

## **PUBLIC-FACING CHART: SELECTED IMMIGRATION DEFENSES FOR SELECTED CALIFORNIA CRIMES**

*Immigrant Legal Resource Center  
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This is a limited guide that provides information on when some common California offenses avoid at least some (but not necessarily all) categories of adverse immigration consequences. Criminal defenders and immigration advocates may wish to direct prosecutors or immigration authorities to this resource, or provide this to clients, where they need to provide authority showing that a conviction does not have a specific bad immigration effect.

Note that the immigration consequences of crimes is a fast-changing field, where developments are difficult to predict. This article is meant to be an informational guide and is not a substitute for independent, up-to-date research into the immigration consequences of any offense.

**Immigration advocates and criminal defense counsel also should consult more in-depth ILRC resources, including the full *California Quick Reference Chart*. If you don't have access to these, email [defenders@ilrc.org](mailto:defenders@ilrc.org).**

### **Business & Prof C § 4324 (a) Forge prescription for any drug (b) Possess any drug obtained by forged prescription**

This offense should not be a controlled substance ground of removal or drug trafficking aggravated felony, because “drug” is overbroad, because it includes non-controlled substances. It is indivisible because it does not set out statutory alternatives, as is required under the categorical approach, but rather is a single term. *Descamps v. United States*, 570 U.S. 254, 257 (2013). Because the statute is overbroad and indivisible, immigration authorities may not consult the record of conviction to see if a controlled substance was involved; no conviction can be held to involve a controlled substance.

Immigration counsel can investigate arguments that (b) is not forgery<sup>1</sup> and is not a crime involving moral turpitude (CIMT).

**Business & Prof C § 7028(a)(1) Contractor without a license.** This is not an aggravated felony and should not be held a CIMT because it is a regulatory offense. See § 25658.

**Business & Prof C § 25658(a) Selling, giving liquor to a person under age 21.** This is not an aggravated felony and has been held not to be a CIMT because it is a regulatory offense.<sup>2</sup> It is not a deportable crime of child abuse because it does not have a victim under the age of 18 as an element of the offense, and it does not constitute abuse.

**Business & Prof C § 25662 Possession, purchase, or use of liquor by a minor.** This is not an aggravated felony and should not be held a CIMT because it is a regulatory offense.

**H&S C § 11357(a)(2) (current statute). Possess no more than 28.5 grams of cannabis or 8 grams of concentrated cannabis, while age 18-20 (infraction).** Arguably a California infraction is not a

conviction for immigration purposes. But if this is treated as a conviction, it is not an aggravated felony unless a prior possession was plead or proved. Possession of a controlled substance is not a crime involving moral turpitude (CIMT). This is a controlled substance offense but it qualifies for the advantages that apply to one or more convictions arising from a single incident involving possession for personal use of 30 grams or less marijuana, e.g., it is not a ground of deportation, not a bar to establishing good moral character, and may be eligible for waiver under § 212(h). Concentrated cannabis shares these advantages.<sup>3</sup>

Defense counsel still should try hard to avoid this and any other controlled substance plea. See discussion at H&S C § 11377, below.

**H&S C § 11357(b)(2) (current statute). Possess more than 28.5 grams cannabis or 8 grams concentrated cannabis. Age 18 and older.**

This is not an aggravated felony unless a prior possession was plead or proved, and is not a crime involving moral turpitude. It is a controlled substance offense but may qualify for the advantages of one or more convictions arising from a single incident involving possession for personal use of 30 grams or less marijuana, discussed at H&S C § 11357(a)(2) above.

The BIA held the 30-gram amount is a factual issue under the “circumstance specific” test.<sup>4</sup> Immigration advocates may dispute this and argue that the regular categorical approach and minimum conduct test should be applied, in which case no conviction under the statute would be held to exceed 30 grams. Under the BIA’s circumstance specific test, ICE must prove the conviction was for more than 30 grams of cannabis, to prove that an LPR is deportable. ICE can use evidence from outside the record of conviction to show the amount. The immigrant must offer similar proof that the amount was 30 grams or less, to qualify for the § 212(h) waiver of inadmissibility.

Defense counsel should consider Pen C § 1000 pre-trial diversion if D is capable of completing it; a non-drug offense; or if that is not possible a specific plea to 29 grams of marijuana. See also discussion at § 11377, below.

**Former H&S C § 11357 (Pre-Prop 64 statute). Possess: (a) Concentrated cannabis (b) Cannabis, 28.5 gms or less (c) Cannabis, more than 28.5 gms (d) Cannabis on or near school grounds, ranked by age of defendant**

The pre- and post-Prop 64 versions of 11357 have different immigration impact only because the various subsections prohibit slightly different conduct. Compare the subsection of the former § 11357 to the current subsections discussed above. See also H&S C § 11377.

*Prop 64 Post-Conviction Relief.* Prop 64 provides a post-conviction relief mechanism that can dismiss and seal a conviction for conduct that no longer is unlawful because the conviction is “legally invalid.” H&S C § 11361.8(e)-(h). While this ought to be an effective vacatur for imm purposes, there is not yet precedent. See more resources on post-conviction relief vehicles at <https://www.ilrc.org/immigrant-post-conviction-relief>

**H&S C § 11360 (Analysis is not changed by Prop 64) Unlawfully sell, import, give away, administer, or (since 1/1/16) transport marijuana for sale Or offer to do these things.**

This is divisible as an aggravated felony. The following automatically are not aggravated felonies: Giving away or offering to give away mj under (a) or (b) (any amount, because the minimum conduct test applies under *Moncrieffe v. Holder*, 569 U.S. 184, 193-99 (2013)); a pre-1/1/16 conviction for transportation (minimum conduct is transportation for personal use); and (Ninth Circuit only) offering to commit any § 11360 offense (*U.S. v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017) (en banc)). Pre-1/1/16 transportation, and arguably giving marijuana away for free, is not a crime involving moral turpitude.

To avoid a controlled substance offense, see §§ 11377, 11379 using non-federal substance defenses. See also other § 11357 options, above. If a plea to § 11360 is required, avoid an aggravated felony by pleading specifically to giving away.

Note that a conviction from on or before July 14, 2011 for giving away marijuana for free can be eliminated by any rehabilitative relief, including Pen C 1203.4, under the *Lujan-Armendariz* rule.<sup>5</sup>

### **H&S C §§ 11377 and 11350 Possess certain controlled substances**

Not an aggravated felony unless a prior possession offense was pled or proved for recidivist enhancement, or the offense was possession of flunitrazepam. Not a crime involving moral turpitude. Consider these alternatives.

**1. Avoid a controlled substance conviction** Depending on the individual, a single possession conviction can be fatal to current or hoped-for immigration status. It can destroy lives and families, including permanently depriving children of a parent. Individual analysis is required, but often a plea to a theft or violent offense is less dangerous than a controlled substance.

**2. Pretrial diversion PC 1000.** As of January 1, 2018, Pen C § 1000 does not involve a guilty plea and is not a conviction for immigration purposes. Defenders should accept pretrial diversion only if the defendant appears capable of completing the program, because the defendant will give up the right to trial by jury as a condition of Pen C § 1000. Such pleas can include drug counseling as a condition of probation.

### **3. Post-conviction relief**

*Former DEJ.* People who pled guilty under former (1997-2017) Pen C § 1000/Deferred Entry of Judgment and who got dismissal under former § 1000.3 are automatically entitled to relief under Pen C § 1203.43, which removes the guilty plea as a conviction for immigration purposes. (In addition, if the only consequence of DEJ was an unconditionally suspended fine, there is no conviction for immigration purposes. *Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010).)

*Conviction on or before 7/14/11.* For a qualifying defendant, a first conviction for possession of any controlled substance, or of paraphernalia, or of giving away a small amount of marijuana, from on or before 7/14/11 is eliminated for immigration purposes by rehabilitative statutes like Pen C § 1203.4, withdrawal per Prop 36, the former § 1000.3, etc. The defendant must not have violated probation or had a prior pretrial diversion (but this might not apply if D was under age 21 at time of plea.) See advisory on *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc).<sup>6</sup>

*Vacatur per Pen C §§ 1473.7, 1016.5, 1018, habeas corpus, etc.* California has several other types of post-conviction relief that can help immigrants; see especially Pen C § 1473.7. Go to [www.ilrc.org/immigrant-post-conviction-relief](http://www.ilrc.org/immigrant-post-conviction-relief).

If one must plead to one of these drug offenses, consider the non-federal substances defenses:

**Non-federal substance defenses.** To be a deportable or inadmissible controlled substance offense or controlled substance agg felony, a state conviction must involve a substance listed in *federal* drug schedules. *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015). California laws include some *non*-federally listed substances.<sup>7</sup> This disparity gives rise to two defenses, the unspecified substance defense and the specific non-federal substance defense.

Note that the Ninth Circuit in 2018 held that methamphetamines as defined under California law at H&S C §§ 11377-79 is not a federally-defined controlled substance, as it is overbroad and indivisible compared to the federal definition, but then withdrew that opinion in 2019. See *Lorenzo v. Sessions*, 902 F.3d 930 (9th Cir. 2018); see *Lorenzo v. Whitaker*, \_F.3d\_ (9th Cir. January 17, 2019) for the published opinion withdrawing *Lorenzo*; and see <https://cdn.ca9.uscourts.gov/datastore/memoranda/2019/01/17/15-70814.pdf> for the unpublished opinion reaffirming that Mr. Lorenzo is not deportable under the controlled

substance ground, because the California definition of methamphetamine is overbroad and indivisible. Currently, meth as defined under California law will be held a federally-defined controlled substance, although immigration advocates might contest this in removal proceedings.

**Unspecified substance defense.** If the entire record of conviction refers only to a “controlled substance,” as opposed to, e.g., “heroin,” then a conviction under §§ 11377-79 and 11350-52 does not establish that the substance at issue was also one that appears on the federal lists. See footnote for discussion of how to create an inconclusive record of conviction for this purpose.<sup>8</sup>

A record that only references an unspecified substance will protect an LPR from being found deportable for a controlled substance removal ground, including aggravated felony. ICE cannot prove that the conviction involves a federally-defined substance. If D is an LPR who is not already deportable, this can save the day.

But litigation is ongoing as to how this defense protects people who must apply for relief, such as undocumented defendants or already-deportable LPRs. See *Marinelarena v. Sessions*, No. 14-72003, pending Ninth Circuit *en banc* review. Until this is resolved, defenders should act conservatively: create an inconclusive record of conviction, but advise that this is not a guarantee that it will protect undocumented persons or deportable LPRs. Try hard for one of the above options, or the specific non-federal substance defense, discussed next.

**Specific non-federal substance defense.** A plea to a specific substance that is not on the federal list -- e.g., chorionic gonadotropin or khat for §§ 11377-11379 -- is not a controlled substance offense for any purpose, including eligibility for admission or relief. See discussion of the *Lorenzo* case and California methamphetamine as a federally-defined controlled substance in “Unspecified substance defense,” above.

**H&S C § 11378 Possession for sale** Possession for sale of a federally-defined controlled substance is an automatic aggravated felony. Rather than plead to §§ 11351 or 11378, one should seek another offense, including a non-drug conviction, simple possession, or if necessary pleading up to “offering to” commit an offense under §§ 11352 or 11379, which is not an aggravated felony in immigration proceedings arising within the jurisdiction of the Ninth Circuit. See below. See discussion of the *Lorenzo* case and California methamphetamine as a federally-defined controlled substance in “Unspecified substance defense,” above.

**H&S C §§ 11379, 11352 Sell, Give away, Transport for sale (1/1/14 statute), Transport for personal use (pre- 1/1/14 statute) or Offer to do any of above**

These offenses are inadmissible and deportable drug convictions unless a non-federal substance defense (see H&S C § 11377, above) applies.

Assuming that a non-federal substance defense does not apply, this is divisible as an aggravated felony. The following are not aggravated felonies: Pre-1/1/14 conviction for transportation (minimum conduct is transportation for personal use); and (Ninth Circuit only) offering to commit any §§ 11379 or 11352 offense (*U.S. v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017) (*en banc*)). A conviction for commercial drug trafficking (sale) of a federally-defined substance also provides a basis for the person to be found inadmissible because the government has “reason to believe” they participated in trafficking. A conviction for giving drugs away should not provide this.

Pre-1/1/14 transportation, and arguably giving drugs away for free, is not a crime involving moral turpitude.

Alternative pleas: See also H&S C § 11391, 25189.5, Pen C §§ 32, 136.1(b)(1), 460, etc.

**H&S C § 25189.5 Disposal of hazardous waste** This is not an aggravated felony and should not be a CIMT. It is not a controlled substance offense as it can involve a variety of hazardous waste.

### **Pen C § 32 Accessory after the fact**

A plea to Pen C § 32 can be extremely useful, because it avoids a conviction relating to a controlled substance, domestic violence, violence, firearms, or an aggravated felony (with the possible exception of obstruction of justice) etc., because it does not take on the character of the principal's offense. For example, accessory after the fact to a controlled substance offense is not a controlled substance offense.<sup>9</sup> In addition, at least within the Ninth Circuit Pen C § 32 is not a crime involving moral turpitude. *However, defenders must conservatively assume that it will be held an aggravated felony if a sentence of a year or more is imposed.* See below. A similar analysis may apply to other offenses that could be construed as obstruction of justice, such as Pen C §§ 136.1(b)(1) and accessory after the fact pursuant to Veh C § 10851.

*Aggravated felony.* An offense that meets the definition of obstruction of justice is an aggravated felony if a sentence of one year or more is imposed. 8 USC § 1101(a)(43)(S). The Ninth Circuit and the BIA have disagreed as to the definition of obstruction of justice, and defenders should make every effort to avoid a sentence of a year or more on a single count of Pen C § 32.

This issue has developed in a case involving Mr. Valenzuela Gallardo, who was convicted of Pen C § 32 and sentenced to 16 months. The Ninth Circuit declined to apply a BIA definition of obstruction of justice that does not require interference with an existing investigation or proceeding, on the grounds that the definition raises serious constitutional concerns. The Ninth Circuit remanded the case to the BIA to either create a new definition or continue to apply the BIA's former definition, which did appear to require interference with an existing investigation or proceeding. The court declined to find that Mr. Valenzuela Gallardo's conviction of Pen C § 32 is obstruction of justice, because Pen C § 32 does not require such interference. For example, it reaches impeding an arrest that did not result from any investigation. See *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 822 (9th Cir. 2016), declining to apply the definition of obstruction in *Matter of Valenzuela Gallardo*, 25 I&N Dec 838, 841 (BIA 2012), and approving the prior definition in *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889, 893 (BIA 1999); see also *Hoang v. Holder*, 641 F.3d 1157, 1161 (9th Cir. 2011). The Seventh Circuit followed the Ninth in *Victoria-Faustino v. Sessions*, 865 F.3d 869 (7th Cir. 2017). In September 2018 the BIA responded by "clarifying" its definition of obstruction, and again holding that Pen C § 32 categorically (always) meets that definition. The BIA stated that obstruction of justice includes any offense that is covered by 18 USC §§ 1501-1521, and any offense that involves an affirmative and intentional attempt that is motivated by a specific intent to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding. *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449 (BIA 2018),

Until this is resolved, defenders must make every effort to obtain a sentence of less than 364 days to protect against possible obstruction of justice conviction. Immigration advocates in removal proceedings, however, may assert that the BIA's most recent decision did not resolve the constitutional issues identified by the Ninth Circuit, and that the new definition should not be applied. They also should pursue additional defenses, in case this argument does not prevail.

*Crime involving moral turpitude.* The Ninth Circuit held that Pen C § 32 never is a crime involving moral turpitude (CIMT). Outside the Ninth Circuit, however, the BIA holds that it is a CIMT if the principal's offense is a CIMT.<sup>10</sup> Therefore, where possible defenders should identify a specific non-CIMT as the principal offense, in case the defendant is transferred outside the Ninth Circuit. Immigration advocates should cite controlling Ninth Circuit precedent.

**SB 54.** Pen C § 32 is one of a few wobblers that does not destroy SB 54 protections limiting jail cooperation with ICE.

### **PC § 69 Attempt to deter by threat or resist by force an executive officer in performing any duty**

Pen C § 69 is not a crime of violence because the minimum conduct is an offensive touching.<sup>11</sup> It is not a crime involving moral turpitude for the same reason. It should not be held an aggravated felony as obstruction of justice because it can involve a variety of officials and duties and it lacks specific intent.<sup>12</sup> Still, defenders should make every effort to obtain a sentence of 364 days or less.

**PC § 118 Perjury.** The Ninth Circuit held that *written* perjury is not a crime involving moral turpitude.<sup>13</sup> However, because the BIA and Ninth Circuit are in conflict, the best, conservative course is to avoid this if avoiding a moral turpitude offense is critical. Assume that this is an aggravated felony if a year is imposed.

**PC § 136.1(a) Nonviolently, maliciously persuade a witness or victim not to participate in proceeding**

The Ninth Circuit held that Pen C § 136.1(a) is not a crime involving moral turpitude.<sup>14</sup> This offense has no element of force or threat and is not a crime of violence or a deportable crime of domestic violence. Avoid a sentence of one year to avoid charge as obstruction of justice; see § 136.1(b)(1).

**PC § 136.1(b) (1) Nonviolently and without malice try to persuade a witness or victim not to file a police report**

Section 136.1(b)(1) is not a crime involving moral turpitude (CIMT). The Ninth Circuit held that Pen C § 136.1(a), which requires malice, is not a CIMT.<sup>15</sup> Therefore the less serious 136.1(b)(1) is not also.

This offense has no element of force or threat and is not a crime of violence or deportable crime of domestic violence. An offense that meets the definition of obstruction of justice is an aggravated felony if one year or more is imposed. Please see discussion of the definition of obstruction of justice at Pen C § 32, above. Like Pen C § 32, § 136.1(b)(1) does not require an existing investigation or proceeding: it involves impeding the filing of an initial police report. But because the law regarding this definition is volatile, defenders must act conservatively and make every effort to obtain a sentence of 364 days or less on a single count. Immigration advocates in removal proceedings can assert that the Ninth Circuit should not apply the BIA's definition of obstruction and that Pen C § 136.1(b)(1) is not an aggravated felony with a sentence of a year or more. See discussion at Pen C § 32, above.

**PC § 148 (a)-(d) Resisting officer in discharge of duty**

Section 148(a) is not a crime of violence; it can be committed simply by going limp. See CALCRIM 2655. Furthermore, it has a maximum possible sentence of 364 days. See Pen C §§ 148(a), 18.5(a).

Sections (b) - (d) should not be a crime of violence, as they can be accomplished by picking up a firearm the officer dropped<sup>16</sup> or grabbing a gun without violence. The offense should not be obstruction of justice because it lacks a specific intent to impede and includes interfering with an emergency medical technician or an officer in performing any duty including, e.g., quieting down a loud party.<sup>17</sup> Still, as always, defenders should act conservatively and make every effort to obtain a sentence of less than 364 days where that is possible.

Section 148(a) should not be held a crime involving moral turpitude. Sections (b)-(c) can be completed by negligence, because one "reasonably should have known" the person was an officer.

**PC § 166 Contempt of court, including violation of any court order**

This is not an aggravated felony or a CIMT. For example, Pen C §§ 166(a)(1) – (3) has no intent element, and (a)(4) includes violating any court order.

A civil or criminal court finding of a violation of the portion of a domestic violence (DV) protective order that is intended to prevent injury, threat, or repeat harassment is a basis for deportation. The Ninth Circuit and BIA disagree as to what evidence can be used to establish that a court finding of violation of an order in fact relates to violating that portion of a DV order, as opposed to violating of some other kind of order or other portion of a DV protective order. In a case involving Pen C § 273.6, the Ninth Circuit held that the categorical approach applies, that § 273.6 is divisible, and that a finding of a violation of an order does not trigger deportability if a vague record of conviction does not establish that the violation is of the above-described sections of a DV order. *Alanis-Alvarado v. Holder*, 558 F.3d 833, 835, 839-40 (9th Cir. 2009). In contrast, the BIA held that the categorical approach does not apply and that ICE can use evidence from outside the record of conviction to prove the violation was of a qualifying portion of a DV protective order. *Matter of Obshatko*, 27 I&N Dec. 173, 176-77 (BIA 2017).

The Ninth Circuit does not owe *Chevron* deference to the BIA as to whether a statute is divisible. But because the law is volatile or defendant could end up in proceedings outside the Ninth Circuit, defense counsel should act conservatively and plead, e.g., to Pen C §§ 166(a)(1), (2), or (3); or plead specifically to violating a DV order with conduct that does not relate to threat, injury, or harassment, such as failure to pay child support or follow visitation guidelines; or, plead to a new offense rather than to violating any order, and keep the record clear of mention of any order.

### **PC § 192(a) Voluntary manslaughter**

This is not a crime of violence because it can be committed by recklessness. *Quijada-Aguilar v. Lynch*, 799 F.3d 1303 (9th Cir. 2015). Still, as always, defenders should make every effort to obtain a sentence of less than 364 days.

### **PC § 192(b), (c)(1), (2) Involuntary or vehicular man-slaughter**

This is not a crime of violence because it can be committed by negligence. See Pen C § 192(a). For the same reason it should not be a crime involving moral turpitude.<sup>18</sup>

### **PC § 207 Kidnapping**

The Ninth Circuit held that Pen C § 207(a) is not a crime involving moral turpitude (CIMT) because it can be committed with good or innocent intent when the defendant uses verbal orders to move a person, who obeys for fear of harm or injury if they don't comply. See *Castrijon-Garcia v. Holder*, 704 F.3d 1205 (9th Cir. 2013). Section 207(e) also has very minor conduct and should not be a CIMT.

The Ninth Circuit held that Pen C § 207(a) is not a crime of violence under 18 USC § 16(a). It lacks as an element the threat of use of violent force, because it can be committed by "any means of instilling fear," including means other than force. *Delgado Hernandez v. Holder*, 697 F.3d 1125, 1127 (9th Cir. 2012).<sup>19</sup> (Note that § 207(a) was found to be a crime of violence under 18 USC § 16(b) and the "average case" analysis, but the Supreme Court struck down 18 USC § 16(b) as unconstitutionally vague. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).)

Kidnapping by fraud, Pen C § 207(d), is not a crime of violence. *United States v. Lonczak*, 993 F.2d 180, 183 (9th Cir. 1993). Kidnapping a minor under Pen C § 207(e) requires no use of force and is not a crime of violence. Still, as always, defenders should act conservatively and make every effort to obtain a sentence of 364 days or less, when that is possible.

An offense that is not a crime of violence cannot be a deportable crime of domestic violence.

### **PC §§ 236, 237(a) Felony false imprisonment by violence, menace, fraud, or deceit**

No conviction of Pen C § 237(a) should be held a crime of violence or a crime involving moral turpitude (CIMT) for any purpose. The statute is overbroad and indivisible as a crime of violence and CIMT. Because it is not a crime of violence it is not a deportable crime of domestic violence.

The California Supreme Court held that violence, menace, fraud, and deceit are not separate elements of Pen C § 237.<sup>20</sup> Therefore the statute is indivisible and must be evaluated by the minimum conduct required to violate any of the four categories.

Felony § 237 effected by “menace” is not a crime of violence, as it includes, e.g., threatening to arrest the person. It has been held not to be a CIMT.<sup>21</sup>

Felony § 237 effected by fraud or deceit is not a crime of violence, and at least deceit should not be held a CIMT.<sup>22</sup>

Felony § 237 effected by “violence” uses a specific definition of violence, which is that “the force used is greater than that reasonably necessary to effect the restraint.” *People v. Castro* (2006) 138 Cal. App. 4th 137, 140. This has been held to include the force necessary to pull the victim a few feet. However, defense counsel should not plead specifically to false imprisonment by “violence,” but should plead to deceit or menace instead. While this is not legally necessary since the statute is indivisible, this may serve to protect the person against (incorrect) charges and litigation.

Additional authority showing that felony false imprisonment is not a crime of violence or CIMT is that it is a lesser included offense of kidnapping by force or fear, Pen C § 207(a). See, e.g., *People v. Apo* (1972) 25 Cal.App.3d 790, 796. As such it has no elements beyond those of kidnapping. Because kidnapping has been held not to be a crime of violence or a CIMT (see discussion of Pen C § 207, above), Pen C § 237 is not either.

Despite this, as with all offenses, defenders should act conservatively and try to obtain a sentence of 364 days or less when that is possible.

**PC §§ 236, 237(a) Misdemeanor false imprisonment.** This is defined as false imprisonment effected *without* violence, menace, fraud, or deceit. It is not a crime of violence or a crime involving moral turpitude (CIMT).<sup>23</sup> Because it is not a crime of violence, it is not a deportable crime of domestic violence.

**PC § 241(a) Assault.** An assault is an attempted battery. The minimum conduct is taking action that may result in an offensive touching, which is not a crime of violence, a deportable crime of domestic violence, or a CIMT.<sup>24</sup> The statute is not divisible between different types of assault, so no conviction is a crime of violence or a CIMT for any purpose.

**PC § 243(a) Battery, Simple.** Section 243(a) is overbroad as a crime of violence and CIMT because the minimum conduct to commit 243(a) is an offensive touching. The statute is not divisible because it does not set out relevant statutory alternatives, as is required under the categorical approach. *Descamps v. United States*, 570 U.S. 254, 257 (2013). The terms “force” and “violence” are synonymous, and both include an offensive touching. Therefore, no conviction is a crime of violence, a deportable crime of domestic violence, or a CIMT for any purpose.<sup>25</sup>

**PC § 243(d) Battery with serious bodily injury**

This should not be held a crime of violence, a deportable crime of domestic violence, or a crime involving moral turpitude (CIMT) for any purpose.

Multiple California cases establish that the minimum conduct to commit Pen C § 243(d) is an offensive touching that was neither intended nor even likely to cause the injury. That does not meet the definition of a crime of violence or a CIMT.<sup>26</sup> The statute is not divisible, as it does not set out relevant statutory



alternatives as is required under the categorical approach. *Descamps v. United States*, 570 U.S. 254, 257 (2013). As an overbroad and indivisible statute, no conviction is a crime of violence or CIMT for any immigration purpose.

Despite this, defenders should try very hard to obtain a sentence of 364 days or less where that is possible. A safer plea is false imprisonment by deceit or menace, or nonviolent witness dissuasion, Pen C § 136.1(b)(1), as a misdemeanor or as a felony with custody of less than one year as a condition of probation.

**PC § 243(e)(1) Battery against spouse.**

Section 243(e) uses the definition of battery set out in Pen C § 243(a), which is overbroad and indivisible as a crime of violence, a deportable crime of domestic violence, or a CIMT. Section 243(e)(1) also is overbroad and indivisible for these purposes, and never is a crime of violence, crime of domestic violence, or CIMT for any purpose.<sup>27</sup>

Because this is not a crime of violence, defendant can accept a stay-away order or similar probation conditions without § 243(e) becoming a deportable DV offense.

**PC § 243.4(a) and (e) Sexual battery.** Neither misdemeanor nor felony Pen C § 243.4 is a crime of violence under 18 USC § 16(a).<sup>28</sup> Therefore it is not an aggravated felony even if one year or more is imposed. Despite this, as with all offenses, defenders should try to obtain a sentence of 364 days or less where that is possible. Because it is not a crime of violence it is not a deportable crime of domestic violence.

**PC § 245(a)(1)(2) Assault with a firearm** is not a deportable firearms offense. Because firearm for purposes of this offense is defined at Pen C § 16520(a), the offense comes within the antique firearms exception. See discussion at Pen C § 246. However, this is a crime of violence and a crime involving moral turpitude.

**PC § 246 Willfully discharge firearm at inhabited building, etc.**

This is held to not be crime of violence because it involves recklessness.<sup>29</sup> Despite this, as with all offenses, defenders should try very hard to obtain a sentence of 364 days or less where that is possible.

This is not a deportable firearms offense. Based on Supreme Court precedent, the Ninth Circuit held that because the federal definition of firearm excludes antique firearms, while the definition of firearm at Pen C § 16520(a) (formerly § 12001(b)) does not, no conviction of an offense that uses the § 16520(a) definition triggers the firearms deportation ground or is a firearm aggravated felony. *Medina-Lara v. Holder*, 771 F.3d 1106, 1116 (9th Cir. 2014). Pen C § 246 uses the § 16520(a) definition of firearm.

**PC § 246.3(a), (b) Willfully discharge firearm or BB device with gross negligence**

Felony reckless or negligent firing has been held not to be a crime of violence.<sup>30</sup> It should not be a crime involving moral turpitude due to gross negligence, but no case on this statute. It is not a deportable firearms offense due to the antique firearms exception; see Pen C § 246, above.

**PC § 261.5(c) Sex with minor under age 18, if D is at least 3 years older.** The Supreme Court held that Pen C § 261.5(c) is not an aggravated felony as sexual abuse of a minor (SAM). *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017). It is not a crime of violence or a deportable crime of domestic violence. Section 261.5(c) also is not a crime involving moral turpitude.<sup>31</sup>

**PC § 261.5(d) Sex with minor under age 16, if D is at least age 21.** The Ninth Circuit held that Pen C § 261.5(d) is neither an aggravated felony as sexual abuse of a minor nor a crime involving moral

turpitude.<sup>32</sup> However, this might change in the future in light of *Esquivel-Quintana*. See § 261.5(c), above. Therefore defenders should act conservatively and try hard to avoid this plea.

**PC § 270 Failure to provide for child** This should not be an aggravated felony, a crime involving moral turpitude (CIMT), or a deportable crime of child abuse. It has no element requiring that the defendant's failure caused the child to suffer destitution or any harm.

**PC § 270.1 Failure to get child to school** This should not be an aggravated felony, a CIMT, or a deportable crime of child abuse. The offense does not require bad intent and can be committed by failure to "reasonably" encourage truant to go to school.

**PC § 272 Contribute to the delinquency of a minor** This broadly defined statute is not an aggravated felony or a CIMT.<sup>33</sup> Because it can involve exposing minor to only mild harm, it does not meet the BIA's definition of child abuse.<sup>34</sup>

**PC § 273a Child endangerment** No conviction of 273a(a) or (b) should be held a crime of violence, because the minimum conduct is negligence and the statute is indivisible.<sup>35</sup> But as always, the best practice is to get 364 days or less on each count, when that is possible. No conviction of (a) or (b) should be a crime involving moral turpitude because the minimum conduct is negligence and the statute is indivisible.<sup>36</sup>

Section 273a(b) is not a deportable crime of child abuse, but § 273a(a) has been so held.<sup>37</sup>

**PC § 273.5 Spousal Injury** The Ninth Circuit held that the minimum conduct to commit Pen C § 273.5 is not a crime involving moral turpitude because it can involve a victim who is a former cohabitant.<sup>38</sup> Immigration advocates will argue that the statute is indivisible as to the type of victim, and therefore that no conviction is a CIMT. But Pen C § 273.5 has been held a crime of violence and a deportable crime of domestic violence.

#### **PC § 273.6 Violation of protective order**

This is not an aggravated felony and should not be a crime involving moral turpitude, because very mild conduct can be held to violate the order.

A civil or criminal court finding of a violation of the portion of a domestic violence (DV) protective order that is intended to prevent injury, threat, or repeat harassment is a basis for deportation. The Ninth Circuit and BIA disagree as to what evidence can be used to establish that a court finding of violation of an order in fact relates to violating that portion of a DV order, as opposed to violating of some other kind of order or other portion of a DV protective order. The Ninth Circuit held that a finding of a violation of "an order" does not trigger deportability if a vague record of conviction fails to establish that the violation is of the above-described sections of a DV order. In the case of § 273.6, the Ninth Circuit held that ICE must show that the reviewable record of conviction establishes that the violated order was issued pursuant to, e.g., Family Code § 6218 rather than, e.g., Cal. Civ. Proc. C § 527.6(c), which does not relate to domestic violence. *Alanis-Alvarado v. Holder*, 558 F.3d 833, 835, 839-40 (9th Cir. 2009). In contrast, the BIA held that ICE can use evidence from *outside* the record of conviction to prove the violation was of the portion of a DV protective order intended to prevent injury, threat, or repeat harassment. *Matter of Obshatko*, 27 I&N Dec. 173, 176-77 (BIA 2017).

The Ninth Circuit does not owe *Chevron* deference to the BIA on the issue of when the categorical approach applies. But because the law is volatile and the defendant could be transferred outside of the Ninth Circuit, defense counsel should plead to a violation of Pen C § 166(a)(1)-(3), plead to a specific violation to a DV order that does not fit requirements (for example, for child support or custody), or plead to a new offense with a record that does not mention violation of an order. See also Pen C § 166, above.

**PC § 288(c) Conduct with lewd intent with minor age 14-15 years and 10 years younger than defendant.** The Ninth Circuit held that § 288(c) is categorically not a crime involving moral turpitude, a crime of child abuse, or an aggravated felony as “sexual abuse of a minor” or as a “crime of violence.”<sup>39</sup> However, because a different rule could apply outside the Ninth Circuit, a more secure plea is to Pen C § 273a(b) or an age-neutral plea.

**PC § 290 Failure to register as a sex offender.** This is not an aggravated felony. Federal courts have indicated that this is not a CIMT because it can be committed by mere negligence, e.g., being late to register by a few days. The BIA held this is a CIMT, but Ninth Circuit declined to follow the BIA and remanded.<sup>40</sup>

**PC §§ 311.11(a), 311.3(a) Possess, copy, exchange, etc. child pornography.** The Ninth Circuit held that under the categorical approach these offenses are not an aggravated felony as child pornography.<sup>41</sup>

**PC § 313.1 Distribute, exhibit, obscene materials to a known minor, or without reasonable care to ascertain person’s true age** Not an aggravated felony. Should not be a crime involving moral turpitude as it has no element of intent to arouse<sup>42</sup> and can be based on negligent failure to ascertain age. It should not be child abuse, as minimum conduct does not prove harm and it includes failing to properly shield parts of magazines in a store or vending machine.<sup>43</sup>

**PC § 315 Keeping or residing in a place of prostitution or lewdness**

This should not be an aggravated felony, or should be divisible, because it includes merely residing in a place of prostitution. While the BIA held it was a crime involving moral turpitude (CIMT), it did not consider the fact that merely residing there - which can include residency by someone with no connection to the sex trade - is part of the offense and is not a CIMT.<sup>44</sup> Conviction under an overbroad statute like this alone does not prove inadmissibility for prostitution.<sup>45</sup>

**PC § 368(b)(1), (c) Elder abuse, endangerment**

Sections 368(b)(1) and (c) prohibit, among other things, negligently permitting an elder to be placed in a situation in which their person or health is endangered. While there are not cases on point for § 368, the statutory language is identical to the child endangerment statute at Pen C § 273a(a) and (b), discussed above. Therefore the analysis under the categorical approach should be the same for both statutes. The Ninth Circuit found that no conviction of §§ 273a(a) or (b) is a crime of violence, because the minimum conduct is negligence and the statute is indivisible.<sup>46</sup> In addition, no conviction of § 273(a) or (b) should be held a crime involving moral turpitude, because the minimum conduct is negligence and the statute is indivisible.<sup>47</sup> The same should be true for §§ 368(b)(1) and (c).

**PC §§ 459, 460(a), (b) Burglary, residential or commercial.** Neither residential nor commercial burglary is an aggravated felony as burglary, a crime of violence, attempted theft, or any other category, for any purpose, even if a sentence of a year or more was imposed.<sup>48</sup> Neither is conviction of residential or commercial burglary a crime involving moral turpitude.<sup>49</sup>

**PC § 459.5 Shoplifting** Not an aggravated felony (it has a 6 month maximum). The Ninth Circuit held that a lawful entry with mere intent to commit theft is not a crime involving moral turpitude (CIMT),<sup>50</sup> so Pen C § 459.5 lawful entry intending to take property should not be. But because CIMT law is volatile, if avoiding a CIMT is critical, consider other options for a new charge (Pen C §§ 460(b), 496, 530.5, Veh C § 10851).

**PC § 466 Possess burglary tools, intend to enter a building, vehicle, etc.** Not an aggravated felony, because it lacks the elements and has a six month maximum sentence. Not a crime involving moral

turpitude (CIMT) because intent to unlawfully enter any building, vehicle, etc., with no intent to commit a further crime is not a CIMT.<sup>51</sup>

**PC § 475(c) Possess “real or fictitious” check, etc. with intent to defraud** The Ninth Circuit held that § 475(c) is broader than the definition of the aggravated felony “forgery” because it includes use of “real” document.<sup>52</sup> Despite this, for all offenses counsel should make every effort to obtain a sentence of 364 days or less. If the loss exceeds \$10,000 see Pen C § 484.

**PC §§ 484 et seq., 487, 666 Theft (petty or grand)**

The Ninth Circuit held that no conviction of Pen C §§ 484/487 is an aggravated felony as “theft” even if a one-year sentence is imposed, because fraud is not an aggravated felony if one year is imposed, and § 484 is not divisible between theft and fraud.<sup>53</sup> As an overbroad and indivisible offense, it is not an aggravated felony for any immigration purpose. However, if a sentence exceeding a year is imposed on a single count *and* the loss to the victims exceeded \$10,000, this might be held an aggravated felony.

In a case where the loss to the victim/s exceeds \$10,000, a plea to Pen C § 484 will prevent the offense from becoming an aggravated felony as a crime of fraud or deceit under 8 USC § 1101(a)(43)(M), because the minimum conduct involves theft and § 484 is not divisible between theft and fraud. Assume, however, that the offense always is a crime involving moral turpitude.

**PC § 485 Theft by misappropriation** See discussion in unpublished Ninth Circuit opinion holding that Pen C § 485 is not a crime involving moral turpitude because it lacks the element of intent to permanently deprive.<sup>54</sup> Avoid a sentence of one year or more.

**PC §§ 496, 496a, 496d Receiving stolen property, or receiving stolen vehicle**

The Ninth Circuit held that Pen C § 496 includes intent to temporarily deprive the owner, which is not a crime involving moral turpitude.<sup>55</sup> While the court found that § 496 was divisible, subsequent Supreme Court precedent makes clear that § 496 is indivisible. Among other things, it does not set out statutory alternatives relating to temporary versus permanent taking, as is required under the categorical approach. *Descamps v. United States*, 570 U.S. 254, 257 (2013). Because it is overbroad and indivisible, no conviction is a CIMT for any purpose. However, it is critical to avoid a sentence imposed of one year or more.

**PC §§ 499, 499b Joyriding; Joyriding with Priors.** This is not a crime involving moral turpitude because the intent is to temporarily deprive. See Pen C § 496, above. Avoid a sentence imposed of one year or more.

**PC § 529(3) False personation**

This is not a crime involving moral turpitude because the minimum conduct to commit the offense does not include intent to gain a benefit or cause liability.<sup>56</sup> It also is not a theft offense and so should not be an aggravated felony if a year or more is imposed. But if the offense resulted in loss exceeding \$10,000, this is dangerous: consider a plea to Pen C § 484/487 with less than a year.

**SB 54.** This is one of a few wobblers that does not destroy SB 54 protections limiting jail cooperation with ICE.

**PC § 529.5(c) Possess document purporting to be gov’t- issued ID or driver’s license.** This is not an aggravated felony and should not be a crime involving moral turpitude because it has no intent to defraud.

**SB 54.** This is one of a few wobblers that does not destroy SB 54 protections limiting jail cooperation with ICE.

**PC § 530.5(a) Use of another’s personal identifying information for any unlawful purpose**

The Ninth Circuit found that Pen C § 530.5(a) is not a crime involving moral turpitude because it does not require intent to commit fraud or cause harm.<sup>57</sup>

Section 530.5 might be committed by forgery or counterfeiting, which are aggravated felonies if a year or more sentence is imposed, but these are not elements of the offense and so it cannot be charged as forgery or counterfeiting. Section 530.5 does not set out statutory alternatives involving forgery or counterfeiting, which is the most basic requirement to be an element under the categorical approach. *Descamps v. United States*, 570 U.S. 254, 257 (2013). Therefore no conviction under § 530.5 can be held an aggravated felony under those categories, even if a sentence of a year or more is imposed.

Section 530.5 states that the information cannot be used “for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information...” It is not divisible for this purpose. There is no state decision finding that a jury must decide unanimously between the § 530.5 alternatives. Further, the Supreme Court stated that if “a statutory list is drafted to offer ‘illustrative examples,’ then it includes only a crime’s means of commission” and therefore the statute is not divisible. *Mathis v. United States*, 136 S.Ct 2243, 2256 (2016). The use of the term “including” a list of possible purposes in § 530.5(a) is a clear example of an illustrative list under *Mathis*. *Ibid*.

But because it involves deceit, a conviction of § 530.5(a) might be held an aggravated felony if the loss to the victim exceeds \$10,000. Consider Pen C § 487 with less than a year, or other options.

**PC § 591 Tampering with or obstructing phone lines, malicious.** This is not a crime of violence: it need not involve force or threat. It should not be a crime involving moral turpitude because it can involve mild acts and intent to annoy.<sup>58</sup> Because it is not a crime of violence it is not a deportable crime of domestic violence.

**PC § 594 Vandalism, Malicious Mischief (b)(1) at least \$400 damage (b)(2) less than \$400 damage**

Not a crime of violence.<sup>59</sup> Should not be a crime involving moral turpitude (CIMT): the Ninth Circuit held that a similar statute punishing damage over \$250 (in 1995 dollars) is not a CIMT.<sup>60</sup> Under that standard, § 594(b)(2) is not a CIMT, and (b)(1) also should not be because the minimum conduct is \$400 worth of damage. The BIA held that Pen C § 594 becomes a CIMT with a gang enhancement, but the Ninth Circuit disapproved that decision.<sup>61</sup>

SB 54. This is one of a few wobblers that does not destroy SB 54 protections that limiting jailor’s cooperation with ICE.

**PC § 602 Trespass.** Not an aggravated felony, and it carries a six-month maximum sentence. Not a crime involving moral turpitude (CIMT) because it has no intent to commit a CIMT or other crime beyond unlawful entry. See, e.g., *Matter of M*, 2 I&N Dec. 721, 723 (BIA 1946). Section 602(1)(4) (discharging firearm) is not deportable firearm offense due to the antique firearms exception; see Pen C § 246.

**PC § 602.5 Trespass, residence.** Not an aggravated felony, not a crime involving moral turpitude (CIMT) (no intent to commit a CIMT or other crime upon entry); see § 602.

**PC § 646.9 Stalking.** This should not be held a crime of violence, and the BIA held that Pen C § 646.9 is not a deportable “stalking” offense under the DV ground.<sup>62</sup>

**PC § 647(c), (e), (h) Disorderly: Begging, loitering.** Not an aggravated felony or a crime involving moral turpitude.

**PC § 647(f) Disorderly: Under the influence of drug, controlled substance, alcohol.** Not an aggravated felony or a crime involving moral turpitude. A plea to a “drug” is not a controlled substance offense because that includes non-controlled substances, and as a single term it is not divisible. Arguably § 647(f) is not divisible between alcohol, drug, and controlled substance.<sup>63</sup>

**PC § 647(i) Disorderly: "Peeping Tom".** Not an aggravated felony. Should not be a crime involving moral turpitude because the offense is completed by peeping, with no intent to commit further crime.<sup>64</sup>

**PC § 647.6(a) Annoy, molest child.** Ninth Circuit held that this is not an aggravated felony as sexual abuse of a minor or a crime involving moral turpitude, and because of the mild conduct and lack of harm it should not be held a deportable crime of child abuse.<sup>65</sup> But it is possible that the analysis would be different in proceedings held outside the Ninth Circuit.

**PC § 653f(a), (c) Solicitation to commit variety of offenses**

The Ninth Circuit held that soliciting under § 653f(a) (violent and theft offenses) and (c) (rape and other sex offenses) are not crimes of violence under 18 USC § 16(a). The court held that they are crimes of violence under § 16(b), but because the Supreme Court struck down § 16(b), these offenses no longer are crime of violence.<sup>66</sup> Because it is not a crime of violence it is not a deportable crime of domestic violence.

There is no case on point, but arguably solicitation to commit rape is not an aggravated felony as rape because the aggravated felony definition includes attempt and conspiracy, but not solicitation, to commit an aggravated felony. See 8 USC § 1101(a)(43)(U) and above footnote.

**PC § 653f(d) Solicitation to commit drug offense such as 11352, 11379, 11391**

Solicitation to commit a drug offense is not a drug trafficking aggravated felony, in cases arising within the Ninth Circuit only.

Arguably H&S C § 11391 does not involve a federally defined controlled substance. If that is true, soliciting it is not a controlled substance offense. Immigration counsel can argue that none of these are removable controlled substance offenses because this is generic solicitation.<sup>67</sup>

**PC § 653m(a), (b) Electronic contact with (a) obscenity or threats of injury with intent to annoy; or (b) repeated annoying or harassing calls.** Not a crime of violence or a deportable crime of domestic violence. This should not be a crime involving moral turpitude because the minimum conduct is intent to annoy.<sup>68</sup>

**PC § 1320(a) Failure to appear for misdemeanor.** Not an aggravated felony as obstruction because that requires a sentence of one year or more. Does not appear to be a crime involving moral turpitude. But a conviction of failure to appear to serve a sentence if the underlying offense is punishable by a term of 5 years, or to face charges if the underlying sentence is punishable by 2 years is an aggravated felony. 8 USC 1101(a)(43)(Q), (T).

**PC § 4573.8 Possess an instrument, container, etc. to use drugs or alcohol in prison, jail without permission.** Not an aggravated felony or a crime involving moral turpitude. Not a deportable or inadmissible controlled substance offense. The term “drugs” is overbroad because it includes non-controlled substances. The term “drugs” is not divisible because it does not include statutory alternatives, as is required under the categorical approach. *Descamps v. United States*, 570 U.S. 254, 257 (2013).

**PC § 12022.7 Enhancement for inflicting GBI during commission of a felony.** Not crime of violence because the only intent required is intent to commit the underlying felony, or at most negligence.<sup>69</sup>

**PC § 17500 Possession of weapon with intent to assault.** Maximum possible sentence is less than one year. Should not be a CIMT because the minimum conduct is an intended offensive touching, with no use of the weapon. Not a deportable firearms offense due to antique firearms rule; see Pen C § 246.

**PC §§ 20010, 21310, 22210, 21710, 22620(a) etc. Possession of weapon other than firearm; see Advice** Possession of a weapon is not a crime of violence<sup>70</sup> or a crime involving moral turpitude.<sup>71</sup> A stun gun does not meet definition of firearm.<sup>72</sup>

**PC §§ 25400(a) Carrying concealed firearm** Not an aggravated felony or a crime involving moral turpitude. Not a deportable firearms offense under antique firearms rule; see Pen C § 246.

**PC § 27500 Sell, supply, deliver, give possession of firearm to persons whom seller (a) knows or (b) has cause to believe is a prohibited person** Not deportable under the firearms ground or a firearms aggravated felony due to antique firearms rule; see Pen C § 246.

**PC § 29800 Felon, addict, etc. possesses or owns a firearm See summary of the antique firearms defense** Not an aggravated felony due to the antique firearms rule; see Pen C § 246. Does not appear to be a crime involving moral turpitude.

**PC § 29805 (formerly PC §12021 (c)) Possess, own, etc. of firearm after conviction of certain misdemeanors** Not a deportable firearms offense; see Pen C § 246. Possession of a firearm by a misdemeanor is not an aggravated felony or a crime involving moral turpitude (CIMT).

**Veh C §20 False statement to DMV** Not aggravated felony. Appears not to be a CIMT because there is no element of intent to gain a benefit.

**Veh C § 31 False info to officer.** Not aggravated felony. Appears not to be a CIMT because there is no element of intent to gain a benefit.

**Veh C § 2800.1 Flight from peace officer** Not an aggravated felony as crime of violence; see § 2800.2. Not a CIMT.<sup>73</sup>

**Veh C § 2800.2 Flight from peace officer with wanton disregard for safety; can be proved by 3 traffic violations** Not an aggravated felony as crime of violence.<sup>74</sup> Not a CIMT because it is overbroad and indivisible due to the fact that recklessness can be proved by three traffic violations under Veh C § 2800.2(b).<sup>75</sup>

### **Veh C § 10851 Vehicle taking, temporarily or permanently**

Section 10851 never is a crime involving moral turpitude for any purpose. It is overbroad because it includes intent to deprive temporarily, and is indivisible because a jury is not required to decide unanimously between temporary and permanent intent.<sup>76</sup> As long as a sentence of a year is not imposed, this is a good plea.

This offense is very risky if a year or more is imposed. The Ninth Circuit held that Veh C § 10851 is not necessarily an aggravated felony as theft if a sentence of a year or more is imposed, because it also can be violated by being an accessory after the fact. While the court did not reach the issue, it indicated that there was strong evidence that § 10851 is not divisible between theft and accessory after the fact. That would mean that no conviction would be an aggravated felony as theft. *Ramirez-Contreras v. Sessions*, 858 F.3d 1298 (9th Cir 2017). But see discussion at Pen C § 32, above, regarding the differing Ninth Circuit and BIA tests for whether accessory after the fact is an aggravated felony as obstruction of justice. While this

legal conflict continues, defense counsel should act conservatively and obtain a sentence of 364 days or less on each individual count, or else plea to Pen C §§ 487, 459/460(b), or another offense.

**Veh C § 10852 Tampering with a vehicle** This is misdemeanor is not an aggravated felony. It is not a CIMT because it involves very minor interference with no intent to deprive owner. It is a lesser included offense to § 10851, which is not a crime involving moral turpitude.<sup>77</sup>

**Veh C § 10853 Malicious mischief to a vehicle** This misdemeanor is not an aggravated felony. It should not be held a CIMT because the minimum conduct involves moving levers or climbing into a vehicle without intent to commit any further crime.<sup>78</sup>

**Veh C § 12500 Driving without license** This is not an aggravated felony or a CIMT because it is a regulatory offense.

**Veh C §§ 14601.1 14601.2 14601.5 Driving on suspended license with knowledge** This is not an aggravated felony or a crime involving moral turpitude (CIMT).<sup>79</sup>

**Veh C. § 16025 Failure to exchange info after accident (infraction)** Not an aggravated felony and should not be a CIMT (it does not include failure to stop as an element; see Veh C § 20001).

**Veh C §§ 20001, 20002, 20003, 20004 Hit and run (felony or misdemeanor)**. This is not an aggravated felony. Simply failing to exchange information such as registration is not a CIMT.<sup>80</sup>

**Veh C §§ 23103, 23103.5 Reckless driving, reckless driving and use of alcohol or drugs** This is not an aggravated felony (recklessness is not a crime of violence) and should not be held a CIMT.<sup>81</sup> This is not a controlled substance offense because it is not divisible as to the substance; and “drugs” is overbroad and indivisible.

**Veh C § 23152(a) Driving under the influence of alcohol** Not an aggravated felony, and not a CIMT, including multiple offenses.<sup>82</sup>

**Veh C § 23152(e), (f) Driving under the influence of a “drug,” or of a drug and alcohol** Not an aggravated felony or CIMT; see Veh C § 23152(a). It is not a controlled substance offense. The term “drug” is overbroad because it includes non-controlled substances. It is indivisible because it is a single term rather than statutory alternatives, as is required under the categorical approach. *Descamps v. United States*, 570 U.S. 254, 257 (2013).

## ENDNOTES

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<sup>1</sup> Arguably section (b), possession of a drug obtained by a forged prescription, is not “forgery,” based on the fact that the Ninth Circuit has held that the “relating to” language cannot be over-extended and that forgery requires possession of a forged instrument. *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870, 876 (9th Cir 2008). Section (b) requires only possession of the drug obtained with a forged instrument, and not possession of the instrument itself. On its face it does not require that the defendant knew that the drug had been obtained by forgery.

<sup>2</sup> This is a regulatory offense, and many state laws include exceptions permitting minors to buy or use alcohol, for example with parents’ permission or at a college event. “Violations of liquor laws do not involve moral



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turpitude, and we do not believe [convictions for selling liquor to a minor] would be deportable offenses.” *Matter of P*, 2 I&N Dec. 117, 120-21 (BIA 1944) (*dictum*).

<sup>3</sup> The removal grounds use the term “marihuana,” which is defined at 21 USC § 802(16) to include all parts of the cannabis plant, including concentrated cannabis (hashish).

<sup>4</sup> The BIA held that the amount of marijuana is not decided under the regular categorical approach, which focuses on the minimum conduct required for guilt that has a realistic probability of prosecution, but under the fact-based “circumstance specific” analysis where any “reliable and probative” evidence may be considered. *Matter of Davy*, 26 I&N Dec. 37 (BIA 2012); see also *Matter of Hernandez-Rodriguez*, 26 I&N Dec. 408 (BIA 2014).

Under the circumstance specific approach, a statement in the plea agreement that the amount was, e.g., 29 grams should overcome other factual evidence. See, e.g., *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002) (plea to loss to victim under \$10,000 is controlling) and see *Nijhawan v. Holder*, 557 U.S. 29, 34-36 (2009), finding that under the circumstance specific approach the facts must be “tethered” to the count of conviction.

The BIA held that ICE must prove deportability by establishing that the amount in the case was over 30 grams, while the immigrant must prove eligibility for a § 212(h) waiver by showing the amount was 30 grams or less. *Matter of Hernandez-Rodriguez*, *supra*.

<sup>5</sup> In immigration proceedings held within the Ninth Circuit, a person who was convicted of certain offenses in state, foreign, or other jurisdiction is eligible for the following *Lujan-Armendariz* benefit: the defendant can eliminate a first conviction received on or before July 14, 2011, by using any “rehabilitative relief” (e.g., withdrawal or plea or dismissal of charges under Pen C § 1203.4, Prop 36, or the former DEJ even absent Pen C § 1203.43). The person must not have violated probation imposed for that offense, or received prior pre-trial diversion, although these limits might not apply to defendants who committed the offense while under age 21. This benefit is mandated if in federal proceedings, the person would have been eligible for expungement under the Federal First Offender Act (FFOA), 18 USC § 3607.

Simple possession and possession of paraphernalia are amenable to treatment under the FFOA. In addition, giving away a small amount of marijuana is specifically named as an offense amenable to FFOA treatment. See 21 USC 841(b)(4). An offense comes within 21 USC 841(b)(4) if the minimum conduct to violate the statute includes giving away a small amount. *Moncrieffe v. Holder*, 569 U.S. 184, 193-99 (2013). For more information see “Practice Advisory: *Lujan and Nunez*” at [www.ilrc.org/resources/practice-advisory-lujan-nunez-july-14-2011](http://www.ilrc.org/resources/practice-advisory-lujan-nunez-july-14-2011) discussing *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc).

<sup>6</sup> See Advisory on *Nunez-Reyes* and *Lujan-Armendariz*, cited above in n. 5.

<sup>7</sup> All drug removal grounds – including deportable and inadmissible convictions or admissions, aggravated felony conviction, being inadmissible because gov’t has “reason to believe” one engaged in or benefitted from trafficking, and drug abuse and addiction -- define “controlled substance” according to federal schedules at 21 USC § 802. To come within any of these removal grounds, a conviction must have involved a substance that at that time was on the federal lists. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1982 (2015) (finding the Kansas statute overbroad and stating, “At the time of Mellouli’s conviction, Kansas’ schedules included at least nine substances not on the federal lists.”).

California drug schedules contain controlled substance that are not listed on the federal schedules. Regarding H&S C §§ 11350-52, see, e.g., *U.S. v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir 2017) (en banc); *U.S. v. De La Torre-Jimenez*, 771 F.3d 1163 (9th Cir. 2014); *U.S. v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012); *Esquivel-Garcia v. Holder*, 593 F.3d 1025 (9th Cir. 2010). Regarding H&S C §§ 11377-79, see, e.g. *Coronado v. Holder*, 759 F.3d 977 (9th Cir. 2014); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007).

<sup>8</sup> The record of conviction that an immigration judge may review consists of the charge pled to, plea colloquy and written plea form/agreement, judgment, and factual basis for the plea stipulated to by the defendant. The record of conviction does not include the preliminary hearing transcript, probation report, sentencing hearing, or prosecutor’s remarks. Where a factual basis is required, one can, e.g., create a written plea statement that is detailed but does not identify a specific substance, such as “On February 20, 2018 at 3 p.m. in Los Angeles, California at the corner of 14th and Vine, I possessed a controlled substance in violation of H&S C § 11377.”

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See, e.g., *People v. Holmes* (2004) 32 Cal.4th 432. See also *People v. Palmer* (2013) 58 Cal.4th 110 (when no stipulation is required).

<sup>9</sup> Accessory and the similar offense misprision of felony are not drug convictions even where the principal offense involves drugs. *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997) (federal accessory after the fact), *Matter of Velasco*, 16 I&N Dec. 281 (BIA 1977) (federal misprision of felony), following *Castaneda de Esper v. INS*, 557 F.2d 79 (6th Cir. 1977). See also *Matter of Carrillo*, 16 I&N Dec. 625, 626 (BIA 1978) (conviction of unlawful carrying of firearm during commission of a felony under a former federal statute was not a drug offense even where felony was identified as drug offense). The Ninth Circuit held that accessory after the fact is not a crime of violence under 18 USC § 16 even where the principal offense involved violence. *United States v. Innis*, 7 F.3d 840 (9th Cir. 1993).

<sup>10</sup> The Ninth Circuit held that Pen C § 32 is categorically *not* a crime involving moral turpitude (CIMT) (never is one), because it lacks the element of depravity required by the generic definition of moral turpitude. *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007)(en banc). In a case arising outside of the Ninth Circuit, however, the Board of Immigration Appeals held that accessory after the fact is divisible: it is a CIMT only if the principal's offense is one. The BIA acknowledged that the Ninth Circuit does not follow this rule. *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011) (regarding federal accessory, 18 USC § 3).

<sup>11</sup> See *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012) (minimum conduct for PC § 69 is offensive touching, so felony is not categorically a crime of violence); *U.S. v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013) (after *Descamps*, *supra*, if minimum conduct of felony resisting arrest under Arizona law is not a crime of violence, no conviction is a crime of violence).

<sup>12</sup> Regarding the requirement of specific intent, see discussion at Pen C § 32 of *Matter of Valenzuela Gallardo*, 25 I&N 838, 849-841 (BIA 2012) and *Valenzuela Gallardo v. Lynch*, 818 F.3d 808 (9th Cir 2016). Regarding definition of executive officer as an officer in the executive branch, which may or may not include law enforcement personnel, see e.g. *People v. Mathews*, 124 Cal. App. 2d 67 (Cal. App. 1954).

<sup>13</sup> *Rivera v. Lynch*, 816 F.3d 1064 (9th Cir 2016).

<sup>14</sup> *Escobar v. Lynch*, 846 F.3d 1019 (9th Cir 2017). See further discussion at next footnote.

<sup>15</sup> The minimum conduct to commit § 136.1(a), “knowingly and maliciously” preventing or dissuading a witness or victim from participating in a trial, proceeding, or inquiry, is not a crime involving moral turpitude (CIMT). *Escobar v. Lynch*, 846 F.3d 1019 (9th Cir 2017), citing cases like *People v. Wahidi* (2013) 222 CA4th 802.

Section 136.1(b)(1) also is not a CIMT, but with an even stronger argument. It has no requirement of knowing or malicious conduct, unless a provision of 136.1(c) also applies. See, e.g., *People v. Usher* (2007) 144 Cal.App.4th 1311, 1321 and discussion at CALCRIM No. 2622. But even when malice does apply, § 136.1(b) uses the same definition as § 136.1(a) and so is not a CIMT.

<sup>16</sup> See *People v. Mathews*, 70 Cal.App.4th 164, 173-74 (Ct App 4th Dist. 1999) (noting that removal of weapon from officer under § 148 could include picking up the weapon after it has been dropped, which does not require violent force).

<sup>17</sup> Section 148 punishes a person who “willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician ... in the discharge or attempt to discharge any duty...” Sections (b)-(d) include these elements plus additional conduct, e.g., taking an officer's gun. While there is no case on point, there are several reasons that § 148 arguably is not obstruction of justice. The fact that § 148 uses the terms “resists, delays, or obstructs” is not dispositive; the issue is whether the elements of § 148 are contained within the generic definition. See generally *Mathis v. United States*, 136 S.Ct. 2243 (2016).

First, by the terms of the statute, all subsections include interfering with a medical technician. This is not obstruction of justice, which is related to criminal proceedings. Second, the BIA defined obstruction of justice to require specific intent to impede the “process of justice,” which does not require an existing investigation or proceeding. *Matter of Valenzuela Gallardo*, 25 I&N 838, 849-841 (BIA 2012). The Ninth Circuit declined to apply that definition because of constitutional concerns. It directed the BIA to apply a prior definition that does require intent to impede an existing judicial proceeding or investigation, or to create a new, constitutionally

sound definition. See *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 821 (9th Cir. 2016). Section 148 does not require an existing investigation or proceeding, and thus is not held obstruction of justice in the Ninth Circuit. Third, it appears that § 148 is overbroad in other ways compared to the generic definition of obstruction. It is a general intent crime, proscribing only the particular act (resist, delay, obstruct) without reference to an intent to do a further act or achieve a future consequence. *People v. Roberts*, 182 Cal. Rptr. 757 (1982). See CALCRIM 2656. It can be violated in ways that do not require specific intent to harm or prevent arrest or proceedings. It is violated by an act of civil disobedience in passively going limp while being arrested, with no intent to avoid arrest. *In re Bacon* (1966) 240 Cal.App.2d 34. It is violated by declining to provide one's name for thirty minutes at booking, because that tends to delay the booking officer. *People v. Quiroga* (1993) 16 Cal.App.4th 961.

It prohibits impeding or delaying any peace officer or emergency medical technician in "any duty." "Any duty" arguably is defined more broadly than the conduct envisioned in the generic definition of obstruction, which is informed by federal statute. It includes, along with interfering with medical personnel, other conduct that does not rise to the level of criminal enforcement such as interfering with police who are quieting down a loud party (*People v. Martinez* (1970) 3 Cal.App.3d 886), or declining to get or stay in a car during a traffic stop (*Young v. County of Los Angeles*, 655 F.3d 1156 (9th Cir. 2011), *Donovan v. Phillips* (9th Cir. 2017) 685 Fed.Appx. 611, 2017 WL 1164437).

In *Matter of Joseph*, 22 I&N Dec. 799, 808 (BIA 1999), the BIA found that resisting one's own arrest pursuant to Maryland's common law "obstructing and hindering" offense would not likely constitute generic 'obstruction of justice' under 8 USC § 1101(a)(43)(S).

Sections (b)-(d) include additional conduct, e.g., taking an officer's gun. Completing the offense of taking or removing an officer's gun, while resisting arrest, is general intent crime. *People v. Matthews*, 70 Cal. App. 4th 164, 175 (Cal. Ct. App. 1999). CALCRIM 2654. See also 2 Witkin, Cal. Crim. Law 4th Crimes--Govt § 20 (2012). Removing or taking used in PC 148 includes conduct corresponding to "grabbing, holding, seizing, pushing, lifting, picking up, or similar notions." *People v. Matthews*, at 174.

<sup>18</sup> See, e.g., *Matter of Tavididishvili*, 27 I&N Dec. 3906 (BIA 2017) (criminally negligent homicide in violation of New York Penal Law § 125.10 is categorically not a crime involving moral turpitude). In *People v. Penny* (1955) 44 Cal.2d 861, the California Supreme Court in analyzing Pen C § 192 noted that the phrase "without due caution or circumspection" is the equivalent of criminal negligence, and that various cases have found that this standard is more than ordinary civil negligence but does not rise to "wanton or reckless" disregard for human life.

<sup>19</sup> For example, Pen C § 207(a) can be violated by the threat of arrest. See, e.g., *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1209 (9th Cir. 2013)) ("For example, 'an implicit threat of arrest satisfies the force or fear element of section 207(a) kidnapping if the defendant's conduct or statements cause the victim to believe that unless the victim accompanies the defendant the victim will be forced to do so, and the victim's belief is objectively reasonable,'" citing *People v. Majors* (2004) 33 Cal. 4th 321, 367.) See also *People v. Moya* (1992) 4 Cal. App. 4th 912, 916-917 (section 207(a) is not divisible between use or threat of force, and "any means of instilling fear." These are not separate elements, but means of committing the crime).

<sup>20</sup> Section 237(a) makes false imprisonment "effected by violence, menace, fraud, or deceit" a felony rather than a misdemeanor. A jury is not required to unanimously agree upon which of these was used. See CALCRIM 1240 and see *People v. Henderson* (1977) 19 Cal. 3d 86, 95 (there is "no basis for severing false imprisonment by violence or menace from the offense of felony false imprisonment; the Legislature has not drawn any relevant distinctions between violence, menace, fraud, or deceit."), partially reversed on other grounds by *People v. Flood* (1998) 18 Cal 4th 470. The Ninth Circuit suggested in dicta that § 237(a) is divisible, but it did not cite to any state analyses of the elements or undertake a federal divisibility analysis according to Supreme Court or Ninth Circuit precedent. *Turijan v. Holder*, 744 F.3d 617, n. 7 (9th Cir. 2014).

<sup>21</sup> False imprisonment by menace is not a crime of violence, because it can be accomplished by merely threatening to arrest the victim (*People v. Moore* (1961) 196 C.App.2d 91, 99); see also *People v. Majors* (2004) 33 Cal.4th 321 (threat of arrest satisfies force or fear requirement for kidnapping). The Ninth Circuit held that it is not a crime involving moral turpitude (CIMT) because it was accomplished when the defendants hid from the police in another's apartment but did not use weapons, did not make threats, did not touch the

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victims, and expressly stated they would not harm them. See discussion of *People v. Islas* (2012) 210 Cal.App.4th 116 in *Turijan v. Holder*, 744 F.3d 617, 621-622 (9th Cir. 2014), holding that Pen C § 237(a) by menace is not a CIMT).

<sup>22</sup> Intent to deceive is not necessarily a CIMT. It can be done in a misguided attempt to do good. See, e.g., *People v. Rios* (1986) 177 Cal.App.3d 445 (father convicted of felony false imprisonment by deceit for taking infant to Mexico because he believed mother was seriously neglectful).

<sup>23</sup> *Saavedra-Figueroa v. Holder*, 625 F.3d 621 (9th Cir. 2010).

<sup>24</sup> See CALCRIM 915, defining simple assault as an action that may result in an offensive touching. See, e.g., *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992); *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989). See next note.

<sup>25</sup> The minimum conduct to commit assault under PC §240 and battery under PC §242 is an offensive touching, which is not a crime of violence or crime involving moral turpitude. See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (Pen C § 243(e)); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1016 (9th Cir. 2006) (Pen C § 242) (noting that the phrase “force or violence” is a term of art that does not set out alternative types of conduct; the words are synonymous and can be committed by an offensive touching). These sections must be evaluated solely based on the minimum prosecuted conduct, because they are not divisible. Prior precedent holding such statutes to be divisible has been overturned by the Supreme Court. See, e.g., discussion in *U.S. v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013) (after as *Descamps v. United States*, 570 U.S. 254, 257 (2013), the resisting arrest statute is no longer divisible because it is not phrased in the alternative: if minimum conduct is not a crime of violence, no conviction of the offense is a crime of violence); *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

<sup>26</sup> The definition of crime of violence at 18 USC § 16(a) requires that the threat or use of force – meaning violent force—must be an element of the offense. The Supreme Court and Ninth Circuit have found that an offensive touching does not meet this definition. See, e.g., *Johnson v. U.S.*, 559 U.S. 133 (2010); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1016 (9th Cir. 2006). In *Matter of Guzman-Polanco*, 26 I&N Dec. 806, 807 (BIA 2016) the BIA stated that under *Johnson*, “a statute that covers any application of physical force, however slight, that may cause physical injury” cannot be held a crime of violence.

Section 243(d) is not a crime of violence. It involves the use of any level of force, including an offensive touching that is neither intended nor even likely to cause an injury. See CALCRIM 925. California courts noted that the Legislature enacted § 243(d) specifically to provide felony punishment for a battery that causes harm “no matter what means or force was used.” It was intended to fill a “gap in the law of assault and battery” by providing punishment for an injury caused by other than violent force. *People v. Hopkins*, 78 Cal. App. 3d 316, 320-321 (Cal. App. 2d Dist. 1978).

Section 243(d) has been used to prosecute conduct that did not involve violent force. See, e.g., *People v. Myers*, (1998) 61 Cal. App. 4th 328 (victim yelled and poked at defendant and defendant pushed victim away defensively; victim slipped and fell on wet pavement and was injured); *People v. Hayes*, 142 Cal. App. 4th 175 (Cal. App. 2d Dist. 2006) (defendant kicked a large ashtray, which fell over and hit an officer’s leg causing a cut and bruising); *People v. Finta*, 2012 Cal. App. Unpub. LEXIS 7488 (Cal. App. 1st Dist. Oct. 17, 2012) (defendant “shoved” a man on his bicycle when he thought that the cyclist had stolen his personal property; cyclist fell and was injured).

Section 243(d) is not a crime involving moral turpitude (CIMT) because, although it is a battery resulting in serious injury, it can be committed by a touching that was neither intended nor likely to cause such an injury. CALCRIM 925 provides that § 243(d) requires a touching only in a “harmful or offensive manner.... It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.” The statute’s purpose is to punish based on the injury caused, not the level of force; it punishes even non-violent force that for some reason results in injury. For this reason, it was held not to be a CIMT for state purposes. *People v. Mansfield*, 200 Cal. App. 3d 82, 88 (Cal. App. 5th Dist. 1988) (not a CIMT because “the least adjudicated elements of battery resulting in serious bodily injury do not necessarily involve force likely to cause serious injury” (emphasis in original)). See also *People v. Hopkins*, 78 Cal. App. 3d 316, 320-321 (Cal. App. 2d Dist. 1978) and discussion in above footnote.

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The BIA recognized that § 243(d) is not a CIMT. See *Matter of Muceros*, A42 998 610 (BIA 2000) Indexed Decision. (BIA “Indexed” decisions are not precedent decisions, but are intended to provide guidance to government. Formerly, Indexed decisions were available to the public on the BIA website). *Muceros* held that because the minimum conduct to commit PC § 243(d) is touching without intent, it is not a CIMT. *Muceros* was cited in *Uppal v. Holder*, 605 F.3d 712, 718-719 (9th Cir. 2010), holding that a Canadian statute that did not require intent to harm similarly is not a CIMT.

<sup>27</sup> Section 243(e), battery against a spouse, uses the same definition of battery as § 243(a). Multiple cases have found that Pen C § 243(e) can be committed by an offensive touching, which is neither a crime of violence nor a crime involving moral turpitude (CIMT). See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1016 (9th Cir. 2006). While *Matter of Sanudo* found that § 243(e) was divisible depending upon the level of violence shown in the record of conviction, in fact the statute is not divisible under the standard set out by the Supreme Court in *Mathis* and *Descamps*, and must be evaluated solely based on the minimum conduct ever prosecuted. See discussion at Pen C § 243(a), above. Therefore, no conviction of § 243(e) is a crime of violence or CIMT, regardless of information in the record, for purposes of deportability, inadmissibility, or eligibility for relief.

<sup>28</sup> The Ninth Circuit held that the minimum prosecuted conduct to commit Pen C § 243.4 does not meet the definition of crime of violence under a federal definition identical to the one used in 18 USC § 16(a), because the touching can be ephemeral and not by force, and the restraint can be psychological and not by force. *U.S. v. Lopez-Montanez*, 421 F.3d 926 (9th Cir. 2005). See also *U.S. v. Espinoza-Morales*, 621 F.3d 1141 (9th Cir. 2010) (neither Pen C 243.4 nor 289(a)(1) are crime of violence under 18 USC § 16(a)). While *Lopez-Montanez* found that felony § 243.4 meets a different definition of crime of violence at 18 USC § 16(b), the Supreme Court held that the § 16(b) definition is unconstitutionally vague and no longer can be applied. *Sessions v. Dimaya*, 138 S Ct 1204 (2018).

<sup>29</sup> *Covarrubias-Teposte v. Holder*, 632 F.3d 1049, 1054-55 (9th Cir. 2011) held that because Pen C § 246 is committed by recklessness it is not a crime of violence. See also *United States v. Coronado*, 603 F.3d 706 (9th Cir. 2010) finding that PC § 246.3 is not a crime of violence.

<sup>30</sup> *U.S. v. Coronado*, 603 F.3d 706 (9th Cir. 2010); *Covarrubias-Teposte v. Holder*, 632 F.3d 1049, 1054-55 (9th Cir. 2011).

<sup>31</sup> Section 261.5(c) is not a crime of violence under 18 USC § 16(a) (or even under 18 USC § 16(b), which now is no longer applied). *Valencia-Alvarez v. Gonzales*, 439 F.3d 1046 (9th Cir. 2006).

Section 261.5(c) is not a crime involving moral turpitude (CIMT). The BIA held that sex with a minor is a CIMT if the minor is under the age of 14, or is under the age of 16 and there is a significant age difference. *Matter of Jimenez-Cedillo*, 27 I&N Dec. 1 (BIA 2017). The minimum conduct to violate § 261.5(c) involves sex with a minor age 16 or older. The statute is not divisible with respect to the age of the minor, so no conviction under the statute can be a CIMT. See also *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007) (section 261.5(d) is not a CIMT).

<sup>32</sup> The Ninth Circuit held that § 261.5(d) is not an aggravated felony as sexual abuse of a minor (*Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1016 (9th Cir. 2009)) and is not a crime involving moral turpitude (*Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007)).

<sup>33</sup> See, e.g., *Matter of V. T.*, 2 I&N Dec. 213, 216-17 (BIA 1944), holding that the predecessor statute, Cal W&I C § 702, is not a crime involving moral turpitude because it includes a wide range of conduct that is not turpitudinous.

<sup>34</sup> In *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) the BIA did not provide a definition of child abuse, but it stated that a Colorado child endangerment statute is a crime of child abuse because the defendant must have recklessly, unreasonably, and without justifiable excuse placed a child where there was a “reasonable probability” that the child “will be” injured, meaning a threat to the child’s life or health, even if the child was not actually harmed. Conversely, the BIA has stated that PC §273a(b) is *not* a deportable crime of child abuse because the minimum conduct to commit the offense does not require a sufficiently high likelihood that harm will result. *Matter of Mendoz-Osharmorio*, 26 I&N Dec. 703, 710 (BIA 2016). Penal C § 272, like PC § 273a(b) does not require a likelihood that harm will result. See CALCRIM 2980. Penal Code §272 has been

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used to, e.g., prosecute the sale of liquor to a minor without requiring ID. *People v. Laisne*, 163 Cal. App. 2d 554 (Cal. App. 3d Dist. 1958).

<sup>35</sup> The Ninth Circuit held that the minimum conduct to commit felony § 273a(a) is not a crime of violence, and that § 273a(a) is not divisible between the various prongs. *Ramirez v. Lynch*, 810 F.3d at 1134-1138. Therefore no conviction of § 273a(a) is a crime of violence. The same ruling must apply to § 273a(b), a lesser included offense to § 273a(a) that is identical to § 273a(a) except that it causes a risk of less serious injury. The BIA also has found that criminally negligent child abuse is not a crime of violence under 18 USC § 16(a), even where it results in the child's death, because it does not involve intentional conduct. See, e.g., *Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999) (*en banc*) (negligence resulted in death by drowning of baby).

<sup>36</sup> Moral turpitude requires reprehensible conduct with a minimum of reckless intent, or moral depravity. Negligent conduct never is a crime involving moral turpitude (CIMT). Section 273a is not a CIMT because the minimum conduct requires only negligence, and the statute is indivisible. See above footnote for discussion of *Ramirez v. Lynch*, 810 F.3d 1127, 1133-34 (9th Cir 2016), which held that that because felony § 273a(a) is an indivisible statute that can be committed by negligence, no conviction can be held a crime of violence. Section 273a can be violated by wholly passive conduct, or good faith but unreasonable belief that the conduct is in the child's best interest: "the statute does not necessarily imply a general readiness to do evil or any moral depravity." *People v. Sanders* (1992) 10 Cal.App. 4th 1268, 1272-1275 (as a state CIMT case finding that § 273a is not a CIMT, not controlling but informative). See also, e.g., *People v. Pointer* (1984) 151 Cal.App.3d 1128, 1131-1134 (macrobiotic diet resulting in severe malnutrition); and *Walker v. Superior Court* (1988) 47 Cal.3d 112, *People v. Rippenberger* (1991) 231 Cal.App.3d 1667 (273a includes failure to seek care for sincere religious reasons).

<sup>37</sup> The BIA stated that § 273a(b) is not a deportable crime of child abuse. See *Matter of Mendoza-Osorio*, 26 I&N Dec. 703, 710 (BIA 2016).

<sup>38</sup> *Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009).

<sup>39</sup> *Menendez v. Whitaker*, 908 F.3d 467 (9th Cir. 2018). See also *United States v. Castro*, 607 F.3d 566 (9th Cir. 2010), holding that § 288(c) is not an aggravated felony as sexual abuse of a minor. While *Castro* stated that a court could look to the record of conviction to evaluate this behavior, in *Menendez* the court stated that under Supreme Court precedent, the offense is not divisible. See also *United States v. Martinez*, 786 F.3d 1227, 1229 (9th Cir. 2015) (Wash. Rev. Code § 9A.44.089 is not categorically sexual abuse of a minor). Earlier, A Ninth Circuit panel held that felony § 288(c) is not a crime of violence under 8 USC § 16(a), which is the only definition now in effect. *Rodriguez-Castellon v. Holder*, 733 F.3d 847 (9th Cir. 2013). The court found it was a crime of violence under 18 USC §16(b) under the "ordinary" case test, but the Supreme Court struck down § 16(b) as void for vagueness in *Sessions v. Dimaya*, *supra*.

<sup>40</sup> *Pannu v. Holder*, 639 F.3d 1225 (9th Cir. 2011) remanded case to the BIA to re-consider its holding in *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007), which is in tension with the requirement that an intent of at least recklessness is required for a crime involving moral turpitude.

<sup>41</sup> *Chavez-Solis v. Lynch*, 803 F.3d 1004 (9th Cir. 2015); *U.S. v Reinhart*, 893 F3d 606 (9th Cir 2018).

<sup>42</sup> See, e.g., *People v. Nakai*, 183 Cal. App. 4th 499, 512 (Cal. App. 4th Dist. 2010).

<sup>43</sup> See discussion in *Berry v. City of Santa Barbara* (1995) 40 Cal. App. 4th 1075, 1080-82.

<sup>44</sup> In *Matter of P--*, 3 I&N Dec. 20 (BIA 1947), the BIA held that a conviction under PC § 315 for keeping a house of ill fame is a crime involving moral turpitude (CIMT). However, it did not consider that § 315 covers simply renting living space in a house of ill fame, with no direct connection to prostitution, which arguably is not a CIMT. See *Cartwright v. Board of Chiropractic Examiners*, 16 Cal. 3d 762, 768 (Cal. 1976) ("Thus, conviction of violating section 315 does not necessarily require proof of personal or entrepreneurial participation in illicit sexual activities. Instead, the conviction can be based on circumstances of personal residence wholly unrelated to chiropractic practice and only peripherally related to prostitution. Such a conviction would not demonstrate professional unfitness on account of baseness, vileness or depravity.") As a state case this does not control as to the issue of whether the offense is a CIMT for moral turpitude purposes, but does control in its characterization of the elements of the offense.

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<sup>45</sup> The State Department defines prostitution for the inadmissibility ground as “engaging in promiscuous sexual intercourse for hire.” 22 C.F.R. § 40.24(b), discussing 8 USC § 1182(a)(2)(D)(i). The Ninth Circuit adopted that definition. See *Kepilino v. Gonzales*, 454 F.3d 1057 (9th Cir. 2006). California law broadly defines prostitution as engaging in sexual intercourse *or* any lewd acts with another person for money or other consideration. Lewd acts include touching of genitals, buttocks or female breast with the intent to sexually arouse or gratify. CALCRIM 1153.

<sup>46</sup> The Ninth Circuit held that the minimum conduct to commit felony § 273a(a) is not a crime of violence, and that § 273a(a) is not divisible between the various prongs. *Ramirez v. Lynch*, 810 F.3d at 1134-1138. Therefore no conviction of § 273a(a) is a crime of violence. The same ruling must apply to § 273a(b), a lesser included offense to § 273a(a) that is identical to § 273a(a) except that it causes a risk of less serious injury. The BIA also has found that criminally negligent child abuse is not a crime of violence under 18 USC § 16(a), even where it results in the child’s death, because it does not involve intentional conduct. See, e.g., *Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999) (*en banc*) (negligence resulted in death by drowning of baby).

<sup>47</sup> Moral turpitude requires reprehensible conduct with a minimum of reckless intent, or moral depravity. Negligent conduct never is a crime involving moral turpitude (CIMT). Section 273a is not a CIMT because the minimum conduct requires only negligence, and the statute is indivisible. See above footnote for discussion of *Ramirez v. Lynch*, 810 F.3d 1127, 1133-34 (9th Cir 2016), which held that that because felony § 273a(a) is an indivisible statute that can be committed by negligence, no conviction can be held a crime of violence. Section 273a can be violated by wholly passive conduct, or good faith but unreasonable belief that the conduct is in the child’s best interest: “the statute does not necessarily imply a general readiness to do evil or any moral depravity.” *People v. Sanders* (1992) 10 Cal.App. 4th 1268, 1272-1275 (as a state CIMT case finding that § 273a is not a CIMT, not controlling but informative). See also, e.g., *People v. Pointer* (1984) 151 Cal.App.3d 1128, 1131-1134 (macrobiotic diet resulting in severe malnutrition); and *Walker v. Superior Court* (1988) 47 Cal.3d 112, *People v. Rippenberger* (1991) 231 Cal.App.3d 1667 (273a includes failure to seek care for sincere religious reasons).

<sup>48</sup> Burglary is not a crime of violence under 18 USC § 16(a) because it has no element of threat or use of force. The Ninth Circuit had held that California first degree burglary was a crime of violence under 18 USC § 16(b). When the Supreme Court struck down 18 USC § 16(b) as being unconstitutionally vague, however, it specifically held that Pen C § 460(a) is not a crime of violence. *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018). The Supreme Court found that Pen C §§ 459/460 is not an aggravated felony as “burglary,” because the minimum conduct includes a lawful entry, whereas the federal generic definition of burglary requires an unlawful entry, and §§ 459/460 is not divisible between lawful and unlawful entry. *Descamps v. U.S.*, 570 U.S. 254 (2013).

Section 459/460 is never an aggravated felony as attempted theft, or other attempted aggravated felony, under two independent theories. First, the Ninth Circuit found that it is never an attempted theft because the minimum conduct to commit § 459 includes entry with intent to commit a non-theft offense, and § 459 is not divisible as to the intended offense. Therefore, no conviction of § 459 amounts to attempted theft for any purpose, regardless of information in the record of conviction. *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014). Second, attempt requires intent plus a “substantial step” toward committing the offense. The minimum conduct for § 460(b) -- a *lawful* entry into a commercial building with intent to commit larceny or any felony -- does not constitute the required substantial step. *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1103-05 (9th Cir. 2011).

<sup>49</sup> California burglary (Pen C § 459) is never a crime involving moral turpitude (CIMT), regardless of whether it is first degree (Pen C § 460(a), residential) or second degree (Pen C § 460(b), commercial) burglary. Two factors distinguish California burglary from some other burglary statutes and decisions holding that those burglary statutes are CIMTs: California burglary includes a lawful entry and is not divisible between a lawful and unlawful entry, and California burglary is not divisible as to the intended offense.

The BIA has long held that burglary involving an *unlawful* entry is a CIMT *if* the intended offense is a CIMT. See, e.g., *Matter of Z*, 5 I&N Dec. 383 (BIA 1953) and see, e.g., *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1019 (9th Cir. 2005), abrogated on other grounds by *Holder v. Martinez-Gutierrez*, 566 U.S. 583 (2012). California burglary does not meet this definition for two reasons. First, the Ninth Circuit held that because §

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460(b) can be committed merely by a lawful entry into a commercial building with bad intent, it is never a CIMT even if the intended offense is a CIMT. *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1103-05 (9th Cir. 2011).

Even if the traditional test were applied to burglary with a lawful entry, Pen C § 459 cannot be held a CIMT because it requires intent to commit larceny *or any felony*, and “any felony” includes non-CIMT offenses, e.g., receipt of stolen property, false imprisonment, vehicle taking, etc. The Ninth Circuit held that § 459 is not divisible for purposes of the intended offense, either between “larceny” and “any felony,” or as to the specific felony. *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014) (§ 459 is not an aggravated felony as attempted theft because it is not divisible as to intended offense). Because the minimum conduct to commit § 459 includes intent to commit offenses that are not CIMTs and the statute is not divisible, no conviction of § 459 is a CIMT under the BIA’s definition. The BIA will defer to the Ninth Circuit as to when an offense is divisible.

The BIA set out a second definition of CIMT that only applies to residential burglary, meaning that it could potentially affect § 460(a) but not § 460(b). It held that a burglary consisting of an *unlawful* entry into an occupied dwelling with intent to commit any crime is a CIMT, regardless of whether the intended crime is a CIMT. *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009). However, California burglary is overbroad because the minimum conduct to commit §459/460(a) includes a lawful entry, and it is not divisible between a lawful and unlawful entry. *Descamps v. U.S.*, 570 U.S. 254 (2013). Because § 459/460(a) is overbroad and indivisible, no conviction of the statute is a CIMT under this definition for any immigration purpose, regardless of information in the record of conviction. Note that § 460(a) is not affected by the Board’s decision in *Matter of J-G-D-F*, 27 I&N Dec. 82 (BIA 2017), which applied the same rule requiring an unlawful entry; that decision addressed only the definition of an occupied dwelling (including an intermittently occupied dwelling, under Oregon law).

<sup>50</sup> See discussion of *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1104 (9th Cir. 2011) at § 460(a) footnote, above. *Hernandez-Cruz* specifically held that PC § 460(b) is not a crime involving moral turpitude even if the intended offense is larceny, because burglary includes a mere lawful entry into a commercial building with bad intent.

<sup>51</sup> See, e.g., *Matter of M*, 2 I&N Dec. 721, 723 (BIA 1946) (mere unlawful entry is not a crime involving moral turpitude (CIMT); it must be unlawful entry with intent to commit a CIMT). Section 466 does not require intent to commit any crime, much less a CIMT, or to enter a particular place, much less an occupied dwelling.

<sup>52</sup> *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870, 8767 (9th Cir 2008).

<sup>53</sup> *Lopez-Valencia v. Lynch*, 798 F.3d 863 (9th Cir. 2015) (Pen C § 484 is not divisible between theft and fraud offenses because a jury is not required to decide unanimously between them; therefore the minimum conduct to commit the offense is not aggravated felony as theft). See discussion of the distinction between theft and fraud in *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008), citing *Soliman v. Gonzales*, 419 F.3d 276, 282-284 (4th Cir. 2005). The Ninth Circuit recognizes this distinction. See *Carlos-Blaza v. Holder*, 611 F.3d 583 (9th Cir. 2010); *Carrillo-Jaime v. Holder*, 572 F.3d 747, 752 (9th Cir. 2009), and regarding PC § 484, *U.S. v. Rivera*, 658 F.3d 1073, 1077 (9th Cir. 2011) (noting that PC §§ 484(a) and 666 is not categorically a theft aggravated felony because it covers offenses that do not come within generic theft, such as theft of labor, false credit reporting, and theft by false pretenses) and *Garcia v. Lynch*, 786 F.3d 789, 794-795 (9th Cir. 2015) (if specific theory of theft under PC §§ 484, 487 is not identified, a sentence of one year or more does not make the offense an aggravated felony; court did not reach the issue of whether the statute is divisible between different theories of theft).

<sup>54</sup> In *Sheikh v. Holder*, 379 Fed.Appx. 697, 2010 WL 2003567 (9th Cir. May 20, 2010) (unpublished), the panel found that Pen C § 285 is not a CIMT because it does not have intent to permanently deprive as an element.

<sup>55</sup> The Ninth Circuit held that the minimum conduct to commit §§ 496 or 496a involves intent to *temporarily* deprive the owner, which is not a CIMT. *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009) (PC 496(a)); *Alvarez-Reynaga v. Holder*, 596 F.3d 534 (9th Cir. 2010) (PC 496d(a)). While those cases held that the statutes were divisible between temporary and permanent taking, the Supreme Court subsequently clarified that a statute is not divisible unless, at a minimum, it is phrased in the alternative. See, e.g., *Descamps v. U.S.*, 570



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U.S. 254 (2013). Because Pen C § 496 is not phrased in the alternative, i.e., it does not prohibit intent to deprive “temporarily or permanently,” it is not divisible. Because § 496 is both overbroad and indivisible, no conviction is a CIMT for any immigration purpose.

<sup>56</sup> See *People v. Rathert* (2000) 24 Cal.4th 200, 206. That held that Pen C § 529(3) does not require specific intent to gain a benefit, noting that “the Legislature sought to deter and to punish all acts by an impersonator that might result in a liability or a benefit, whether or not such a consequence was intended or even foreseen... The impersonator's act, moreover, is criminal provided it might result in any such consequence; no higher degree of probability is required.” See also *Paulo v. Holder*, 669 F.3d 911 (9th Cir. 2011) (stating that Pen C § 529(3) for false personation is not a crime involving moral turpitude (CIMT)); *Linares-Gonzalez v. Lynch*, 823 F.3d 508 (9th Cir. 2016) (sections 530.5(a) and (d)(2) are not categorically CIMTs, because they are not fraud since they do not require the perpetrator to obtain anything tangible of value, and they are not vile, base or deprived crimes because they do not necessarily involve an intent to injure, actual injury, or a protected class of victim; they include only intent to annoy).

<sup>57</sup> *Linares-Gonzalez v Lynch*, 823 F.3d 508 (9th Cir. 2016). See, e.g., *People v. Hagedorn* (2005) 127 Cal.App.4th 734, 818 (upheld conviction of Pen C § 530.5(a) for working under another’s name and using the identifying information to cash the paycheck); *People v. Johnson*, (2012) 209 Cal.App.4th 800, 818, accord; CALCRIM 2040.

<sup>58</sup> For purposes of § 591, malice is defined as follows: “Someone acts maliciously when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.” CALCRIM 2902. The requirement of malice “functions to ensure that the proscribed conduct was a ‘deliberate and intentional act, as distinguished from an accidental or unintentional’ one.” *People v. Rodarte*, 223 Cal.App.4th 1158 at 1170 citing *People v. Atkins* (2001) 25 Cal.4th 76. Section 591 is not a specific intent crime; it requires the general intent to do the proscribed act. See *Kreiling v. Field*, 431 F.2d 502 (9th Cir. 1970) (upholding a § 591 conviction where a former telephone repairman moved two levers on the inside of a payphone so that he could make a free call, which then made it impossible for others to use). The disabling need not be permanent. See *People v. Tafoya*, 92 Cal. App. 4th 220 (Cal. App. 4th Dist. 2001) (conviction for removing battery from ex-wife’s phone when she tried to call her mother during an argument; ex-wife called from a landline instead).

<sup>59</sup> See, e.g., *U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir 2001) (graffiti not crime of violence); *In re Nicholas Y.*, 85 Cal.App.4th 941 (Ct.App. 2 Dist. 2000) (writing on a glass window with a marker that could easily be erased constituted “defacing” under the statute).

<sup>60</sup> See, e.g., *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995) (malicious mischief, where malice involves wish or design to vex, annoy, or injure another person, was not a crime involving moral turpitude under Wash. Rev. Stat. 9A.48.080, which at the time required damage of at least \$250 (now requires damage of \$750)) and *U.S. v. Landeros-Gonzales*, 262 F.3d 424 (5th Cir 2001) (graffiti not crime of violence). See also *People v. Kahanic* (1987) 196 Cal App 3d 461 (conviction upheld when damage was to property jointly owned by defendant and victim).

<sup>61</sup> The BIA held that PC §§ 594 becomes a crime involving moral turpitude (CIMT) with a § 186.22(d) enhancement. *Matter of E.E. Hernandez*, 26 I&N Dec. 397 (BIA 2015). But the Ninth Circuit disapproved and declined to apply that case, holding that the gang enhancement does not transform a non-CIMT into a CIMT. *Hernandez-Gonzalez v. Holder*, 778 F.3d 793 (9th Cir. 2015) (possession of billy club with PC § 186.22(b) is not a CIMT).

<sup>62</sup> A conviction of “stalking” causes deportability under the domestic violence ground, 8 USC § 1227(a)(2)(E). Reversing its own precedent, the BIA held that Pen C § 646.9 is *not* a deportable crime of stalking. It held that § 646.9 is overbroad and indivisible because it prohibits intent to cause fear for one’s “safety,” while the generic definition of stalking requires intent to cause fear of “death or bodily injury.” Therefore, no conviction of § 646.9 is a deportable crime of stalking for any immigration purpose. *Matter of Sanchez-Lopez*, 27 I&N Dec. 256 (BIA 2018), overruling *Matter of Sanchez-Lopez*, 26 I&N Dec. 72 (BIA 2012).

The Ninth Circuit held that at least § 646.9 harassing is not a crime of violence under 18 USC § 16(a) or § 16(b). *Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir. 2007). Furthermore, § 646.9 should not be held

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divisible between following and harassing, because a jury is not required to unanimously decide between them. See CALCRIM 1301. The BIA declined to apply the Ninth Circuit's decision in *Malta-Espinoza* outside the Ninth Circuit, and found that every § 646.9 conviction is a crime of violence. *Matter of U. Singh*, 25 I&N Dec. 670, 676-677 (BIA 2012). However, this finding was based on the definition of crime of violence at 18 USC § 16(b), which the Supreme Court has since struck down in *Sessions v Dimaya*, 138 S Ct 1204 (2018). Under the remaining definition, 18 USC § 16(a), no conviction of § 646.9 should be held a crime of violence for any purpose nationally, regardless of information in the ROC.

<sup>63</sup> See CALCRIM 2966, which does not require a jury to decide unanimously between alcohol, drugs, or controlled substances.

<sup>64</sup> *In re Joshua M.* (2001) 91 Cal. App. 4th 743. The purpose of the law is “not to protect the property and safety of householders; it is designed to control ‘peeping Toms’ and other persons of that type.” *People v. Lopez* (1967) 249 Cal.App.2d 93, 103.

<sup>65</sup> The Ninth Circuit held that the minimum conduct to commit Pen C § 647.6 is not an aggravated felony as sexual abuse of a minor. *U.S. v. Pallares-Galan*, 359 F.3d 1088, 1101 (9th Cir. 2004). Neither is the minimum conduct a crime involving moral turpitude (CIMT), because as non-explicit, annoying behavior, it does not necessarily harm the victim. *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1000-1001 (9th Cir. 2008), partially overruled by *Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009) (to the extent it and other decisions suggest that the BIA is not owed *Chevron* deference in moral turpitude cases)).

Section 647.6 is not a divisible statute, because the terms “annoy” and “molest” are synonymous. See *People v. Kongs*, 30 Cal. App. 4th 1741, 1749 (1994), cited in *Nicanor-Romero*, *supra*. Because § 647.6 is overbroad and indivisible, no conviction is SAM or a CIMT for any immigration purpose, regardless of information in the ROC, within the Ninth Circuit.

Because of the minor nature of the minimum conduct and the resulting findings of lack of harm to the minor, § 647.6 also should not be held a crime of child abuse under the BIA's guidelines.

The Ninth Circuit went into useful detail about the type of minor conduct that has been found to violate § 647.6. In finding that it is not sexual abuse of a minor, the court noted that defendants have been convicted of § 647.6 for conduct such as include urinating in public, offering minor females a ride home, driving in the opposite direction; repeatedly driving past a young girl, looking at her, and making hand and facial gestures at her (in that case, “although the conduct was not particularly lewd,” the “behavior would place a normal person in a state of being unhesitatingly irritated, if not also fearful”) and unsuccessfully soliciting a sex act. *U.S. v. Pallares-Galan*, 359 F.3d at 1101 (9th Cir. 2004). In finding that it is not a CIMT, the court noted that defendants have been convicted of § 647.6 for conduct such as brief touching of a child's shoulder, photographing children in public with no focus on sexual parts of the body so long as the manner of photographing is objectively “annoying,” and hand and facial gestures or words alone; it found that words need not be lewd or obscene so long as they, or the manner in which they are spoken, are objectively irritating to someone under the age of eighteen, and it is not necessary that the acts or conduct actually disturb or irritate the child. *Nicanor-Romero*, 523 F.3d at 1000.

In considering whether § 647.6, which reaches irritating behavior toward a 17-year-old, constitutes a deportable crime of child abuse, it may be useful to note that having sexual intercourse with a minor age 16 or older is neither sexual abuse of a minor (*Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017)) nor a crime involving moral turpitude (*Matter of Jimenez-Cedillo*, 27 I&N 1 (BIA 2017)), due to the lack of harm to the minor.

<sup>66</sup> *Prakash v. Holder*, 579 F.3d 1033 (9th Cir. 2009) (Pen C § 653f(a) is a crime of violence under 18 USC § 16(b) but not under § 16(a)). The court acknowledged in dicta that the offense would not be an aggravated felony under 1101(a)(43)(U). *Prakash* at 1039.

<sup>67</sup> See *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009), stating in discussion that because § 653f is a generic solicitation statute that pertains to different types of offenses, as opposed to a statute passed primarily to restrict controlled substances, it is not an offense “relating to” a controlled substance.

<sup>68</sup> Section 653m(a) should not be a crime involving moral turpitude (CIMT), because the minimum conduct to commit the offense is an intent to annoy, and may be committed by using obscene language, which has been

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defined as “offensive to one’s feelings, or to prevailing notions of modesty or decency; lewd.” *People v. Hernandez*, 231 Cal.App.3d 1376 (Ct App 2 Dist. 1991). The statute should not be divisible as a CIMT because even if the offense involved a threat of injury, the *mens rea* required is an intent to annoy. *Id.* at 1381.

<sup>69</sup> See, e.g., discussion at *People v. Poroj*, 190 Cal. App. 4th 165, 166 (Cal. App. 4th Dist. 2010) (holding no *mens rea* requirement, distinguishing other cases holding general intent requirement). See also *U.S. v. Ramos-Perez*, 572 Fed.Appx. 465 (9<sup>th</sup> Cir. 2013)(unpublished), distinguishing *prior* version of 12022.7 requiring specific intent with current version, which does not.

<sup>70</sup> *United States v. Medina-Anicacio*, 325 F.3d 638 (5<sup>th</sup> Cir. 2003).

<sup>71</sup> Even possessing a sawed-off shotgun is not a crime involving moral turpitude. *Matter of Hernandez-Casillas*, 20 I&N Dec. 262, 278 (BIA 1990). Possession of concealed non-firearms weapons offenses are general intent crimes. *People v. Rubalcava*, 23 Cal.4th 3221, 96 Cal. Rptr. 2d 735 (2000) (interpreting former Pen C § 12020, which encompassed a variety of weapons and now is renumbered into separate offenses).

<sup>72</sup> A stun gun does not meet the definition of firearm, which must be explosive-powered. A stun gun is defined as a weapon with an electrical charge. Pen C § 17230.

<sup>73</sup> A conviction under Veh C § 2800.1 is not a crime involving moral turpitude (CIMT). The Ninth Circuit held that Veh C § 2800.2, which requires the same conduct but with the addition of recklessness, is not a CIMT. See discussion of *Ramirez-Contreras v. Sessions*, 858 F.3d 1298 (9<sup>th</sup> Cir 2017), below. See also *Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011), where the BIA found that the offense of driving a vehicle while eluding a police officer was a CIMT because it had as an aggravated factor wanton or willful disregard for the lives or property under Wash. Rev. Code § 46.61.024. Section 2800.1 does not have those elements.

<sup>74</sup> *Penuliar v. Mukasey*, 528 F.3d 603 (9<sup>th</sup> Cir 2008). Recklessness is not sufficient for crime of violence. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1129-30 (9<sup>th</sup> Cir. 2006) (*en banc*). A prior decision held that 2800.2 is a crime of violence because of the high degree of recklessness, but it relied on a case that was specifically overturned by *Fernandez-Ruiz*. See *United States v. Campos-Fuerte*, 357 F.3d 956, 960 (9<sup>th</sup> Cir. Cal. 2004), relying on *U.S. v. Ceron-Sanchez*, 222 F.3d 1169, 1171 (9<sup>th</sup> Cir. 2000), overturned by *Fernandez-Ruiz*, *supra*. Further, recklessness under § 2800.2 includes simple violation of three traffic offenses in the course of committing the offense, and the statute is indivisible between that and traditional recklessness. See next note.

<sup>75</sup> *Ramirez-Contreras v. Sessions*, 858 F.3d 1298 (9<sup>th</sup> Cir 2017). The Ninth Circuit noted that evading a police officer coupled with recklessness defined as “willful and wanton disregard,” standing alone, would suggest an intent sufficient to render § 2800.2 a crime involving moral turpitude (CIMT), referencing *Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011) (Washington statute with those elements is a CIMT). However, because § 2800.2(b) defines willful and wanton disregard for this purpose as including simply violating three traffic laws, which can involve relatively innocuous and non-dangerous conduct, the court distinguished § 2800.2 from the statute considered in *Matter of Ruiz-Lopez* and held that (1) the minimum conduct to commit § 2800.2 is not a CIMT, and (2) § 2800.2 is not divisible between violation of three traffic laws and other conduct amounting to recklessness. Therefore *no* § 2800.2 conviction is a CIMT for any purpose, even if the record of conviction identifies conduct other than the three traffic violations.

<sup>76</sup> The minimum conduct to commit § 10851 is a taking with intent to temporarily deprive, and that conduct is not a crime involving moral turpitude (CIMT). Because § 10851 is not divisible under the categorical approach, no conviction of 10851 is a CIMT for any immigration purpose, regardless of information in the record. *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9<sup>th</sup> Cir. 2016) (*en banc*).

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This is not changed by recent BIA precedent that expands the definition of theft as a CIMT to include not only permanently, but “substantially” depriving the person of ownership benefits, by depriving the owner for a long time. The BIA acknowledges that joyriding (which includes depriving property for a few hours or days and is covered by § 10851) does not meet that new “substantially” deprive definition. *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 850-51 and n. 10 (BIA 2016); *Matter of Obeya*, 26 I&N Dec. 856 (BIA 2016). (Note also that the new standard articulated in *Diaz-Lizarraga* and *Obeya* does not apply retroactively to convictions received before their publication date, which was November 16, 2016. *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1292 (9th Cir. 2018).)

<sup>77</sup> “An accepted definition of ‘tamper’ is to ‘interfere with.’” *People v. Anderson* (1975) 15 Cal.3d 806. Opening a door of an unlocked vehicle without the owner’s consent is tampering. *People v. Mooney* (1983) 145 Cal.App. 3d 502. This is a lesser-included offense of Veh C § 10851 and requires no intent to deprive the owner. Section 10851 is not a crime involving moral turpitude; see above.

<sup>78</sup> The minimum conduct to commit Veh C § 10853 includes non-turpitudinous conduct such as merely moving levers or climbing onto or into vehicle, and the specific intent can be to commit a crime not involving moral turpitude. See § 10853 and *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (*en banc*).

<sup>79</sup> A single Arizona offense that has as elements DUI while knowingly driving on a suspended license was held a CIMT *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (*en banc*). No single California offense combines a DUI and driving on a suspended license, and it is well-established that the gov’t is not permitted to combine two offenses to try to create a CIMT. See, e.g., *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989) (“Moral turpitude cannot be viewed to arise from some undefined synergism by which two offenses are combined to create a crime involving moral turpitude, where each crime individually does not involve moral turpitude.”)

<sup>80</sup> See *Cerezo v. Mukasey*, 512 F.3d 1163 (9th Cir. 2008) (finding that VC § 20001(a) is not categorically a crime involving moral turpitude). In finding that VC § 20002(a)(2) was not a crime involving moral turpitude (CIMT), the Ninth Circuit reasoned in an unpublished case that VC § 20002(a)(2) could be violated by a person who, “after hitting a parked car, leaves his name and address in a conspicuous place on the parked vehicle but fails to report the incident to the local police department.” *Serrano-Castillo v. Mukasey*, 263 Fed.Appx. 625 (9th Cir. 2008). Pleading to conduct such as this would avoid a CIMT.

<sup>81</sup> Sections 23103 and 23103.5 should not be held crimes involving moral turpitude (CIMT), because they require only recklessness causing a risk of safety of persons or property, not a risk of imminent death or very serious bodily injury. Recklessness that might damage property or harm persons generally is not held a CIMT. For example, the Foreign Affairs Manual, which guides issuance of immigrant visas, states that reckless driving is not a crime involving moral turpitude. See 9 FAM 40.21(a) N2.3-2. Recklessly causing bodily injury is not a CIMT. *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996).

Moral turpitude has been found to inhere in an offense if it has as an element a conscious disregard of a known risk when it causes, or creates the “imminent risk” of causing, death or very serious bodily injury. See e.g., *Matter of Franklin*, 20 I&N Dec. 867, 870-71 (BIA 1994) (conscious disregard resulting in manslaughter), *Matter of Leal*, 26 I&N Dec. 20, 24-26 (BIA 2012) (conscious disregard causing a “substantial risk of imminent death”). These California offenses lack that element.

<sup>82</sup> *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001).