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#10 - CANARIES IN THE MINES:
THE ENCROACHMENT ON CONSTITUTIONAL PROTECTIONS AND DUE PROCESS THAT EVEN A LAWYER MIGHT NOT RECOGNIZE

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AGENDA

1. Misdemeanor Procedures
2. Felony Procedures
3. Immigration Crossovers
4. Courts
5. Detention
6. Video
7. Bond Hearings
8. Your Constitutional Rights at the order
9. The Hidden Constitutional Threat in Trump's travel-ban lawsuit
10. Revocation or Denial of Passport in Case of Certain Unpaid Taxes
11. Family Separation at Border May Be Subject to Constitutional Challenge, Judge Rules, New York
Speaker Biographies

**Professor Richard Boswell** joined the full-time faculty at UC Hastings after teaching as a visiting professor in 1990. He received his B.A. in Urban Economics from Loyola-Marymount University in Los Angeles and his J.D. from the George Washington University National Law Center where he was a member of the Journal of International Law & Economics. He was in private practice and later joined the faculty of the George Washington University National Law Center where he founded the law school’s immigration clinic and directed their Trial Practice Program. Working his way west, he joined the law faculty at the Notre Dame in 1986.


As one of the founders of the Clinical Education Association, he served as its President in 1994. He served as coeditor-in-chief of the Clinical Law Review (1997-2002) and remains as an ex-officio member of its Board of Editors. The Clinical Law Review is a peer reviewed law journal of the Clinical Legal Education Association (CLEA), the New York University Law School and the Association of American Law Schools (AALS). In addition to his work in clinical legal education, Professor Boswell has worked on rule of law/justice projects in Central Asia, Colombia, Guatemala, Palestine, Venezuela and most recently in Haiti. His current scholarly work involves a comparative study of the immigration laws of more than seven countries covering a broad range of legal systems.

**Peggy Bristol** is an immigration attorney whose practice began with two pro bono children’s cases that were referred from the CCCBA. She now has offices in Walnut Creek and Oakland. Her practice focuses on humanitarian immigration relief including Special Immigrant Juvenile Status and asylum, representing young people in custody proceedings in ten Northern California counties. She also represents clients in immigration court and before the Board of Immigration Appeals. In 2015 she was inducted into the Alameda County Women's Hall of Fame for her work in representing undocumented minors. She earned her JD from John F Kennedy University School of Law and has taught courses in law and management at Contra Costa College and Humphreys College of Law.
**Ali Saidi** is an attorney with the Contra Costa County Public Defender’s Office, where he serves as the county’s first Deputy Public Defender Immigration Attorney and as the Director of Stand Together Contra Costa, the county’s new rapid response and immigration due process program. Mr. Saidi specializes in the intersection between immigration law and criminal law. He provides continuing legal education trainings as well as expert technical assistance for public defender offices, clinics and bar associations throughout the Bay Area regarding representation of immigrants in criminal proceedings.

Mr. Saidi received his B.A. from the University of California, at Berkeley and his J.D. from the University of Michigan Law School. He began his legal career at the Contra Costa County Public Defender’s office as a criminal defense attorney for several years and then went into private practice for over a decade, practicing both criminal defense and deportation defense. Mr. Saidi has represented hundreds of individuals charged with serious crimes in California state courts and has represented immigrants in deportation and removal proceedings in immigration court, before the Board of Immigration Appeals, and before the Ninth Circuit Court of Appeals. Mr. Saidi formerly taught Criminal Pretrial Advocacy at UC Berkeley School of Law. Mr. Saidi returned to the public sector in 2015 to establish the immigration unit at the Office of the Public Defender for Contra Costa County.

**Joseph Tully** was admitted into the California Bar in June 1999, was hired by the Fresno County Public Defender’s Office and has been practicing criminal law ever since. He is a certified specialist in criminal law by the California State Bar Board of Specialization and is a fierce advocate for the accused. A founding partner of Tully & Weiss Attorneys at Law, he has been highly successful in jury trials up and down the state.
Selected Immigration Defenses for Selected California Crimes, Immigration Legal Resource Center (ILRC), Sept. 2018

What Qualifies as a Conviction for Immigration Purposes? ILRC

How to Use the Categorical Approach Now - ILRC, 2017

The Constitution in the 100-Mile Border Zone, ACLU
https://www.aclu.org/other/constitution-100-mile-border-zone

Your Rights in the Border Zone: ACLU, February 13, 2018
https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/your-rights-border-zone

The Hidden Constitutional Threat in Trump's travel-ban lawsuit

Revocation or Denial of Passport in Case of Certain Unpaid Taxes

https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf

Family Separation at Border May Be Subject to Constitutional Challenge, Judge Rules, New York Times, June 6, 2018

How Refugees Get to the U.S., Human Rights First
http://www.humanrightsfirst.org/sites/default/files/Asylum-Overview-chart.jpg

Overview of Asylum Process (Flowchart) United Nations High Commissioner for Refugees (UNHCR)
http://www.unhcr.org/58a212354.pdf

"Ins" and "Outs" of Immigration Detention, Human Rights First
This article is an updated guide to selected California offenses that discusses precedent decisions and other information showing that the offenses avoid at least some adverse immigration consequences. This is not a complete analysis of each offense. It does not note adverse immigration consequence that may apply.

**How defense counsel can use this article.** Criminal defense counsel who negotiate a plea that is discussed in this article should provide the noncitizen defendant with a copy of the relevant pages containing the immigration analysis. In the event that the noncitizen defendant ends up in removal proceedings, presenting that summary of the analysis may be their best access to an affirmative defense against deportation, because the vast majority of immigrants in deportation proceedings are unrepresented by counsel. Because ICE often confiscates documents from detainees, it is a good idea to give a second copy of the summary to the defendant’s immigration attorney (if any), or family or friend, for safekeeping. Again, this article does not show all immigration consequences of offenses. For further information and analysis of other offenses, defense counsel also should consult the California Quick Reference Chart; go to www.ilrc.org/chart.

As always, advise noncitizen defendants not to discuss their place of birth or undocumented immigration status with ICE or any other law enforcement representative. See information at www.ilrc.org/red-cards.

The fact that the person gives an immigration judge or officer this summary should not be taken as an admission of alienage.

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.

**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.

Defense counsel should avoid a sentence of a year or more. Immigration counsel can investigate arguments that (b) is not forgery 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. 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.³

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.⁴ 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 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](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.
Defenders: 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.\(^5\)

**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.

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 ensures that there is not a conviction. (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 these limitations 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).\(^6\)

   **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.\(^7\) This disparity gives rise to two defenses.

Note that the Ninth Circuit 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. *Lorenzo v. Sessions* (9th Cir. August 29, 2018). However, because *Lorenzo* will be challenged, defenders should try not to rely on the decision at this time. See practice advisory on *Lorenzo* at [https://www.ilrc.org/advisory-about-immigration-consequences-california-methamphetamine-convictions-lorenzo-v-sessions](https://www.ilrc.org/advisory-about-immigration-consequences-california-methamphetamine-convictions-lorenzo-v-sessions).

**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.¹⁸

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 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. The Ninth Circuit held that methamphetamines as defined at H&S C 11377-79 is not a federally-defined controlled substance, as it is overbroad and indivisible compared to the federal definition. *Lorenzo v. Sessions* (9th Cir. August 29, 2018) (but see warning above).

**H&S C § 11378 Possession for sale** The Ninth Circuit held that a conviction for possession for sale of methamphetamine under § 11378 is not an aggravated felony or a removable controlled substance offense, because the California definition of methamphetamine is overbroad and indivisible compared to the federal definition and thus is not a federally defined controlled substance. *Lorenzo v. Sessions* (9th Cir. August 29, 2018) (but see warning above). However, rather than plead to §§ 11351 or 11378, one should seek another offense, including if necessary pleading up to “offering to” commit an offense under §§ 11352 or 11379. If the record shows that a federally-defined substance was involved, §§ 11351/11378 is an aggravated felony, while §§11352/ 11379 can avoid this.

**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 is not 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. 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 discussion 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. 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). But in September 2018, the BIA responded by enlarging on 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 definition is resolved, defenders must make every effort to obtain a sentence of less than 364 days to protect against a possible obstruction of justice aggravated felony. 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. 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. 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. Still, as always, defenders should make every effort to obtain a sentence of 364 days or less.
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. 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

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, defendants must act conservatively and make every effort to obtain a sentence of 364 days or less on a single count. Immigration advocates 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 of Pen C § 32, above.

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. Therefore the less serious 136.1(b)(1) is not also.

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 sentenced of 364 days. See Pen C §§ 18.5, 148(a).

Sections (b) - (d) should not be a crime of violence, as they can be accomplished by picking up a firearm the officer dropped 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. 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. ¹⁷

**PC § 207 Kidnapping**

The Ninth Circuit held that Pen C § 207(a) is not a crime of violence under 18 USC §16(a) because it lacks as an element the use of violent force, and 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). (The Supreme Court struck down the other definition of crime of violence at 18 USC 16(b). *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).) In addition, Pen C § 207(d) by fraud is not a crime of violence. *United States v. Lonzczak*, 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.

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.

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

No conviction of Pen C § 237(a) should be 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 § 237.¹⁸ Therefore the statute is indivisible and must be evaluated by the minimum conduct required to violate any of the four categories.

Felony false imprisonment is not a crime of violence of CIMT because 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.

In addition, cases demonstrate that the minimum conduct to commit Pen C § 237 is neither a crime of violence nor a CIMT. Because this is an indivisible statute, if one of the four means of committing the offense is not a crime of violence or CIMT, then no conviction under the statute is, for any immigration purpose. In the case of § 237, almost all of the means are neither a crime of violence nor a CIMT.

Felony § 237 effected by “menace” is not a crime of violence (it includes threatening an arrest) and has been held not to be a CIMT.¹⁹

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
This has been held to include the force necessary to pull the victim a few feet. This is equivalent to or less than the amount of force required for simple battery, which is not a crime of violence or a CIMT. See, e.g., Matter of Sanudo, 23 I&N Dec. 968 (BIA 2006) (Pen C § 243(e)).

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

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). 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. 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.

**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. 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, as with all offenses, defenders should try hard to obtain a sentence of 364 days or less.

**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.

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). 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. Avoid a sentence of a year or more.

PC § 246 Willfully discharge firearm at inhabited building, etc.
This is held to not be crime of violence because it involves recklessness. Despite this, as with all offenses, defenders should try 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. 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.

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. However, it is possible that this will change in the future in light of Esquivel-Quintana. See § 261.5(c), above. Defenders should conservatively 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. Because it can involve exposing minor to only mild harm, it does not meet the BIA’s definition of child abuse.

PC § 273a Child endangerment No conviction of 273a(a) or (b) is a crime of violence, because the minimum conduct is negligence and the statute is indivisible. 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) is a crime involving moral turpitude because the minimum conduct is negligence and the statute is indivisible. Section 273a(b) is not a deportable crime of child abuse.

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. Immigration advocates will argue that the statute is indivisible as to the type of victim, and therefore that no conviction is a CIMT. Avoid a sentence of a year or more.

9
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 this is not an aggravated felony as sexual abuse of a minor or a crime of violence.37 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.38

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.39

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 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.41

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. Conviction under an overbroad statute like this alone does not prove inadmissibility for prostitution.43

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. 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. 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. Neither is conviction of residential or commercial burglary a crime involving moral turpitude.

**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), 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 (§§ 460(b), 496, 530.5).

**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.

**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. 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. As an overbroad and indivisible offense, it is not an aggravated felony for any immigration purpose.

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. However, counsel should try to avoid having a sentence of one year imposed on a single count where the loss to the victim exceeds $10,000.

**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. 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. 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. Avoid a sentence 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 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. If the offense resulted in loss exceeding $10,000, consider a plea to Pen C § 484/487

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.

Section 530.5 might be committed by forgery or counterfeiting, but these are not elements of the offense. For one thing, the offense does not set out statutory alternatives involving forgery or counterfeiting, as is required under the categorical approach. Descamps v. United States, 570 U.S. 254, 257 (2013). Therefore it cannot 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 as to these purposes. First, there is no state decision finding that a jury must decide unanimously between the § 530.5 alternatives. Second, 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.C.t 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.

PC § 591 Tampering with or obstructing phone lines. 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. 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. 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. 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.

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(l)(4) (discharging firearm) is not deportable firearm offense due to the antique firearms exception; see Pen C § 246.
**Defenses for California Crimes**

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**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.\(^{60}\)

**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.\(^{51}\)

**PC § 647(i) Disorderly: "Peeping Tom".** Not an aggravated felony. Should not be a crime involving moral turpitude because the offense is completed by peeking, with no intent to commit further crime.\(^{62}\)

**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.\(^{63}\)

**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 crime of violence under 18 USC § 16(b), but not under § 16(a). Because the Supreme Court struck down § 16(b), these offenses no longer are crime of violence.\(^{64}\) Because it is not a crime of violence it is not a deportable crime of domestic violence.

Solicitation to commit rape ought not to be held 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.\(^{65}\)

**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.\(^{66}\)

**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.

**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.67

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 or a crime involving moral turpitude. A stun gun does not meet definition of firearm.70

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.71

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. 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).73

Veh C § 10851 Vehicle taking, temporarily or permanently

Avoid a sentence of a year or more because of the danger that this will be charged as an aggravated felony. 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. There is 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 Ninth Circuit and BIA conflict as to whether the offense of accessory after the fact is an aggravated felony as obstruction of justice. Because the law is volatile, defense counsel should make every effort to obtain a sentence of 364 days or less when that is possible. Counsel in removal proceedings can assert that this is not an aggravated felony as obstruction, but should also seek other defenses in case the argument does not prevail. See discussion of Pen C § 32, above.
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 the alternatives.74

**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.75

**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.76

**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).77

**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.78

**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.79 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.80

**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).

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1 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.

2 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 turpitude, and we do not believe [convictions for selling liquor to a minor] would be deportable offenses.” *Matter of P*, 26 I&N Dec. 117, 120-21 (BIA 1944) (*dictum*).

3 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).

4 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.

5 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.

Matter of Velasco, 771 F.3d 1163 (9th Cir. 2014); Matter of Carrillo, 16 I&N Dec. 625, 626 (BIA 1978) (federal accessory after the fact), following

6 See Advisory on Nunez-Reyes and Lujan-Armendariz, cited above in n. 5.

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. Mellouliv. Lynch, 135 S. Ct. 1980, 1982 (2015) (finding the Kansas statute overbroad and stating “At the time of Melloul’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).

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.” 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).

9 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).

10 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).
11 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).

12 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).

13 *Escobar v. Lynch*, 846 F.3d 1019 (9th Cir 2017). See further discussion at next footnote.

14 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.

15 See *People v. Matthews*, 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).

16 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,
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.

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 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”). The Supreme Court 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).

False imprisonment by menace is not a crime of violence, because it cannot 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 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).

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).

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).

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.

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.

25 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.

26 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. Esquio-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).

27 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.

28 U.S. v. Coronado, 603 F.3d 706 (9th Cir. 2010); Covarrubias-Teposte v. Holder, 632 F.3d 1049, 1054-55 (9th Cir. 2011).

29 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).

30 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)).
31 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.

32 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 Mendoza-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 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).

33 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. Ramírez 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).

34 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 not divisible. See above footnote for discussion of Ramírez 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).

35 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).

36 Morales-Garcia v. Holder, 567 F.3d 1058 (9th Cir. 2009).

37 A Ninth Circuit panel held that felony § 288(c) is not a crime of violence under 8 USC § 16(a), which is the only current standard. 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.

In United States v. Castro, 607 F.3d 566 (9th Cir. 2010), the Ninth Circuit held that § 288(c) is not an aggravated felony as sexual abuse of a minor because it is not necessarily physically or psychologically abusive. While Castro stated that a court could look to the record of conviction to evaluate this behavior, the U.S. Supreme Court since then has clarified that the standard is the minimum conduct to commit the offense. 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).

38 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.

39 Chavez-Solis v. Lynch, 803 F.3d 1004 (9th Cir. 2015); U.S. v Reinhart, 893 F3d 606 (9th Cir 2018).


42 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.

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.

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).

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).

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).

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 § 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 Louisaint*, 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).

48 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.

49 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.

50 *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870, 8767 (9th Cir 2008).

51 *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-Madurga*, 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).

52 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.

53 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 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.

54 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).

55 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.

56 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).

57 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).

58 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. Landeras-Gonzales, 262 F.3d 424 (5th Cir 2001) (graffiti not crime of violence). See also People v. Kahunic (1987) 196 Cal App 3d 461 (conviction upheld when damage was to property jointly owned by defendant and victim).

59 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).

60 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 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.

61 See CALCRIM 2966, which does not require a jury to decide unanimously between alcohol, drugs, or controlled substances.


63 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.

64 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.

65 See Mielewczuk 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.

66 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 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.

67 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 (9th Cir. 2013)(unpublished), distinguishing prior version of 12022.7 requiring specific intent with current version, which does not.

68 United States v. Medina-Anicacio, 325 F.3d 638 (5th Cir. 2003).


70 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.

71 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 (9th 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
A police officer was a CIMT because it had as an aggravating 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.

**Penuliar v. Mukasey**, 528 F.3d 603 (9th Cir 2008). Recklessness is not sufficient for crime of violence. **Fernandez-Ruiz v. Gonzales**, 466 F.3d 1121, 1129-30 (9th 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 overruled by **Fernandez-Ruiz**. See **United States v. Campos-Fuerte**, 357 F.3d 956, 960 (9th Cir. Cal. 2004), relying on **U.S. v. Cerón-Sánchez**, 222 F.3d 1169, 1171 (9th Cir. 2000), overruled 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.

**Ramirez-Contreras v. Sessions**, 858 F.3d 1298 (9th 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.

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 (9th Cir. 2016) (en banc).

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 definition. **Matter of Diaz-Lizarra**, 26 I&N Dec. 847, 850-51 and n. 10 (BIA 2016); **Matter of Obeya**, 26 I&N Dec. 856 (BIA 2016). (Note that the new standard articulated in **Diaz-Lizarra** 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).)

“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.

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).

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 govt’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.”)

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.

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.

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.

Avoiding a Conviction for Immigration Purposes

Immigration law has its own definition of what constitutes a criminal "conviction." Because most (although not all) immigration consequences require a conviction, if your client does not have a conviction, the immigration case might be saved. This Advisory discusses which dispositions that come out of criminal court actually constitute a conviction for immigration purposes, and how to avoid a conviction.

Note that some immigration penalties are triggered just by conduct, even absent a conviction. A noncitizen might be found inadmissible or deportable if immigration authorities have evidence that the person engaged in the business of prostitution, made a false claim to citizenship, used false immigration or citizenship documents, smuggled aliens, is or was a drug addict or abuser, or formally admitted committing certain drug or moral turpitude offenses, or if the government has "reason to believe" the person ever has supported or participated in drug trafficking or money laundering. In those situations, avoiding a conviction is a good step, but will not necessarily protect the person.

This Advisory will discuss the following topics:

A. Definition of Conviction, Effect of Rehabilitative Relief
B. When Rehabilitative Relief Eliminates a Conviction: DACA and Lujan-Armendariz
C. Not a Conviction: Pretrial Diversion under New Cal Pen C § 1000
D. Former California Deferred Entry of Judgment: Problems and Solutions
E. Not a Conviction: Juvenile Delinquency Dispositions
F. Not a Conviction: California Infractions?
G. Appeal of a Conviction
H. Vacation of Judgment for Cause and Pen C § 1473.7, Prop 64

APPENDIX: Further Discussion of Lujan-Armendariz and Older Drug Convictions

A. Definition of Conviction, Effect of Rehabilitative Relief

The immigration statute contains its own definition of when a conviction has occurred in state criminal court – regardless of what state law says. For immigration purposes, a conviction occurs:
• Where there is “a formal judgment of guilt of the alien entered by a court” or,
• “if adjudication of guilt has been withheld, where ... a judge or jury has found the alien guilty, or the alien has entered a plea of guilty or nolo contendere, or has admitted sufficient facts to warrant a finding of guilt, and ... the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.¹

The BIA has held that a guilty plea or finding of guilt, plus any imposition of probation, fine, or jail creates a conviction for immigration purposes.² This means that if the person pled guilty, it is very likely that she has a conviction. In limited cases, advocates have succeeded in arguing that the criminal court imposed absolutely no punishment, penalty, or restraint of liberty and therefore there was no conviction despite a guilty plea – but this is a difficult argument that will be hard-fought.³

Once a conviction exists, what can erase it? In general, a conviction is not eliminated for immigration purposes by mere “rehabilitative relief” – meaning, where a state permits withdrawal of a plea or dismissal of charges because the defendant completed probation or other requirements, rather than because of some legal error.⁴ Immigration authorities will not accept rehabilitative relief to eliminate a conviction even if state law provides that absolutely no conviction or even arrest record remains. In California, people who complete all requirements and have pleas withdrawn or charges dismissed under “expungements” (what immigration authorities call Pen C § 1203.4), Prop 36 (Pen C § 1210) or the former Deferred Entry of Judgment (former Pen C § 1000) still have a “conviction” for immigration purposes. The result is that defense counsel and prosecutors in good faith have advised thousands of immigrants that certain alternative programs would not be a conviction for any purpose – when in fact the dispositions are convictions for the purpose of deportation.

For this reason, effective January 1, 2018 California amended Pen C § 1000 to change it from DEJ to a true pretrial diversion. This pretrial diversion does not require a plea or finding of guilt, and therefore is not a conviction for immigration purposes. See Part C, below. In addition, people with prior DEJ cases whose charges are dismissed pursuant to Pen C § 1000.3 can make an additional simple application, pursuant to Pen C § 1203.43, that will eliminate the DEJ “conviction” for immigration purposes. See Part D, below.

There are two instances where rehabilitative relief does eliminate a conviction for immigration purposes. Within the Ninth Circuit only, rehabilitative relief will eliminate a qualifying minor drug conviction from on or before July 14, 2011. And nationally, rehabilitative relief can eliminate a conviction as an absolute bar to eligibility for Deferred Action for Childhood Arrivals (DACA). See Part B.

A conviction does not result from an acquittal, a dismissal under a pretrial diversion, or a deferred prosecution, verdict, or sentence. In addition, juvenile delinquency dispositions, and judgments vacated for cause or reversed on appeal, are not convictions. It appears that California infractions should not be held

³ But see Retuta v. Holder, 591 F.3d 1181 (9th Cir. 2010) (California deferred entry of judgment was not a conviction because there was no punishment, penalty, or restraint on liberty where the only punishment was an unconditionally suspended fine; the court implicitly found that a requirement to attend drug education classes is not a punishment or penalty). But see Matter of Mohamed, supra, which includes such a requirement in a longer list of “penalties.”
⁴ Murillo-Espinosa v. INS, 261 F.3d 771 (9th Cir. 2001).
convictions, but reportedly they are so held in at least some cases. In the Ninth Circuit, criminal cases pending on direct appeal are convictions for immigration purposes. See Parts E-H.

Court-martial, not guilty by reason of insanity. A judgment of guilt that has been entered by a general court-martial of the United States Armed Forces has been held a “conviction” for immigration purposes.\(^5\) There is a grave risk that a not guilty by reason of insanity (NGI) disposition constitutes a conviction, at least under California procedure, since the defendant is required first to enter a guilty plea, and in effect be convicted, before entering a NGI plea and receiving treatment rather than a sentence.

B. When Does Rehabilitative Relief Eliminate a Conviction? DACA and *Lujan-Armendariz*

If there has been a plea or finding of guilt and the court has ordered any kind of penalty or restraint, including probation, immigration authorities will recognize the disposition as a conviction even if the state regards the conviction as eliminated by some kind of rehabilitative relief leading to a withdrawal of the judgment or charges. See discussion in Part A.

**Example:** Katrina is convicted of felony grand theft under Pen C § 484, 487. She successfully completes probation and the plea is withdrawn under Pen C § 1203.4. For immigration purposes, the conviction still exists.

There are at least two exceptions to this rule.

1. **Exception: State Rehabilitative Relief Might Eliminate a First Minor Drug Conviction from On or Before July 14, 2011, in the Ninth Circuit only**

This section provides a basic outline of the requirements the *Lujan-Armendariz* benefit. For further discussion of this rule, see the APPENDIX at the end of this Advisory.

Previously, the Ninth Circuit held that any state rehabilitative relief eliminates a first conviction for certain minor drug offenses, as long as the person would have met all the requirements for relief under the Federal First Offender Act (FFOA), 18 USC § 3607, had the case been held in federal court. *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). On July 14, 2011, the Ninth Circuit reversed *Lujan-Armendariz*, but it applied its decision prospectively only, to convictions coming after the decision. *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (en banc), prospectively overruling *Lujan-Armendariz*, *supra*.

The result is that, in immigration proceedings arising within the Ninth Circuit only, the good *Lujan-Armendariz* rule continues to apply to qualifying drug convictions that occurred on or before July 14, 2011. State rehabilitative relief such as, in California, withdrawal of plea or dismissal of charges under Prop 36, the former DEJ, or Pen C § 1203.4, will eliminate a conviction for immigration purposes as long as the following requirements are met:

- The conviction occurred on or before July 14, 2011 and the immigration proceedings arise within the jurisdiction of the Ninth Circuit.

• It is the person’s first drug conviction (although the *Lujan-Armendariz* benefit should apply to multiple pleas in the same hearing, as long as the person has no drug priors);

• The conviction was for simple possession, possession of paraphernalia or other offense less serious than possession and not covered under federal law, or for giving away a small amount of marijuana; but the *Lujan-Armendariz* benefit does not apply to conviction for use or being under the influence;

• The person was not found to have violated probation, and did not participate in any earlier diversion program, including pretrial diversion. (Arguably these disqualifiers do not apply to people who were under age 21 when they committed the offense, because they come within a different FFOA provision, 18 USC § 3607(c).)

**Example:** Yali pled guilty to a first drug offense, possession of cocaine, in January 2011. She completed probation conditions without a problem and had no prior pre-plea diversion. She withdrew the plea in July 2017, under Pen C § 1203.4. She does not have a conviction for any immigration purposes.

**WARNING:** NINTH CIRCUIT ONLY: This benefit will only be recognized in immigration proceedings held in Ninth Circuit states. If ICE detains the immigrant in California and transports her to detention and removal proceedings in Texas, that circuit’s law applies and the disposition will be treated as a conviction.

For further discussion of *Lujan-Armendariz* see APPENDIX to this Advisory and see Chapter 3, § 3.6, *Defending Immigrants in the Ninth Circuit* ([www.ilrc.org](http://www.ilrc.org), 2013).

2. **Exception: Rehabilitative Relief Eliminates a Conviction as an Absolute Bar to Eligibility for Deferred Action for Childhood Arrivals (DACA)**

Rehabilitative relief will eliminate a conviction as an absolute bar to Deferred Action for Childhood Arrivals (DACA), the relief for people brought to the U.S. as children. DACA materials refer to rehabilitative relief as “expungement.” The conviction still may be considered as a negative factor in the discretionary decision of whether to grant DACA. (While the situation is fluid, at this writing it appears likely that DACA renewals will continue at a minimum for several months into 2018. See materials at [www.ilrc.org/daca](http://www.ilrc.org/daca) and especially [www.ilrc.org/daca-faqs-march-2018](http://www.ilrc.org/daca-faqs-march-2018).)

C. **Not a Conviction: Pretrial Diversion, Pen C § 1000 (January 1, 2018)**

For a conviction to exist under immigration law, the defendant must plead guilty or *nolo contendere* before a judge, or the judge must find the person guilty. INA § 101(a)(48)(A), 8 USC § 1101(a)(48)(A).

As of January 1, 2018, California has a pretrial diversion program. See Pen C § 1000 et seq., amended effective Jan. 1, 2018 by AB 208 (Eggman). The program does not require a guilty plea. Rather, a defendant charged with one or more minor drug offenses, who is not disqualified because of other criminal record issues, can plead not guilty and the case will be diverted to a civil drug education program. If the person successfully completes the program, the charges will be dropped. Because there was no guilty plea, this disposition is not a conviction for immigration or other purposes. If the person is not successful, ultimately he or she will have to face the drug charges back in regular criminal proceedings. For further information see *Practice Advisory: New California Pretrial Diversion* at [https://www.ilrc.org/new-california-pretrial-diversion-minor-drug-charges](https://www.ilrc.org/new-california-pretrial-diversion-minor-drug-charges).
This pretrial diversion can be a great option for a motivated and fairly functional defendant. But if a defendant is not as functional and is likely to fail the diversion program, counsel should push hard for a different defense strategy, because failure of pretrial diversion is very likely to result in a drug conviction. See discussion in the Practice Advisory.

Before January 1, 1997, Pen C § 1000 also set out a pretrial diversion program. Carefully check clients with dispositions from that time period to see if they may have avoided pleading guilty. Note that even after the law changed in 1997, for some years many criminal court judges did not actually take a guilty plea or admission. From January 1, 1997 to December 31, 2017, Pen C § 1000 was “deferred entry of judgment,” which did require a guilty plea and generally was held a conviction. See Part D, below.

Some counties have drug court programs. Assume conservatively that if drug court requires a plea or other admission of guilt, the result is a conviction; if not, it is not. Even without a plea, a drug court disposition creates immigration problems if the person must admit to being in danger of becoming an addict, which itself is a ground of inadmissibility or deportability. Defense counsel should try hard to get another option, such as pretrial diversion. However, if necessary, admitting to abuse generally is less dangerous than having a drug possession conviction.

**D. Former California Deferred Entry of Judgment: Problems and Solutions**

Between January 1, 1997 and December 31, 2017, California Pen C § 1000 et seq. set out “deferred entry of judgment” (DEJ) as an alternative for minor drug offenders. The person would plead guilty and then be diverted to a drug education program and monitoring for 18-36 months. If the person was successful the charges would be dropped, and Pen C § 1000.3 promised that the person would not have a conviction or arrest record based on the incident, and would suffer no loss of any legal benefit. Due to the guilty plea, however, immigration authorities generally ruled that even a successfully completed DEJ was a drug “conviction” for immigration purposes.

If your client pled guilty under DEJ and actually completed the program, he or she should apply for dismissal of charges under Pen C § 1000.3, if that was not already done, and then submit a simple application for Pen C § 1203.43. This will eliminate the DEJ “conviction.” If your client pled guilty under DEJ, dropped out of the program, and never returned to court for sentencing, it is possible that the criminal case might be reopened. See discussion of § 1203.43 below, and especially the cited Advisories. If your client pled guilty to DEJ, failed the program, and then was sentenced to probation, Prop 36, or jail, then your client does have a conviction.

If your client is in removal proceedings now and § 1203.43 has not yet been applied for, argue that the client merits a continuance to get the § 1203.43 order, and consider arguments under Retuta that the disposition is not a conviction. See discussion of Retuta and continuances, below.

**California Penal Code § 1203.43.** Immigration authorities recognize that a conviction vacated on the basis of a legal defect no longer exists for immigration purposes. As of January 1, 2016, Californians who successfully completed DEJ have a relatively quick and easy way to obtain such a ruling. Section § 1203.43 provides that the DEJ statute makes an affirmative misrepresentation to some defendants, including all noncitizens, because it promises that successful completion of all conditions will result in no conviction and no loss of legal benefits. Therefore, § 1203.43 specifically provides that a defendant who had charges dismissed under Pen C § 1000.3 due to successful completion of DEJ is entitled to withdraw the guilty plea as being legally invalid, based on the misrepresentation. This vacation of judgment for cause is sufficient to
eliminate the DEJ “conviction” for immigration purposes. See discussion of vacating a conviction for cause at Part H, below.


**Retuta exception, continuances.** If the client does not yet have a § 1203.43 order and is in removal proceedings, argue that the person should be given a continuance to obtain the order. Consider arguments based on Matter of Montiel, 26 I&N Dec. 555 (BIA 2015), which held that for purposes of judicial efficiency, removal proceedings may be continued pending the adjudication of a direct appeal of a conviction by trial. The § 1203.43 motion presents an even more compelling case: while an appeal might or might not be sustained, relief is automatic under § 1203.43 once the client has completed the program and the DEJ term has elapsed. This case should take precedent over any general EOIR policy restricting continuances.

If needed, investigate arguments that the DEJ is not a conviction, and litigate the question. The Ninth Circuit held that a California DEJ disposition was not a conviction for immigration purposes when the only consequence imposed in the particular case was an unconditionally suspended fine. The court reasoned that no penalty or restraint had been imposed, and therefore the disposition did not meet the definition of conviction at INA § 101(a)(43) (discussed in Part A, above). *Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010). In most cases the Retuta defense will not be needed because of the availability of Pen C § 1203.43, but it may be useful in some cases where a § 1203.43 withdrawal of plea has not yet been obtained.

**E. Not a Conviction: Juvenile Delinquency Dispositions**

Adjudication in juvenile delinquency proceedings does not constitute a conviction for almost any immigration purpose, regardless of the nature of the offense.\(^6\) If the record of proceedings indicates that proceedings were in juvenile court, there was no conviction.

In addition, formally admitting conduct that one committed while a juvenile does not make a person inadmissible for admitting to a moral turpitude or controlled substance offense. This is because the person is admitting to having committed civil delinquency conduct\(^7\), not a “crime.”

Juvenile court proceedings still can create problems for juvenile immigrants, however. A juvenile delinquency disposition will cause problems if it establishes that the youth has engaged in prostitution, is or has been a drug addict or abuser, or – by far the worst -- has been or helped a drug trafficker, or benefitted from an inadmissible parent or spouse’s trafficking within the last five years. Undocumented juvenile defendants might be eligible to apply for lawful immigration status.

FOR A HANDOUT ON REPRESENTING JUVENILES in delinquency or dependency proceedings or family court proceedings, see § N.15 Juveniles at www.ilrc.org/chart. See also free materials available at

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\(^6\) *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). The exceptions are that certain delinquency dispositions may form a bar to applying for Family Unity (see **Defending Immigrants in the Ninth Circuit**, Chapter 11, § 11.24) or to petitioning for a relative under the Adam Walsh Act (see § N.13, Adam Walsh Act at www.ilrc.org/chart.

For a comprehensive discussion of representing non-citizens in delinquency or dependency, see ILRC’s manual, *Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth.*

**F. Not a conviction: California Infractions?**

The Board of Immigration Appeals has held that certain offenses that are less than a misdemeanor – sometimes called infractions or offenses – do not qualify as criminal convictions. This is because they are handled in non-conventional criminal proceedings that do not provide the usual constitutional protections of a criminal trial, and/or the disposition does not have effect as a prior conviction in subsequent prosecutions.⁸

*There are multiple reports of immigration authorities treating a California infraction as a conviction, and some unpublished Ninth Circuit decision have deferred to them.* For that reason, advocates should assume conservatively that an infraction may be held a conviction, and seek an additional defense where possible. It seems like overkill, but the safest course is to vacate the infraction under Pen C §1473.7 or other effective means.

There are very strong arguments that a California infraction should not be held a conviction for immigration purposes. Advocates should argue the matter and preserve the issue on appeal. As of March 2018, a case with strong briefing is pending in the Ninth Circuit; see *Ventura Heredia v Sessions* (No. 15-72580). See also Yi, “Arguing that a California Infraction is Not a Conviction” at www.ilrc.org/crimes.

**G. Convictions on Appeal**

The Ninth Circuit has held that a conviction that is pending on appeal remains a conviction for immigration purposes.⁹ Criminal defense counsel must assume that filing a timely appeal will *not prevent* a conviction from having immigration effect. It is possible that at some point the Ninth Circuit rule will change, or the Supreme Court will consider the issue. See also *Matter of Montreal*, 26 I&N Dec. 555 (BIA 2015) (in some circumstances the fact that a case is on direct appeal of right supports the grant of continuance pending resolution of the appeal).

If the conviction is actually reversed on appeal, it will no longer have immigration effect.¹⁰

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¹⁰ *Planes* at 996.
H. Vacation of Judgment Based on Legal Error


The conviction must have been vacated for cause, meaning based on a legal defect in the proceeding. A conviction is not eliminated for immigration purposes if the court vacated it for reasons “solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings.”\footnote{Matter of Pickering, 23 I&N Dec. 621 (BIA 2003).} However, a legal defect that has some relationship to immigration does have effect, for example, ineffective assistance of counsel based on a failure to adequately advise the defendant regarding immigration consequences.

As of January 1, 2017, California has a new form of post-conviction relief, Pen C § 1473.7. This permits an immigrant who is no longer in actual or constructive custody to apply to vacate a conviction “due to a prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.” With § 1473.7 available, many immigrants are coming back to court to challenge unconstitutional convictions. See also discussion at Part D, above, of Pen C § 1203.43, a means of vacating a “conviction” obtained under the former California Deferred Entry of Judgment for legal error, which is based on legal error but procedurally is easy to obtain.

In 2016 California voters passed Proposition 64, which legalized some conduct involving marijuana. Proposition 64 also provided some post-conviction relief to reduce or eliminate older convictions relating to conduct that is now legal. This includes Health & Safety C § 11361.8(e)-(h), which permits a person to ask “to have the conviction dismissed and sealed because the prior conviction is now legally invalid...” While the “legally invalid” language is promising, it is not yet clear that immigration authorities will accept this disposition as eliminating a prior drug conviction. Until there is clarification, the safest course is to eliminate the conviction with some other relief such as Pen C § 1473.7.

For more information about California post-conviction relief, see materials at www.ilrc.org/immigrant-post-conviction-relief, and consult with expert practitioners in the local court or with the ILRC Attorney of the Day line (see information at www.ilrc.org/technical-assistance).

APPENDIX: Further Discussion of Lujan-Armendariz and Older Drug Convictions

This appendix provides more information on the Lujan-Armendariz rule and the Federal First Offender Act (FFOA), continued from Part B. Federal law provides for a form of rehabilitative relief that eliminates a conviction for immigration and other purposes. See the FFOA at 18 USC § 3607. If a qualifying defendant in federal court pleads guilty under the FFOA to a first drug offense listed in 21 USC § 844, and completes probation without violation, then the charges are dismissed and the disposition “shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.” See 18 USC § 3607(a), (b). This absolute language in the federal statute, directing
that there is no conviction for any purpose whatsoever, is why a disposition under the FFOA is held not to be a conviction for immigration purposes despite the fact that it is a rehabilitative statute.

The Ninth Circuit held that if a person convicted in state court would have qualified for the FFOA had the case been held in federal court, then state rehabilitative relief will eliminate the conviction for immigration purposes. Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000). Lujan-Armendariz only applied within the Ninth Circuit. Eleven years later, on July 14, 2011, the Ninth Circuit reversed Lujan-Armendariz – but only prospectively, for convictions appearing after publication of the opinion. Nunez-Reyes v. Holder, 646 F.3d 684, 690 (9th Cir. 2011). It did not reverse Lujan-Armendariz’ effect on convictions from before the Nunez-Reyes opinion, i.e., before July 14, 2011. Within the Ninth Circuit, many older convictions still can be eliminated for immigration purposes by state rehabilitative relief, as long as the person would meet all the requirements for the FFOA.

Under Nunez-Reyes and Lujan-Armendariz, in immigration proceedings arising within the Ninth Circuit only, state rehabilitative relief will eliminate a conviction as long as:

a) The conviction occurred on or before July 14, 2011

b) It is the person’s first drug conviction.

Actually, the statute says that the person must not have been convicted of a drug offense “prior to the commission of the” instant offense. 18 USC § 3607(a)(2). This gives rise to the argument that a person could use Lujan-Armendariz to eliminate multiple offenses pled to in the same hearing, because the person would not have been convicted of a drug offense prior to the commission of any of the offenses.

c) The conviction was for simple possession, possession of paraphernalia or another offense less serious than possession and not covered under federal law, or giving away a small amount of marijuana, but not for use or being under the influence;

d) The person was not found to have violated probation, and did not participate in any earlier diversion program, including pretrial diversion

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13 While Nunez-Reyes did not specifically state what happens to convictions on the day the opinion was published, it stated that its decision would affect convictions received “after” the date of publication, and this is the only fair approach. See discussion in Defending Immigrants in the Ninth Circuit (www.ilrc.org, 2013), at § 3.6.
14 The FFOA requires the person to have been charged with an offense listed at 21 USC § 844. See 18 USC 3607(a) (first sentence). Section 844 includes simple possession, whether felony or misdemeanor.
15 Cardenas-Uriarte v. INS, 227 F.3d 1132 (9th Cir. 2000).
16 21 USC § 841(b)(4) provides that a conviction for “distributing a small amount of marijuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18 [the FFOA].”
17 Nunez-Reyes, supra.
18 Estrada v. Holder, 560 F.3d 1039 (9th Cir. 2009).
19 De Jesus Melendez v. Gonzales, 503 F.3d 1019, 1026-27 (9th Cir. 2007).
Arguably these disqualifiers based on a probation violation or a prior pretrial diversion do not apply to people who were under age 21 when they committed the offense. They come within a different FFOA provision, 18 USC 3607(c), which does not include those disqualifiers.

e) Foreign rehabilitative relief will eliminate the immigration consequences of a foreign conviction that meets the above requirements.20

Besides not being deportable or inadmissible for having a conviction, the Lujan-Armendariz benefit also should prevent the person from being held inadmissible on the ground of having formally admitted the commission of a drug offense. The BIA has held that when conduct is brought before a criminal court judge, and the resulting disposition is something less than a conviction (the case here), then the inadmissibility ground based on admitting that conduct cannot be applied.21

For further discussion, see Chapter 3, § 3.6, Defending Immigrants in the Ninth Circuit (www.ilrc.org, 2013).

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20 Dillingham v. INS, 267 F.3d 996 (9th Cir. 2001).