this reason the BIA, in a guiding but not precedential "index" decision, and the Ninth Circuit have found that P.C. § 243(d) is not necessarily a CIMT. *See Uppal v. Holder*, 605 F.3d 712 (9th Cir. 2010); *Matter of Muceros*, A42 998 6100 (BIA 2000) indexed decision, http://www.usdoj.gov/eoir/vll/intdec/indexnet.html.
[11] A BB gun does not meet the federal definition of firearms because it does not expel by explosive.
[12] See *U.S. v. Coronado*, 603 F.3d 706 (9th Cir. 2010) (negligence is not a crime of violence).

- Arguably being a felon or addict who owns (not possesses) ammunition, P.C. § 30305, has no immigration consequences, but be sure to analyze the prior felony[13]
- Non-violently attempting to persuade a victim or witness not to contact the police, P.C. § 136.1(b)(1), with a sentence imposed of less than one year is not an aggravated felony, firearms, or domestic violence offense, and should not be a crime involving moral turpitude, although there is no guarantee as to the latter
- For other immigration-neutral offenses see *California Quick Reference Chart*

Even if a firearms offense is originally charged, if it is fairly minor or there are strong equities, it might be possible to negotiate a more immigration-neutral plea such as the above. You may want to stress to the prosecutor that a permanent resident or refugee can face a horrific penalty for one firearms conviction, e.g. under P.C. §§ 25400(a) or 26350, even if the offense is not violent. The person will be deportable, and will be placed in removal proceedings and held in detention (usually hundreds of miles from home) throughout these proceedings. In many cases the person will not have any defense and will be deported, despite dependent U.S. citizen family.

Keep the records of conviction for *any* offense clear of reference to a firearm – even if the offense does not have "weapon" as an element. For example, in a plea to § 243(d), keep out of the record that a firearm may have been involved. If evidence in the reviewable record establishes that the defendant committed the offense with a firearm, ICE might charge a deportable firearms offense or aggravated felony.[14] The good news is that the Supreme Court appears likely to reverse this rule in spring 2013, and hold that a prior conviction is evaluate based only upon the statutory elements[15] – but best to be safe.

II. Pleas That Avoid Some but Not All Immigration Consequences

If the pleas in Part II, *supra*, are not available, the below pleas will avoid serious immigration consequences for at least some immigrants.

1. Plead to a Non-Firearms Offense Even if it may be a Crime Involving Moral Turpitude or Crime of Violence

[13] While felon in possession of a firearm or ammunition is an aggravated felony, this should not apply to a felon who owns these items. See *U.S. v. Pargas-Gonzalez*, 2012 WL 424360, No. 11CR03120 (S.D. Cal. Feb. 9, 2012) (citing *U.S. v. Casterline*, 103 F.3d 76, 78 (9th Cir. 1996) (reversing conviction under § 922(g)(1) where defendant owned a firearm but was not in possession at the alleged time)). Possession of ammunition is not a deportable firearms offense; that ground reaches only firearms and "destructive devices." 8 USC 1227(a)(2)(C).

[14] ICE will assert that this is permitted under *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011). For further discussion see *§ N.3 The Record of Conviction*, and for really extensive discussion see Practice Advisory: The Categorical Approach in the Ninth Circuit, available at www.ilrc.org/crimes.

[15] See discussion of *Descamps v. United States* in *§N.3 Record of Conviction.*

Plead to an offense that does not involve a firearm and that thus is not *automatically* a deportable offense. It may be possible to avoid other immigration consequences presented by the offense:

- If the offense is a first plea to a crime involving moral turpitude (CIMT), it may be possible to plead to the offense without becoming deportable or inadmissible. See Part I, *supra.*

- If it is a crime of violence, theft, or burglary offense, it is not an aggravated felony unless a sentence of a year or more is imposed on a single count.

- Do not let the record of conviction show that the victim was under the age of 18, to avoid a deportable crime of child abuse.

- If the offense might be held a crime of violence, do not let the record show that the victim had a domestic relationship with the defendant, to avoid a deportable crime of domestic violence. See *§N.9 Violence, Child Abuse.*

Consider the following offenses. See also additional Notes and the California Quick Reference Chart.

✓ ***Intent to assault while possessing a deadly weapon, Calif. P.C. § 17500.*** This is a potentially good alternate plea that may have no immigration consequences. To prevent this from being a deportable firearms offense, do not let the ROC show that the weapon was a firearm, or better yet plead to a specific weapon that is not a firearm. "Deadly weapon" can include, e.g., a brick.

As opposed to assault *with* a deadly weapon, assault *while possessing* a deadly weapon is not necessarily a CIMT[16] or even a crime of violence.[17] Try to plead to assault with intent to commit an offensive touching,[18] while possessing, but not threatening with or using, a deadly weapon. If that is not possible, plead to the language of the statute but do not allow any facts in the record of conviction to show threatening with or using the weapon, or to show hurt or injury.

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[16] Possessing a deadly weapon is not a crime involving moral turpitude (CIMT). See, e.g., *Matter of Hernandez-Casillas*, 20 I&N Dec. 262, 278 (BIA 1990) (sawed-off shotgun). Simple assault is not a CIMT. See, e.g., *Matter of Sanudo*, *supra* (battery); *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989) (assault with intent to commit a felony). Two non-CIMTs should not be combined to make a CIMT. See, e.g., *Matter of Short*, 20 I&N at 139 ("Accordingly, if a simple assault does not involve moral turpitude and the felony intended as a result of that assault also does not involve moral turpitude, then the two crimes combined do not involve moral turpitude.").

[17] To be a crime of violence, a misdemeanor must have as an element the intent to use or threaten actual violent force. 18 USC § 16(a).

[18] While § 240 provides that the offense involves a "violent injury," it has long been established that "[t]he 'violent injury' here mentioned is not synonymous with 'bodily harm,' but includes any wrongful act committed by means of physical force against the person of another, even although only the feelings of such person are injured by the act." *People v. Bradbury*, 151 Cal. 675, 676 (Cal. 1907).

Analyze what will happen if the conviction is held to be a CIMT and/or crime of violence. In some cases this will have no effect. Because §17500 has a six-month maximum sentence, if it is the defendant's *only* CIMT conviction it will not cause inadmissibility or deportability under the CIMT ground. If held a crime of violence, the only possible effect would be if the record adequately showed that the victim shared a domestic relationship with the defendant. See *§N.9 Violence, Child Abuse*. It cannot be an aggravated felony as a crime of violence, because that requires a one-year sentence. To prevent it from being a deportable crime of child abuse, don't let the record show a victim under age 18.

✓ ***Assault with a deadly weapon or with force likely to produce great bodily harm, Calif. P.C. § 245(a)(1), (4).*** See analysis in Appendix II to this Note, "Immigration Effect of Selected Firearms Offenses." While it can avoid a deportable firearms offense, it is a crime of violence; assume that it is also a CIMT unless, e.g., the defendant was so inebriated as to not form the intent.

✓ ***Burglary, Theft, Receipt of Stolen Property.*** In almost every case these offenses will be an aggravated felony *if* a sentence of a year is imposed, and will be a CIMT, but see discussion in *§ N.13 Burglary, Theft, Fraud.*

✓ ***Other offenses that may be a CIMT or crime of violence, but do not involve a firearm.***

III. Pleas That At Least Avoid Conviction of a Firearm Aggravated Felony

For a summary of immigration consequences of more firearms convictions, organized by offense, see **Appendix II – Firearms Offense Chart.** A state firearms offense is an aggravated felony if it

- involves trafficking for commercial gain in firearms or destructive devices,
- is a crime of violence with a sentence imposed of one year or more on a single count; or
- is analogous to certain federal firearms offenses, including being a felon, addict, or undocumented person in possession of a firearm or ammunition[19]

The following strategies may result in a deportable firearms offense, but at least will not be a firearms aggravated felony:

1. Plead to ***possession,*** e.g., P.C. §§ 25400(a) (carrying a concealed firearm) or 26350 (openly carrying unloaded firearm), ***rather than sale*** or any offense involving trafficking. ***Giving*** a firearm, i.e. without the commercial element, also should work.

[19] 8 USC § 1101(a)(43)(C).

2. Avoid a ***firearm sentence enhancement*** under P.C. § 12022, which is likely to result in conviction of an aggravated felony as a crime of violence. Instead try to plead to possession of a firearm and/or the underlying felony offense, and use sentencing strategies to accept the required time while avoiding a sentence of one year or more on any single count. See *§N.4 Sentence.* Be sure to also analyze all offenses.

3. If charged with P.C. § 29800, ***see these alternatives to felon or drug addict in possession of a firearm***, to avoid conviction of an aggravated. Be sure to analyze the immigration consequences of the prior offense/s. If one must plead to § 29800:

   ✓ Plead to ***misdemeanant*** in possession under § 29800.[20] Or plead to §§ 29805 (person convicted of specified misdemeanor), 29815(a) (persons with probation conditions prohibiting firearm possession), or 29825 (possess, receive, purchase a firearm knowing that s/he is prohibited from doing so by TRO, PO, or injunction; but seek assistance if the order relates to domestic violence).

   ✓ There is a strong argument that a plea to § 29800 as a ***felon or drug addict who owns rather than possesses a firearm*** will avoid an aggravated felony. Section 29800 is an aggravated felony only if it is analogous to certain federal firearms offenses; these include possession but not ownership.[21] Keep the record of conviction, including the factual basis for the plea, clear of information regarding the defendant's possession, access, or control over the firearm. A plea might read, "On December 13, 2012, I did own a firearm, having previously been convicted of a felony." Ammunition is even a better plea; see next paragraph.

   A plea to being a ***felon or addict who owns ammunition*** under P.C. § 30305 has the added advantage of not being a deportable firearms offense.[22] Assuming that the "owns versus possesses" argument will succeed in preventing an aggravated felony, with this plea a permanent resident may not be deportable at all.

   Note that being a ***drug addict*** can cause inadmissibility and deportability. See *§N.8 Controlled Substances.* Note that a state offense is an aggravated felony if it has as elements ***being an undocumented person*** who possesses a firearm. No California firearms offense has undocumented status as an element, however.

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[20] Section 29800 refers to persons convicted of a felony or convicted under P.C. § 23515(a), (b), or (d). These subsections cover "violent firearms offenses," some of which are felony/misdemeanor wobblers, including §§ 245(a)(2), 246, and 417(c). Therefore conviction as a misdemeanant is punishable under this section. See also *United States v. Castillo-Rivera*, 244 F.3d 1020, 1022 (9th Cir. 2001) (conviction under former P.C. § 12021(a)(1) is divisible as an aggravated felony as an analogue to 18 USC 922(g)(1), (3), because it includes possession of a firearm by a felon or a misdemeanant.)

[21] See 18 USC § 922(g)(1)-(5). While felon in possession of a firearm or ammunition is an aggravated felony, this should not apply to a felon who owns these items. *U.S. v. Pargas-Gonzalez*, 2012 WL 424360, No. 11CR03120 (S.D. Cal. Feb. 9, 2012) (concluding that former § 12021(a) is not categorically an aggravated felony as an analog to 18 USC § 922(g)(1) (felon in possession) because California is broader in that it covers mere ownership of guns by felons). *Pargas-Gonzalez* cites *U.S. v. Casterline*, 103 F.3d 76, 78 (9th Cir. 1996) in which the court reversed conviction under § 922(g)(1) where defendant owned a firearm but was not in possession at the alleged time. Like the former § 12021(a), the current § 29800 prohibits "owning" a firearm.

[22] Possession of ammunition is not a deportable firearms offense because that ground reaches only firearms and "destructive devices." 8 USC 1227(a)(2)(C).

(Being convicted of a firearms offense, at a time when one is in fact undocumented, is not an aggravated felony if the undocumented status is not an element of the offense.) And to state the obvious, analyze the ***prior felony or misdemeanor*** for immigration consequences.

4. Try to avoid conviction for possessing, selling, converting a ***short-barreled rifle or shotgun, machinegun, or silencer,*** under P.C. §§ 33215, 32625 and 33410. It may be charged as a crime of violence, so make every effort to obtain 364 days or less on each count (although immigration lawyers have strong arguments against this classification). Possession with 364 days or less on all counts should not held be an aggravated felony, but still should be avoided. If possible instead plead to §§ 25400(a) or 26350 for carrying a firearm, or to P.C. § 17500 for a weapon.

Appendix 12-I:

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.

Please give a copy of the applicable paragraph/s to the Defendant, *with instructions to hand it to an Immigration Judge or defense attorney. Please include a copy of any* ***official documents*** *(e.g. plea form) that will support the defendant's argument.*

Please give or mail a second copy to the defendant's friend or relative, or mail it to the defendant's home address*. Because authorities at the immigration detention center may confiscate the defendant's documents, doing this will provide a back-up copy accessible to the defendant.*

* * * * *

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.

An offense involving an antique firearm is not a deportable firearms offense. Antique firearms are excluded from the definition employed in the firearms deportation ground. See INA § 236(a)(2)(C) reference to 18 USC § 921(a)(3).

* * * * *

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.

Simple assault or battery of a spouse, under P.C. § 243(a) or 243(e) is neither a crime involving moral turpitude, a crime of violence, nor a crime of domestic violence, unless the offense was committed with actual violence rather than offensive touching. See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (Calif. P.C. § 243(e) is neither a moral turpitude offense nor a crime of violence if it is not committed with actual violence); see also *Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010); *Johnson v. U.S.*, 130 S. Ct. 1265 (2010) (offensive touching is not a crime of violence).

* * * * * * * * *

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.

Battery that results in serious bodily injury under Calif. P.C. § 243(d) is not a crime involving moral turpitude, a crime of violence, nor a crime of domestic violence, unless the offense was committed with actual violence rather than offensive touching. Significantly, § 243(d) requires neither intent to cause an injury, nor use of force likely to cause an injury. It requires only general intent to make an offensive touching, with the result that an injury occurred.

Battery under § 243(d) has the same intent and conduct requirements as simple battery or spousal battery under P.C. § 243(a), (e). In finding that § 243(d) is not necessarily a crime involving moral turpitude for state purposes, a California appellate court held that "the state of mind necessary for the commission of a battery with serious bodily injury is the same as that for simple battery; it is only the result which is different. It follows that because simple battery is not a crime involving moral turpitude, battery resulting in serious bodily injury necessarily cannot be a crime of moral turpitude because it also can arise from the 'least touching.'" *People v. Mansfield*, 200 Cal. App. 3d 82, 88 (Cal. App. 5th Dist. 1988).

Regarding moral turpitude, the Board of Immigration Appeals held that when battery offenses are committed with offensive or de minimus touching rather than violence, they are not crimes involving moral turpitude. *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (holding that Calif. P.C. § 243(e), spousal battery, does not involve moral turpitude unless committed with actual violence). For this reason the Ninth Circuit and the Board of Immigration Appeals (in an Index Decision) stated that P.C. § 243(d) also is not necessarily a crime involving moral turpitude. See *Matter of Muceros*, A42 998 6100 (BIA 2000) indexed decision, http://www.usdoj.gov/eoir/vll/intdec/indexnet.html, holding that because P.C. § 243(d) has the same intent as simple battery, it is not a crime involving moral turpitude. See also discussion in *Uppal v. Holder*, 605 F.3d 712, 718-719 (9th Cir. 2010).

Regarding a crime of violence, a misdemeanor will qualify as a crime of violence only under 18 USC § 16(a), if it has as an element intent to use or threaten violent force. Offenses such as §§ 243(a) or (e) are not crimes of violence under 18 USC § 16(a) unless the record proves that the offense was committed with actual violence or threat of actual violence, as opposed to offensive touching. See, e.g., *Matter of Sanudo, supra; Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010).

The same finding applies to ***misdemeanor § 243(d).*** California courts have held that § 243(d) requires only the same "least touching" as simple battery. Section 243(d) need not

involve force likely to cause injury. "[Section 243(d)] addresses the result of conduct rather than proscribing specific conduct… For example, a push that results in a fall and concomitant serious injury may not be sufficient deadly force to permit successful prosecution under section 245, subdivision (a). However, *it is triable as felony battery*… This analysis dictates the least adjudicated elements of battery resulting in serious bodily injury do not necessarily involve force likely to cause serious injury." *People v. Mansfield*, 200 Cal. App. 3d at 88 (citations omitted) (emphasis in original).

Felony battery under § 243(d) also should not be found a crime of violence. A felony offense is a crime of violence under 18 USC § 16(b) if by its nature, the offense involves a substantial risk that violent force may be used against the person or property of another in the course of its commission. Section 243(d) is a "wobbler" offense that can be punished as a felony or as a misdemeanor. There is no difference between the elements of felony or misdemeanor § 243(d). As the *Mansfield* court stated above, a perpetrator may commit felony § 243(d) with no intent to cause injury or to use violence. Thus, the offense contains no inherent risk that the perpetrator will resort to force. See also discussion in *Covarrubias-Teposte v. Holder*, 632 F.3d 1049, 1054-55 (9th Cir. 2011) (felony reckless firing into an inhabited house is not a crime of violence under 18 USC § 16(b) based on a risk that a fight would break out; "there must be a limit to the speculation about what intentional acts could hypothetically occur in response to the crime of conviction").

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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.

Brandishing/exhibiting a non-firearm weapon in a rude manner, P.C. § 417(a)(1) is not a crime involving moral turpitude. See, e.g., discussion in *Matter of G.R.*, 2 I&N Dec. 733, 738-39 (1946).

Section 417(a) is not a crime of violence. As a misdemeanor, it does not come within 18 USC § 16(a), because it lacks the element of threat or use of force. See, e.g., *People v. McKinzie*, 179 Cal App 3d 789, 224 Cal Rptr 891 (Cal App 4th Dist 1986) (the victim of the act need not be aware that the brandishing is occurring; it is enough that the brandishing be in public).

Section 417(a) is divisible for purposes of a deportable firearms offense: § 417(a)(1) involves a non-firearm weapon, while § 417(a)(2) involves a firearm.

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Possession of a non-firearm weapon, e.g., dagger, brass knuckles, or blackjack, under current Calif. P.C. §§ 21310, 21710, or 22210, or former Calif. P.C. § 12020(a)(1), does not have adverse immigration consequences. Possessing a weapon is not a crime involving moral turpitude. See, e.g., See, e.g., *Matter of Hernandez Casillas*, 20 I&N Dec. 262, 277 (A.G. 1991, BIA 1990) (possessing a sawed-off shotgun is not a crime involving moral turpitude). These offenses do not come within the firearms deportation ground or the definition of aggravated felony relating to firearms, because these weapons are not firearms or destructive devices.

Neither is possession of any of these weapons a crime of violence under 18 USC § 16. See discussion in *United States v. Medina-Anicacio*, 325 F.3d 638, 647 (5th Cir. 2003) (possession of a weapon under former Calif. P.C. § 12020 is a general intent crime that does not contain an inherent risk that violence will be used in committing the offense);

* * * * * *

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Firing a weapon with reckless disregard under P.C. § 246 is not a crime of violence. See *Covarrubias-Teposte v. Holder*, 632 F.3d 1049 (9th Cir. 2011).

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Negligently firing a firearm or BB gun under Cal. P.C. § 246.3 is not a crime of violence. See *United States v. Coronado*, 603 F.3d 706 (9th Cir. 2010) (finding felony § 246.3 is not a crime of violence, citing *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. Ariz. 2006)).

Section 246.3 is divisible as a deportable firearms offense under INA§ 237(a)(2)(C) because it can involve either a firearm or a BB gun. A BB gun does not meet the applicable definition of firearm, which requires the projectile to be expelled from the weapon by an explosive. See 18 USC § 921(a)(3). Instead, a BB gun is defined in Calif. P.C. § 16250 as a device that requires expulsion by force of air pressure.

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Intent to assault while possessing a deadly weapon, Cal. P.C. § 17500, may have no immigration consequences. It is a misdemeanor with a maximum six-month sentence.

Deportable firearms offense. The offense is divisible because it includes weapons (or any object that can be used as a weapon) that are not firearms.

Crime involving moral turpitude (CIMT). Section 17500 is not necessarily a crime involving moral turpitude. It requires an intent to commit a simple assault while possessing a weapon. The weapon is not used to threaten or harm the victim. (That would be a more serious offense, assault with a deadly weapon, Cal. P.C. § 245.)

Simple assault under California law is not a CIMT. It includes an intent to commit mere offensive touching. While § 240 states that an assault is an attempt to commit a "violent injury," it has long been established that "[t]he 'violent injury' here mentioned is not synonymous with 'bodily harm,' but includes any wrongful act committed by means of physical force against the person of another, even although only the feelings of such person are injured by the act." *People v. Bradbury*, 151 Cal. 675, 676 (Cal. 1907). Because the intended offense is not a CIMT, the assault is not a CIMT. See, e.g., *Matter of Sanudo, supra* (offensive touching is not a CIMT); *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989) (assault with intent to commit a felony is a CIMT depending upon the felony). Possessing a deadly weapon is not a CIMT. *Matter of Hernandez-Casillas*, 20 I&N Dec. 262, 278 (BIA 1990) (possessing a sawed-off shotgun is not a CIMT). These two non-CIMTs cannot be combined to create a CIMT. See, e.g., *Matter of Short*, 20 I&N Dec. at 139 ("Accordingly, if a simple assault does not involve moral turpitude and the felony intended as a result of that assault also does not involve moral turpitude, then the two crimes combined do not involve moral turpitude.").

Crime of Violence, Domestic Violence. To be a crime of violence, a misdemeanor must have *as an element* the "use, attempted use, or threatened use" of physical force. 18 USC § 16(a). As discussed above, § 17500 lacks these elements.

***Effect of* Descamps v. United States.** In spring 2013 the U.S. Supreme Court will decide *Descamps v. United States*. The court is expected to hold that that a prior conviction must be evaluated based upon its elements alone, i.e., its "least adjudicable elements" or "minimum conduct to violate the statute," and not by additional information in the record of conviction. If that is made the rule, then as a matter of law §17500 will not be a crime of violence or firearms offense (or, if *Silva-Trevino* is overturned, a crime involving moral turpitude). This should be true whether the issue is deportability or eligibility for relief. If I would be removed under current law, but would not be removable or would be eligible for relief under a favorable decision *Descamps*, I request the court to hold my case in abeyance, and I ask for help in consulting with an immigration defense lawyer.

* * * * * * * * *

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.

Conviction under current Cal. P.C. §§ 29800, 30305, or former 12021, is divisible as an aggravated felony. Under INA §101(a)(43)(E), the definition of aggravated felony includes offenses described at 18 USC § 922(g)(1)-(5), notably being a felon or drug addict in possession of a firearm or ammunition. The above California statutes are divisible as aggravated felonies, because they prohibit some offenses not prohibited under § 922(g)(1)-(5).

First, the California statutes prohibit being a ***misdemeanant in possession of a firearm.*** This offense is not prohibited under § 922(g).

Second, the California statutes prohibit being a felon or drug addict who ***owns (rather than possesses) a firearm or ammunition***. Section 922(g) prohibits a felon from possessing firearms or ammunition, but not from owning these items. Being a felon who owns a firearm is not an aggravated felony because it is a distinct offense from being a felon who possesses one. See *U.S. v. Pargas Gonzalez*, 2012 WL 424360, No. 11CR03120 (S.D. Cal. Feb. 9, 2012) (unpublished) (holding that being a felon who owns a firearm in violation of Cal. P.C. §12021 is not an aggravated felony), citing *U.S. v. Casterline*, 103 F.3d 76, 78 (9th Cir. 1996) (reversing conviction under § 922(g)(1) where defendant, a felon, owned a firearm but was not in possession of it).

Being a felon who ***owns ammunition*** is not an aggravated felony for the above reasons, and further is not a deportable firearms offense under INA § 237(a)(2)(C). Ammunition is not included in the definition of "firearm" or "destructive device" used in the deportation ground, which is set out at 18 USC § 921(a)(3), (4).

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Appendix 12-II: Selected Firearms Offenses Under Ninth Circuit Law: Deportable, Inadmissible, Aggravated Felony[1]

Su Yon Yi and Katherine Brady, Immigrant Legal Resource Center

OFFENSE **Summary of Immigration Effect**	**AGGRAVATED FELONY (AF) CONVICTION** **-Firearms Trafficking[2]** **-State Analogue to Federal Firearms Offense[3]** **- Crime of Violence (COV), which is an AF only if sentence of at least one year is imposed[4]**	**DEPORTABLE, INADMISSIBLE CONVICTION** **-Firearms Offense[5]** **-Crime of Domestic Violence (DV)[6]** **-Crime of Child Abuse[7]**	**Conviction of CRIME INVOLVING MORAL TURPITUDE (CIMT)[8]**
Note: Effect on Asylees, Refugees *Firearms offenses can affect asylees and refugees differently than they do other immigrants.* *This Chart does not discuss this area further, but for more information see §N.17 Relief. Try to get expert consultation when representing an asylee or refugee.*	An AF conviction is basis for removal (deportation) for refugees. An AF conviction is a "particularly serious crime" that is a bar to getting asylum, and a basis to terminate asylee status and have the person put in removal proceedings. A non-aggravated felony also can be a particularly serious crime, depending upon whether there was a threat to people versus property, the sentence imposed, and factual circumstances.	A refugee who is deportable can be put in removal proceedings. A refugee or asylee, whether or not in removal proceedings, can apply to adjust status to become a lawful permanent resident. If the person is inadmissible s/he must obtain a special waiver in order to adjust. Absent extraordinary hardship, waiver will be denied for conviction of a "*violent or dangerous*" offense. (A violent or dangerous crime also is a basis to deny asylum in the first place.)	See column to left regarding effect of inadmissibility and deportability.
Exhibit weapon in rude or threatening manner; use **Calif. P.C. § 417(a)** **(1) Non-firearm** **(2) Firearm** ***Summary***: *With careful pleading, § 417(a) is not deportable, inadmissible or AF.*	<u>To avoid AF as COV</u>, plead to: -A six-month misdo, and/or to -Rude rather than threatening conduct, and/or get 364 days or less on each count	<u>To avoid a deportable firearm offense</u> plead to 417(a)(1) (or to 417(a) with a vague record, if avoiding becoming deportable is the only goal). - <u>Exception: Antique firearms.</u> If ROC shows the firearm was "an antique as defined at 18 USC 921(a)(16)" the offense is not a deportable firearms offense.[9] <u>To avoid a deportable crime of DV</u> plead to rude not threatening conduct (which should avoid a COV) and/or don't let ROC show DV-type victim; see § 245. <u>To avoid a deportable crime of child abuse</u> don't let ROC show victim under age 18	Exhibiting a weapon in a rude manner ought not to be held a CIMT.[10] Even if it is, a *first* single conviction of a 6-month or 1-yr CIMT misdo might not cause CIMT consequences. See *Note: CIMT*

Battery -- *Possible Alternative Plea* **Calif. P.C. §§ 243(d) (with serious bodily injury)** **243(e) (spousal battery)** ***Summary:*** *With careful pleading § 243(e) and probably § 243(d) are not deportable, inadmissible or AF.*	To avoid an AF as COV for 243(e) or *misdemeanor* 243(d)[11] -Have ROC show offensive touching and/or -Avoid sentence of 1 yr or more on any single count (this is always the most secure option). To avoid an AF as COV for *felony* 243(d), get 364 days or less on each count. While felony 243(d) shd not be held a COV if the record shows an offensive touching,[12] avoid any fight by avoiding 1 yr sentence. NOTE: Designating or reducing a wobbler offense to a misdemeanor per PC §§ 17, 19 creates a misdo for immigration purposes.[13].	To avoid deportable firearms offense do not let ROC show firearm involved, or show an antique firearm (see §417) To avoid deportable crime of child abuse keep minor age of victim out of ROC. To avoid deportable crime of DV: -Avoid a COV conviction by pleading to a misdemeanor where the ROC shows (or if DV deportability is the only issue, at least does not disprove) conduct was offensive touching, and/or -Create a record that does not show DV-type victim; see §245.	To avoid CIMT, ROC shd show offense committed only by offensive touching.[14]
Assault (2012 version) **Calif. P.C. § 245(a)** **(1) Non-Firearm** **(2) Firearm** **(3) Machine gun** **(4) Force likely to cause great bodily harm** ***Summary****: With careful pleading a CIMT may be the only consequence.*	To avoid firearms AF: avoid plead to (3) which might be charged AF. See PC 32625. To avoid AF as COV, obtain sentence of 364 days or less for each § 245 conviction	To avoid deportable firearms offense plead to (1) or (4) with no firearm in ROC or (2) with ROC specifying antique (see §417). To avoid deportable crime of child abuse or of DV: To avoid child abuse, keep minor age of victim out of ROC. To avoid deportable DV, (1) avoid a COV, or (2) don't let ROC show the domestic relationship: either designate a non-DV-type victim (e.g., new boyfriend, neighbor, even police officer) or, less secure, keep the ROC clear of all evidence of a victim with a domestic relationship. See endnote 6 and see *Note: Violence, Child Abuse*.	Assume yes CIMT, with possible exception if ROC indicates person was intoxicated/ incapacitated and intended no harm.[15]

Willfully discharge firearm at inhabited building, etc. with reckless disregard **P.C. § 246** ***Summary:*** *Can avoid AF, but deportable for firearms and a CIMT*	COV: While this has been held not to be a COV, to be safe: -Plead specifically to reckless disregard, -Where possible, plead or reduce to misdemeanor; -To be sure, get 364 days While the Ninth Circuit held that felony §246 is not necessarily an AF as a COV even with 1 yr or more imposed,[16] it is always best to get 364 days or less on each count. See *Note: Sentences* for strategies.	Deportable firearms offense unless ROC shows firearm was antique (see §417). (To avoid deportable crime of DV or deportable crime of child abuse, see §245. However, absent an antique weapon, client is already deportable for firearms, so this is not key)	Yes CIMT[17]
Discharge weapon with gross negligence that could kill or injure **Calif. P.C. § 246.3** **(a) Firearm** **(b) BB gun** ***Summary****: Discharge of BB gun may have no consequence but possible CIMT.*	To avoid a COV: Felony reckless or negligent firing has been held not to be a COV,[18] but to be secure, try to obtain 364 days or less on each count. Also try to plead or reduce to a misdemeanor.	To probably avoid a deportable firearm offense plead to (b) (or if deportability is the only concern, keep record vague between (a) & (b)), because bb gun shd not be a "firearm."[19] Or specify antique firearm in ROC; see §417. To avoid deportable crime of DV, avoid a COV (see AF column) or avoid an ROC with DV-type victim; see § 245. To avoid deportable crime of child abuse, keep minor age of victim out of ROC	Should not be CIMT because gross negligence, but may be charged as CIMT.
Intent to Assault While Possessing Deadly Weapon **Calif. P.C. § 17500** ***Summary:*** *With careful pleading, the conviction is at most a CIMT. Further, a single CIMT conviction with 6-month max will not make a noncitizen deportable or inadmissible under the CIMT grounds.*[20]	Not a COV aggravated felony because 6-month maximum sentence (plus this is arguably not a COV; see next column)	To avoid a deportable firearms offense ROC shd show non-firearm (or antique firearm; see §417). Or, if deportability is the only issue, ROC can be vague. Deportable crime of DV: Might not be held COV if ROC does not show attempt or threat to use force or use weapon, i.e. a simple assault while possessing but not using or threatening to use the weapon. More secure: plead to a non-DV victim where possible, or keep the domestic relationship out of ROC (see §245). To avoid a deportable crime of child abuse do not let ROC show victim under age 18	Not necessarily CIMT, altho ICE might so charge. Make specific plea to assault intending offensive touching (or intending no injury) with *possession but no intent to use* a deadly weapon.[21] Even if a CIMT: If this is a *first* CIMT it's not inadmissible or deportable offense or bar to relief as a CIMT, because 6 mo max. See *Note: CIMT.*

Possession of weapon (non-firearm), e.g.: **Calif. P.C. §20010, etc.** ***Summary:*** *Appears to have no consequences.*	Not an AF: Offenses such as **Calif. P.C. §§ 20010 (blowgun), 21310 (dirk, dagger), 21710 (knuckles), 22210 (blackjack), and 22620(a) (stun gun)** at not AF's.	Not deportable firearms offense. (While a "gun," stun gun does not meet the federal definition of firearm.[22])	No, possession is not a CIMT.[23]
Possession of a firearm **Calif. P.C. §§ 25400(a) (concealed); 26350 (unloaded)** ***Summary:*** *Deportable firearms offense; see suggestions.*	Not an AF, although as always try to obtain 364 days or less on each count.	Yes, deportable firearm offense (unless ROC specifies antique; see §417). To avoid this, see possession of ammunition or non-firearms weapon; or see, e.g., P.C. §§ 243, 17500.	No, possession is not a CIMT.[24]
Sell, Deliver, Give Firearm to Felon, etc. **Calif. P.C. § 27500** ***Summary:*** *May be divisible AF; but see instructions.*	May be divisible as firearm AF: Sale is AF. Deliver or give possession/control avoids commercial element and thus might avoid AF. [25]	Yes, deportable firearm offense (unless ROC specifies antique; see §417).	Assume yes CIMT. *Might* not be if give rather than sell, or perhaps where only had cause to believe was a felon, etc. [26]
Possession, ownership of a firearm by a misdemeanant, felon, or addict **Calif. P.C. § 29800 (firearm)** ***Summary:*** *Felon in possession of a firearm is an AF, but felon who owns a firearm should not be. See AF column. These both come within firearms deport ground. To avoid both AF and firearms deport ground, see PC 30305.*	Firearms AF includes *possession* of a firearm by a *felon or addict*, etc.[27] To avoid this AF do any of these: -Plead to misdemeanant in possession;[28] -Plead specifically to *owning (rather than possessing)* a firearm. Clear the ROC of facts showing possession, access or control of the firearm. (Plead, e.g., "On 9/24/12 in San Diego, CA I did own a firearm, having previously been convicted of a felony.") Strong argument that this is not a federal analogue and therefore not an AF.[29] Even better plea is PC 30305. -Specify in ROC antique firearm.[30] -To surely avoid AF (altho still deportable for firearms) consider PC §§ 29805[31], 29815(a)[32], 29825[33] with a ROC consistent with instructions above.	Avoid deportable firearms offense. The deportation ground reaches firearms and explosives, but not ammunition.[34] Therefore owning ammunition, including being a felon who owns ammunition, is not a deportable firearms offense, while owning a firearm is. See PC 30305. Not deportable if ROC shows antique; see §417. Note that being an addict is inadmissibility grnd if current and deportability grnd if anytime since admission.	Owning or possessing a firearm is not a CIMT. See § 25400. ICE might attempt to charge it as such based on the additional 29800 elements, however. Be sure to analyze all prior conviction/s for immigration consequences

Possession, ownership of ammunition by a misdemeanant, felon, or addict **Calif. P.C. § 30305 (ammunition)** ***Summary:*** *Plea to felon who owns ammo may avoid immigration consequences.*	Firearms AF includes *possession* of ammunition by a *felon, addict*, etc. To avoid this, in state court: -Plead to misdemeanant in possession; -Plead specifically to *owning but not possessing* ammo, even if a felon, or drug addict -See additional instructions and endnotes at PC §29800, above.	Not deportable firearms offense. The deportation ground reaches firearms and explosives, but not ammunition. Therefore owning ammunition, including being a felon who owns ammunition, is not a deportable firearms offense. Note that being an addict is grounds for removal. See §29800	See §29800 for CIMT. Be sure to analyze all prior conviction/s for immigration consequences.
Possession of certain ammunition **Calif. P.C. §§ 30210, 30315 (armor piercing bullets)** ***Summary:*** *Appears to have no consequences.*	Possession of ammunition is not an aggravated felony unless it is stolen, is possessed by a felon, etc.[35].	Possession of ammunition is not a deportable firearm offense,[36] but keep the record clear of evidence of firearm	Simply owning, possessing ammunition is not a CIMT (see §25400).
Possession, sale, conversion of short-barreled shotgun/rifle, silencer, machinegun **Calif. P.C. §§ 33215, 33410, 32625,** ***Summary:*** *Avoid these pleas if possible, but see instructions to avoid consequences.*	Sale or keeping for sale is AF as firearms trafficking.[37] Possession with 1 yr or more on any one count might be charged as AF as COV, although imm counsel have good arguments against this. Possession with less than 1 yr should not be held be an AF, but still shd be avoided.	Yes, deportable firearm offense (unless ROC specifies antique; see §417).	Carrying, possessing is not a CIMT.[38] Unclear whether sale would be held CIMT.

ENDNOTES

[1] Thanks to Holly Cooper, Chris Gauger, Tally Kingsnorth, Graciela Martinez, Mike Mehr, Jonathan Moore, Norton Tooby, and ILRC attorneys for their help. For additional information see Brady, Tooby, Mehr & Junck, *Defending Immigrants in the Ninth Circuit ("Defending Immigrants")* at www.ilrc.org. See also *§N.12 Firearms Offenses*, in the *California Quick Reference Chart and Notes on Immigration Consequences of Crimes* at www.ilrc.org/crimes.

[2] 8 USC § 1101(a)(43)(C), INA § 101(a)(43)(C).

[3] 8 USC § 1101(a)(43)(E)(ii), (iii), INA § 101(a)(43)(E)(ii), (iii). States offense that are analogous to federal firearms offenses described in 18 USC §§ 922(g)(1)-(5), (j), (n), (o), (p), (r) or 924(b), (h) are aggravated felonies. Also offenses described in 26 USC § 5861 related to "dangerous weapons" are aggravated felonies. See list of dangerous weapons in the first row of this chart.

[4] 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. 8 USC § 1101(a)(43)(F), INA § 101(a)(43)(F).

[5] An offense involving a firearm or destructive device as defined in 18 USC § 921(a) is deportable. 8 USC § 1227(a)(2)(E). There is not a similar "firearms" ground of inadmissibility. 8 USC § 1182(a)(2). Firearm is defined as any explosive-powered weapon except an antique firearm. 18 USC § 921(a)(3).

[6] A deportable "crime of domestic violence" is a "crime of violence" defined at 18 USC 16, which is committed against a victim with whom the defendant shares a relationship protected under state domestic violence laws. One to avoid this deportation ground is to plead to an offense that is not a COV. If that is not possible, the other way to avoid this is to be convicted of a COV, but not against a victim with the domestic relationship. Currently the offense is not a deportable DV offense if the domestic relationship is not conclusively proved in the record of conviction, and that is a reasonable plea. However, in the future the rule might change to permit ICE to go somewhat beyond the record of conviction to identify the victim's relationship. Therefore, if one cannot avoid a crime of violence, a more secure way to avoid this deportation ground is to plead to an offense with a specific "non-DV type" victim, e.g. the new boyfriend, a neighbor, or even a police officer. See 8 USC § 1227(a)(2)(E)(i), INA § 237(a)(2)(E)(i), and see *§ N.9 Crime of Domestic Violence, Crime of Child Abuse.*

[7] A deportable "crime of child abuse" is an offense that harms or risks serious harm to a victim under age 18. Under current law, this includes an offense that does not have age of the victim as an element, if the victim's minor age is set out in the record of conviction. 8 USC § 1227(a)(2)(E)(i), INA § 237(a)(2)(E)(i). See *§ N.9 Crime of Domestic Violence, Crime of Child Abuse.*

[8] A conviction of a crime involving moral turpitude can cause inadmissibility or deportability depending upon how many convictions, when the offense was committed, and the actual or potential sentence. See *§ N.7 Crimes Involving Moral Turpitude.* Note that simply possessing a firearm, even a short-barreled shotgun, is not a crime involving moral turpitude. *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (A.G. 1991, BIA 1990), *Cabasug v. INS*, 847 F.2d 1321 (9th Cir. 1988) (possessing a sawed-off shotgun is not a crime involving moral turpitude).

[9] Antique firearms are specifically excluded from the federal definition of firearms, used in immigration proceedings. 18 USC § 921(a)(3). For this purpose an antique is defined as a firearm manufactured in or before 1898 or certain replicas of such antiques. 18 USC § 921(a)(16). The immigrant must prove that the weapon was an antique. *Matter of Mendez-Orellana*, 25 I&N Dec. 254 (BIA 2010). Therefore it is very helpful if the plea can be specifically to this type of antique.

[10] P.C. § 417 is a general intent crime that does not require intent to harm. *See People v. Hall*, 83 Cal.App.4th 1084, 1091-92 (Ct.App.3d Dist. 2000). See *Defending Immigrants in the Ninth Circuit*, Ch. 4, Annotations.

[11] Section 243(e) (a misdemeanor) committed with offensive touching is not a crime of violence. See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) and several federal cases, including *United States v. Johnson*, 130 S.Ct. 1265 (2010). Misdemeanor § 243(d) should be held to not be a crime of violence if committed by offensive touching, for the same reason. A misdemeanor can be a crime of violence only under 18 USC § 16(a), which is interpreted to require intent to use or threaten violent force. Section 243(d) can be committed by a de minimus touching that is not likely, and is not intended, to cause injury, but that still results in injury. See, e.g., discussion in *People v. Mansfield*, 200 Cal. App. 3d 82, 88 (Cal. App. 5th Dist. 1988). Counsel still must make every effort to obtain a sentence of 364 days or less on any single count.

[12] Felony § 243(d) can be committed by a de minimus touching that is neither intended nor likely to cause injury, but that still results in injury. See, e.g., *People v. Mansfield, supra.* A felony is a COV under 18 USC § 16(b) if it is an offense that by its nature carries a substantial risk that the perpetrator will use violent force against the victim. Arguably it is not permissible to speculate that the victim will become angry, attack the perpetrator, and the perpetrator will respond with violent force. See, e.g., *Covarrubias-Teposte v. Holder*, 632 F.3d 1049, 1054-55 (9th Cir. 2011) (where reckless firing into an inhabited house may not be held a crime of violence under § 16(b) because of a possible fight in response to the act, because "there must be a limit to the speculation about what intentional acts could hypothetically occur in response to the crime of conviction"). However, counsel should make every effort to obtain 364 or less on any single count. If more time in jail is required, see strategies at *§ N.4 Sentence Solutions.*

[13] See, e.g., *LaFarga v. INS*, 170 F.3d 1213 (9th Cir 1999).

[14] The BIA and several courts have held that P.C. § 243(e) is not a CIMT if committed by offensive touching. See, e.g., *Matter of Sanudo, supra.* Because § 243(d) can be committed with the same de minimus conduct and intent as

243(e), the Ninth Circuit and, in a guiding "Index" opinion, the Board of Immigration Appeals, have found that P.C. § 243(d) is not necessarily a CIMT. *See Uppal v. Holder*, 605 F.3d 712 (9th Cir. 2010); *Matter of Muceros*, A42 998 6100 (BIA 2000) indexed decision, http://www.usdoj.gov/eoir/vll/intdec/indexnet.html; see also, e.g., *People v. Mansfield*, 200 Cal. App. 3d at 82, 88 (Cal. App. 5th Dist. 1988) ("[T] he state of mind necessary for the commission of a battery with serious bodily injury is the same as that for simple battery; it is only the result which is different. It follows that because simple battery is not a crime involving moral turpitude, battery resulting in serious bodily injury necessarily cannot be a crime of moral turpitude because it also can arise from the "least touching.")

[15] See *Carr v. INS*, 86 F.3d 949, 951 (9th Cir. 1996) cited in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1073 (9th Cir. 2007) (en banc) (§ 245(a) is not categorically a CIMT). P.C. § 245(a) is a general intent crime that requires no intent to harm and reaches conduct while intoxicated or incapacitated. *See, e.g., People v. Rocha*, 3 Cal.3d 893, 896-99 (Cal. 1971).

[16] *Covarrubias-Teposte v. Holder*, 632 F.3d 1049 (9th Cir. 2011), finding that because P.C. § 246 is committed by recklessness it is not a crime of violence. The opinion by Judge Gould (with Judges O'Scannlain and Ikuta) reaffirmed that this offense is not a crime of violence, but also criticized the precedent that precludes all reckless offenses from being a COV. See also *United States v. Coronado*, 603 F.3d 706 (9th Cir. 2010) finding that P.C. § 246.3 is not a COV.

[17] See *Matter of Muceros*, (BIA 2000), Indexed Decision, *supra.*

[18] See discussion of *Covarrubias-Teposte v. Holder* and *United States v. Coronado*, *supra.*

[19] To be a firearm under federal law, the projectile must be expelled from the weapon by an explosive. 18 USC § 921(a)(3). A BB gun is defined in Calif. P.C. § 16250 as a device that requires expulsion by force of air pressure and thus does not match the federal definition of firearm.

[20] A single CIMT is not a deportable offense unless it was committed within five years after admission and has a potential sentence of one year or less. 8 USC § 1227(a)(2). A single CIMT is not an inadmissible offense if it comes within the petty offense exception by being the only CIMT the person has committed, with a sentence imposed of six months or less and a potential sentence of one year or less. 8 USC § 1182(a)(2). Because § 17500 has a potential sentence of only six months, if it is the only CIMT it avoids inadmissibility and deportability.

[21] Simple possession of a deadly weapon is not a CIMT. *Matter of Hernandez-Casillas*, 20 I&N Dec. 262, 278 (BIA 1990) (possession of sawed-off shotgun is not a CIMT). Simple assault is not a CIMT. See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (simple battery with offensive touching, even against a spouse, is not a CIMT); Matter of Short, 20 I&N Dec. 136, 139 (BIA 1989). Two non-CIMTs cannot be combined to make a CIMT. See, e.g., *Matter of Short*, 20 I&N at 139 ("Accordingly, if a simple assault does not involve moral turpitude and the felony intended as a result of that assault also does not involve moral turpitude, then the two crimes combined do not involve moral turpitude.") However, ICE still might charge it as a CIMT.

[22] A stun gun does not meet the definition of firearm, which requires it to be explosive powered. A stun gun is defined as a weapon with an electrical charge. P.C. § 17230.

[23] Possessing a sawed-off shotgun is not a CIMT. *Matter of Hernandez-Casillas*, *supra*.

[24] *Ibid.*

[25] Generally a transaction requires a commercial element to be 'trafficking." See also discussion in *Matter of Kwateng*, 2006 WL 3088884 BIA (Sept. 29, 2006, Oakley) (unpublished)(finding that transfer of a firearm with no commercial element is not an aggravated felony as firearms trafficking).

[26] See, e.g., *Ali v. Mukasey*, 21 F.3d 737 (7th Cir. 2008) (noting that not all unlicensed trafficking of firearms is CIMT if merely failure to comply with licensing or documentation requirements).

[27] 8 USC § 1101(a)(43)(E)(ii), INA § 101(a)(43)(E)(ii) (listing offenses described in 18 USC § 922(g)(1)-(5)). These sections of § 922(g) prohibits shipping, transporting, possessing or receiving a firearms or ammunition by felon (convicted of an offense with a potential sentence of more than one year), fugitive, persons adjudicated mentally defective or institutionalized, users and addicts of a federally listed controlled substance, and undocumented persons.

[28] *U.S. v. Castillo-Rivera*, 244 F.3d 1020, 1022 (9th Cir. 2001) (noting that former Calif. P.C. § 12021(a) is broader than the felon in possession aggravated felony because it also covers those convicted of specified misdemeanors).

[29] *U.S. v. Pargas-Gonzalez*, 2012 WL 424360, No. 11CR03120 (S.D. Cal. Feb. 9, 2012) (concluding that former § 12021(a) is not categorically an aggravated felony as an analog to 18 USC § 922(g)(1) (felon in possession) because California is broader in that it covers mere ownership of guns by felons). *Pargas-Gonzalez* cites *U.S. v. Casterline*, 103 F.3d 76, 78 (9th Cir. 1996) in which the court reversed conviction under § 922(g)(1) where defendant owned a firearm but was not in possession at the alleged time. Like the former § 12021(a), the current § 29800 prohibits owning a firearm.

[30] 18 USC § 921(a)(3) defines firearms to exclude antique firearms (manufactured before Jan. 1, 1899 (18 USC § 921(a)(16)).

[31] P.C. § 29805 prohibits possession of a firearm by person convicted of specified misdemeanor. A conviction under this will avoid an aggravated felony but will be deportable as a firearms offense.

[32] P.C. § 29815(a) prohibits persons with probation conditions from possessing a firearm. Although a plea to this offense with a clear record avoids an aggravated felony, this will be a deportable firearms offense.

[33] P.C. § 29825 covers possessing, receiving, or purchasing a firearm knowing that s/he is prohibited from doing so by TRO, PO, or injunction. A conviction under this statute could avoid an aggravated felony with a clear record, but is a deportable firearms offense and could also be deportable under the violation of a DV-protective order ground.

[34] See definitions at18 USC § 921(a)(3), (4).

[35] It is a federal offense to manufacture, import, sell, or deliver armor-piercing ammunition. 18 USC § 922(a)(7) & (8). However that federal offense is not one of the offenses included in the aggravated felony definition at 8 USC § 1101(a)(43)(E).

[36] Ammunition is not a firearm or destructive device for purposes of the firearms deportation ground at 8 USC § 1227(a)(2)(C), INA § 237(a)(2)(C), which references 18 USC § 921(a)(3), (4) (defining firearms and destructive device, and not including ammunition); see also *Malilia v. Holder*, 632 F.3d 598, 603 (9th Cir. 2011) ("Because only the improper delivery of a firearms would constitute a removable offense, a violation of § 922 is not categorically a removal [firearms] offense. For instance, improperly delivering ammunition would not render the alien removal under § 1227.").

[37] See endnote 9, *supra*.

[38] *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (A.G. 1991, BIA 1990), *Cabasug v. INS*, 847 F.2d 1321 (9th Cir. 1988) (possessing a sawed-off shotgun is not a crime involving moral turpitude).