QUICK REFERENCE GUIDE TO THE BASIC IMMIGRATION CONSEQUENCES OF SELECT FLORIDA CRIMES

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IMPORTANT ADVISAL: The following analysis of the basic immigration consequences of Florida crimes is a draft only and will likely be revised. It should not be relied upon as providing a definitive analyisis of the issues discussed and it is *not* a substitute for practitioners' own research and analysis. Feedback is appreciated and should be directed to Becky Sharpless, Florida Immigrant Advocacy Center, rsharpless@fiacfla.org, (305) 573-1106 ext. 1080.

Chapter 316, 322 – Motor Vehicles

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§ 316.027(1)(a) – Accidents involving personal injuries, failure to stop; leaving scene

Elements:
The defendant

1. was the driver in an accident resulting in the injury of any person;
2. knew or should have known that s/he was involved in an accident;
3. knew or should have known of the injury of the person; and
4. willfully failed to stop and give identifying information *or* willfully failed to render "reasonable assistance" to the injured person.

Crime of Moral Turpitude Analysis: Neither the Eleventh Circuit nor the BIA has ruled on whether this statute, or one like it, is a crime involving moral turpitude. Because the traditional factors that are associated with moral turpitude (malicious intent, contrary to the morals of society, fraud, recklessness or specific intent) are absent, it should not be found to involve moral turpitude.

Recommendation: This offense is most likely not a crime involving moral turpitude.

Aggravated Felony Analysis: Neither the Eleventh Circuit nor the BIA has ruled on whether this statute, or one like it, is an aggravated felony. Since it does not involve force or the threat of force, it is not a crime of violence.

Recommendation: This offense will not be considered an aggravated felony, even if the defendant receives a sentence of a year or more.

§ 316.027(1)(b) – Accident involving death, failure to stop; leaving scene

Elements:
The defendant

1. was the driver in an accident result in the death of any person;
2. knew or should have known that s/he was involved in an accident;
3. knew or should have known of the death of the person; and
4. willfully failed to stop and give identifying information *or* willfully failed to render "reasonable assistance" to the injured person.

Immigration analysis: Same as for § 316.027(1)(a).

§ 316.192 – Reckless driving

Elements:
The defendant

1. drove any vehicle;
2. in willful or wanton disregard for the safety of persons or property.

Crime of Moral Turpitude Analysis: The BIA stated in *Matter of C-*, 2 I&N Dec. 716 (BIA 1947), that offenses involving nothing more than "reckless driving or gross negligence" are not "inherently base, vile or depraved" and therefore do not involve moral turpitude. The statute at issue in that case required the willful destruction or damage of property and "willful" was defined to include "gross or wanton negligence." Given that the Florida statute is similar, it is most likely not a crime involving moral turpitude.

Recommendation: Reckless driving is not a crime involving moral turpitude.

Aggravated Felony Analysis: This offense cannot be an aggravated felony because it is not possible to receive a sentence to imprisonment of a year or more.

§ 316.193(2)(a) – Misdemeanor DUI, 1st and 2nd conviction

Elements:
The defendant
1. drove or was in actual physical control of a vehicle;
2. while driving or in actual physical control of the vehicle
    a. was under the influence of alcohol, chemical or controlled substance to the extent that her/his normal faculties were impaired; or
    b. had a blood or breath alcohol level of 0.08 or higher.

Crime of Moral Turpitude Analysis: The BIA, in *In re Torres-Varela*, 23 I&N Dec. 78 (BIA 2001), held that aggravated driving under the influence under Arizona law due to prior DUI convictions was not a crime involving moral turpitude. The BIA distinguished its decision from *Matter of Lopez-Meza*, Int. Dec 3423 (BIA 1999), which held that an Arizona DUI statute was a crime involving moral turpitude because it involved driving under the influence with a suspended license. Because the Florida misdemeanor DUI statute lacks the aggravating factor of driving with a suspended license, it is not a crime of moral turpitude under *Matter of Lopez-Meza.* And, it has no knowledge or intent requirement. It therefore is not a crime involving moral turpitude.

Recommendation: Misdemeanor DUI is not a crime involving moral turpitude.

Aggravated Felony Analysis: Misdemeanor DUI cannot be an aggravated felony as a crime of violence because it is not punishable by a year or more imprisonment.

Recommendation: Misdemeanor DUI is not an aggravated felony.

§ 316.193(2)(b) – Felony DUI, 3rd and 4th conviction

Elements:
The defendant
1. drove or was in actual physical control of a vehicle;
2. while driving or in actual physical control of the vehicle
    a. was under the influence of alcohol, chemical or controlled substance to the extent that her/his normal faculties were impaired; or
    b. had a blood or breath alcohol level of 0.08 or higher.
3. has two/three prior DUI convictions.

Crime of Moral Turpitude Analysis: The BIA, in *In re Torres-Varela*, 23 I&N Dec. 78 (BIA 2001), held that aggravated driving under the influence under Arizona law due to prior DUI convictions was not a crime involving moral turpitude. The BIA distinguished its decision from *Matter of Lopez-Meza*, Int Dec 3423 (BIA 1999), which held that an Arizona DUI statute was a crime involving moral turpitude because it involved driving under the influence with a suspended license. The Florida statute, like the Arizona law at issue in *In re Torres-Varela*,

punishes more heavily subsequent DUI offenses rather than driving under the influence with a suspended license. And, it has no knowledge or intent requirement. It therefore is not a crime involving moral turpitude.

Recommendation: Felony DUI is not a crime involving moral turpitude.

Aggravated Felony Analysis: The Eleventh Circuit, in *Le v. INS*, 196 F.3d (11th Cir. 1999), held that driving under the influence with serious bodily injury under Florida law was a crime of violence within the meaning of the aggravated felony definition. The court's analysis, however, depended on the element in the statute requiring serious bodily injury. Felony DUI *without* serious bodily injury, therefore, should not be considered a crime of violence.

Recommendation: Felony DUI without serious bodily injury is not a crime of violence. A one year sentence to this crime should not result in an aggravated felony conviction.

§ 316.193(3)(c)2 – DUI resulting in serious bodily injury

Elements:
The defendant

1. drove or was in actual physical control of a vehicle;
2. while driving or in actual physical control of the vehicle
    a. was under the influence of alcohol, chemical or controlled substance to the extent that her/his normal faculties were impaired; or
    b. had a blood or breath alcohol level of 0.08 or higher
3. and, as a result, the defendant caused serious bodily injury to the victim.

Crime of Moral Turpitude Analysis: The BIA has not ruled on whether this Florida statute, or one like it, is a crime involving moral turpitude. While the statute requires serious bodily injury, it does not require any intent or knowledge whatsoever. For the same reasons that DUI manslaughter (see below) should not be a crime involving moral turpitude, DUI resulting in serious bodily injury should also not be so considered.

Recommendation: DUI resulting in serious bodily injury should not be considered a CMT.

Aggravated Felony Analysis: The Eleventh Circuit, in *Le v. INS*, 196 F.3d (11th Cir. 1999), held that driving under the influence with serious bodily injury under Florida law was a crime of violence within the meaning of the aggravated felony definition. If a sentence of one year or more imprisonment is imposed, the crime will be an aggravated felony.

Recommendation: DUI resulting in serious bodily injury with a one year sentence of imprisonment or more is an aggravated felony.

§ 316.193(3)(c)3.a – DUI manslaughter

Elements:
The defendant

1. drove or was in actual physical control of a vehicle;
2. while driving or while in actual physical control was
    a. under the influence of alcohol or a chemical or controlled substance to the extent that her/his normal faculties were impaired; or
    b. had a blood or breath alcohol level of 0.08 or higher;
3. as a result, caused or contributed to the cause of the death of the victim.

Crime of Moral Turpitude Analysis: The BIA has held that manslaughter involving a mens rea of at least recklessness involves moral turpitude. *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994). Because the Florida DUI manslaughter statute has no *mens rea* requirement whatsoever, it should not be considered a crime involving moral turpitude.

Recommendation: DUI manslaughter should not be considered a crime involving moral turpitude.

Aggravated Felony Analysis: DUI manslaughter is not an aggravated felony as a crime of "murder." It, however, is a crime of violence and will be considered an aggravated felony if there is a sentence of a year or more imprisonment. The Eleventh Circuit, in *Le v. INS*, 196 F.3d (11th Cir. 1999), held that driving under the influence with serious bodily injury under Florida law was a crime of violence within the meaning of the aggravated felony definition. Under parallel reasoning, DUI manslaughter will be considered a crime of violence.

Recommendation: DUI manslaughter is an aggravated felony if a sentence of a year or more imprisonment is imposed.

§ 316.193(3)(c)3.b – DUI manslaughter; failing to render aid or give information

Crime of Moral Turpitude Análisis : Same as for § 316.193(3)(c)3.a.

Aggravated Felony Analysis: Same as for § 316.193(3)(c)3.a

§ 316.1935(2) – Fleeing or attempting to elude law enforcement officer in marked patrol vehicle with siren and lights activated

Elements:

1. The defendant
    a. was operating a vehicle upon a street or highway in Florida;
    b. was ordered to stop by a duly authorized law enforcement officer;
    c. knowing s/he had been directed to stop,
    d. willfully refused or failed to stop the vehicle in compliance with the order; or
    e. having stopped the vehicle, willfully fled in an attempt to elude the officer.

2. The law enforcement officer was in an authorized law enforcement patrol vehicle with agency insignia and other jurisdictional markings prominently displayed on the vehicle and with siren and lights activated.

Crime of Moral Turpitude Analysis: Neither the Eleventh Circuit nor the BIA has considered whether the Florida offense of fleeing or attempting to elude a law enforcement officer, or a crime like it, is a crime involving moral turpitude. Since it involves no force or fraud, it should not be considered a crime involving moral turpitude.

Recommendation: Fleeing or attempting to elude a law enforcement officer is not a crime involving moral turpitude.

Aggravated Felony Analysis: Neither the Eleventh Circuit nor the BIA has considered whether the Florida offense of fleeing or attempting to elude a law enforcement officer, or a crime like it, is an aggravated felony. However, since the crime involves no force or risk of force being used, it should not be considered a crime of violence within the meaning of the aggravated felony definition.

Recommendation: Fleeing or attempting to elude a law enforcement officer will not be considered an aggravated felony, even if a prison term of a year or more is imposed.

§ 316.1935(3) – Driving at high speed or with wanton disregard for safety while feeling or attempting to elude law enforcement officer who is in a marked patrol vehicle with siren and lights activated

Elements:

1. The defendant
    a. was operating a vehicle upon a street or highway in Florida;
    b. was ordered to stop by a duly authorized law enforcement officer;
    c. knowing s/he had been directed to stop,
        i. willfully refused or failed to stop the vehicle in compliance with the order; or

ii. having stopped the vehicle, willfully fled in an attempt to elude the officer.

d. during the course of the fleeing or attempting to flee, defendant drove at high speed or in any manner demonstrating a wanton disregard for the safety of persons or property

2. The law enforcement officer was in an authorized law enforcement patrol vehicle with agency insignia and other jurisdictional markings prominently displayed on the vehicle and with siren and lights activated.

Crime of Moral Turpitude Analysis: Neither the Eleventh Circuit nor the BIA has considered whether the Florida offense of driving at high speed or with wanton disregard for the safety of others while fleeing involves moral turpitude. Because reckless driving under the Florida statute is probably not a crime involving turpitude, this statute is probably also not such a crime (see analysis of Reckless Driving).

Recommendation: This offense is probably not a crime involving moral turpitude.

Aggravated Felony Analysis: Neither the Eleventh Circuit nor the BIA has considered whether the Florida offense of driving at high speed or with wanton disregard for the safety of others while fleeing, or a crime like it, is an aggravated felony. However, since the crime involves no force or risk of force being used, it should not be considered a crime of violence within the meaning of the aggravated felony definition.

Recommendation: This offense will probably not be considered an aggravated felony even if a sentence of a year or more imprisonment is imposed.

§ 316.1935(4) – Aggravated fleeing or eluding

Elements:
The defendant

1. was the driver in an accident result in injury of any person;
2. knew or should have known that s/he was involved in an accident;
3. knew or should have known of the injury of the person;
4. willfully failed to stop and give identifying information *or* willfully failed to render "reasonable assistance" to the injured person;
5. in the course of leaving or attempting to leave and having knowledge of an order to stop given by a duly authorized law enforcement officer
    a. willfully refused or failed to stop in compliance with such an order, or having stopped in knowing compliance with such order, willfully flees in an attempt to elude such officer; and
    b. as a result of such fleeing or eluding, causes injury to another person or causes damage to any property belonging to another person.

Crime of Moral Turpitude Analysis: Neither the Eleventh Circuit nor the BIA has considered whether the Florida offense of aggravated fleeing or eluding involves moral turpitude. Unlike nonaggravated fleeing or eluding, aggravated fleeing or eluding requires the defendant cause injury or damage to property as a result of the fleeing or eluding. However, it does not require a specific intent to cause injury or damage. It should not be considered a crime involving moral turpitude.

Recommendation: Aggravated fleeing or eluding should not be considered a crime of moral turpitude.

Aggravated Felony Analysis: Neither the Eleventh Circuit nor the BIA has considered whether this offense is an aggravated felony. Although the statute does require injury to a person or damage to property, it is unclear whether the courts would find that there is a substantial risk of physical force being used during the commission of the offense. If so, the crime would be a crime of violence and, if a sentence of a year or more imprisonment were imposed, it would be an aggravated felony.

Recommendation: Aggravated fleeing or eluding might be considered an aggravated felony as a crime of violence if a year or more imprisonment is imposed.

§ 322.34(6) – Careless operation of motor vehicle with suspended license, resulting in death or serious bodily injury

Elements:

1. The defendant operated a motor vehicle in a careless or negligent manner;
2. The defendant's careless or negligent operation of the motor vehicle caused the death of, or great bodily harm to, another human being;
3. Either:
   a. At the time, the defendant did not have a driver's license; OR
   b. At the time, the defendant's license or privilege to drive was canceled, suspended, or revoked AND notice of the cancellation, suspension, or revocation was given to the defendant.

NOTE: This subsection applies only to cancellations, suspension or revocations "pursuant to s. 316.655, s. 322.26(8), s. 322.27(2), or s. 322.28(2) or (4)." Consequently, not every suspension, etc. qualifies.

NOTE: The notice provision of element 3.b. does not require actual notice. It is sufficient for the Department to mail notice to the defendant at the address on the license.

Crime of Moral Turpitude Analysis: The BIA, in *Lopez-Meza*, Int. Dec. 3423 (BIA 1999), held that an Arizona statute for DUI with a suspended license was a crime involving moral turpitude. The Board reasoned that the commission of a DUI while the defendant was "absolutely prohibited" from driving due to a suspended license violated the accepted norms of society and was a crime involving moral turpitude. The Board also reasoned that the offense involved moral turpitude because it required knowledge that the license was suspended. The Florida statute requires that the defendant have no drivers license or that the license be suspended and it requires that the defendant have been given notice of the suspension. Given the similarity of the Arizona and Florida statutes, it is very possible that the Florida offense will be considered a crime involving moral turpitude.

Recommendation: This offense is likely to be found a crime involving moral turpitude.

Aggravated Felony Analysis: The Eleventh Circuit, in *Le v. INS*, 196 F.3d (11th Cir. 1999), held that driving under the influence with serious bodily injury under Florida law was a crime of violence within the meaning of the aggravated felony definition. Since this offense also requires serious bodily injury, it will be considered an aggravated felony as a crime of violence if a sentence of one year imprisonment or more is imposed.

Recommendation: This offense is an aggravated felony if a year or more imprisonment is imposed.

Chapter 777 – Attempts, Solicitation, Conspiracy

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§ 777.03—Accessory after the fact

Elements:

A felony was committed by another.

The defendant

1. after the felony was committed, maintained, assisted or gave any other aid to the person who committed the felony.
2. did so with the intent that the person committing the felony avoid or escape detention, arrest, trial, or punishment.
3. was not related to the person committing the felony by blood or marriage as husband, wife, parent, grandparent, child, grandchild, brother, or sister.

Crime of Moral Turpitude Analysis: The BIA has held that knowingly harboring and concealing a person with an arrest warrant and accessory after the fact to manslaughter does involve moral turpitude. *Matter of Sloan*, 12 I&N Dec. 840 (BIA 1066, AG 1968); *Matter of Sanchez-Marin*, 11 I&N Dec. 264 (BIA 1965). In the context of deciding whether an accessory after the fact offense falls within the controlled substance ground of deportation, the BIA ruled that an accessory after the fact offense where the underlying offense was drug trafficking does *not* take on the nature of the underlying crime and is not a drug conviction or a drug trafficking aggravated felony. *Matter of Batista-Hernandez*, Int. Dec. 3321 (BIA 1997). Because this ruling did not involve an analysis of whether accessory after the fact was a crime involving moral turpitude, it is not controlling. Although the reasoning in *Matter of Batista-Hernandez* strongly supports the position that accessory after the fact does not necessarily take on the character of the underlying crime, it is unclear how persuasive this reasoning will be in the Eleventh Circuit. The Eleventh Circuit, in *Itani v. Ashcroft*, 298 F.3d 1213 (11th Cir. 2002), held that the federal misprison of a felony statute, 8 U.S.C. 4, is a crime involving moral turpitude because "it necessarily involves an affirmative act of concealment or participation in a felony, behavior that runs contrary to accepted societal duties and involves dishonest or fraudulent activity." Even in *Matter of Batista-Hernandez*, the BIA came to its conclusion that accessory after the fact did not take on the character of a controlled substance conviction because it believed that "accessory after the fact falls somewhere between misprision of a felony and aiding an abetting in terms of its relation to the underlying crime." It found that accessory after the fact "is more akin to misprision." Given that, in the Eleventh Circuit, misprision is a crime involving moral turpitude, it is unclear whether *Matter of Batista-Hernandez* can be used successfully to argue that accessory after the fact does not take on the character of the underlying crime.

Recommendation: Accessory after the fact is likely a crime involving moral turpitude if the underlying crime involves moral turpitude. It may also involve moral turpitude even if the underlying crime does not.

Aggravated Felony Analysis: In *Matter of Batista-Hernandez*, Int. Dec. 3321 (BIA 1997), the BIA held that the offense of accessory after the fact is an aggravated felony as an obstruction of justice crime.

Recommendation: If a sentence of a year or more imprisonment is imposed, accessory after the fact is likely an aggravated felony.

§ 777.04(1)—Criminal Attempt

Elements:
The defendant

1. did some act toward committing the crime that went beyond just thinking or talking about it;
2. would have committed the crime except that someone prevented him from committing the crime or he/she failed.

Crime of Moral Turpitude Analysis: BIA has consistently ruled that attempts to commit an offense involve moral turpitude when the underlying offense does. *Matter of Katsansis*, 14 I&N Dec. 266 (BIA 1973); *Matter of Awaijane*, 14 I&N Dec. 117 (BIA 1972); *Matter of Moore*, 13 I&N Dec. 811 (BIA 1971). Moreover, the crime of moral turpitude ground of inadmissibility expressly states that an attempt to commit a crime involving moral turpitude falls within the ground. 8 U.S.C. 1182(a)(2)(A)(i). (Note: the crime of moral turpitude ground of deportation does not contain similar language, 8 U.S.C. 1227(a)(2)(A)(i).)

Recommendation: Criminal attempt will be a crime of moral turpitude if the underlying offense is.

Aggravated Felony Analysis: If the underlying offense would be an aggravated felony, 8 U.S.C. 1101(a)(43)(U) states that an "attempt" will also be an aggravated felony.

Recommendation: Criminal attempt will be an aggravated felony if the underlying offense is.

§ 777.04(2)—Criminal Solicitation

Elements:
The defendant

1. solicited another person to commit the crime;
2. during the solicitation, commanded, encouraged, hired, or requested the person to engage in specific conduct which would constitute the commission of the crime or an attempt to commit the crime.

Crime of Moral Turpitude Analysis: Neither the BIA nor the Eleventh Circuit has ruled on whether the Florida solicitation statute, or one like it, is a crime of moral turpitude. It is possible that solicitation will be treated like attempts and accessory after the fact (i.e., solicitation involves moral turpitude if the underlying offense does). However, there is an argument that solicitation is different than attempts and accessory after the fact. *See United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001).

Recommendation: Solicitation is possibly a crime involving moral turpitude if the underlying offense is.

Aggravated Felony Analysis: Unlike attempts and conspiracy, the aggravated felony definition does not state that solicitation is to be treated like the underlying crime. *See* 8 U.S.C. 1101(43)(a)(U). However, solicitation may nonetheless be considered an aggravated felony if the underlying offense is.

Recommendation: Solicitation is possibly an aggravated felony if the underlying crime is.

§ 777.04(3)—Criminal Conspiracy

Elements:
The defendant
1. intended that the offense would be committed.
2. in order to carry out the intent, agreed, conspired, combined, or confederated with others to cause the crime to be committed either by them, or one of them, or by some other person.

It is not necessary
1. that the conspiracy to commit the crime be expressed in any particular words or that words pass between the conspirators.
2. that the defendant do any act in furtherance of the offense conspired.

Crime of Moral Turpitude Analysis: Conspiracy to commit a crime involves moral turpitude when the underlying crime does. Moreover, the crime of moral turpitude ground of inadmissibility expressly states that conspiracy to commit a crime involving moral turpitude falls within the ground. 8 U.S.C. 1182(a)(2)(A)(i). (Note: the crime of moral turpitude ground of deportation does not contain similar language, 8 U.S.C. 1227(a)(2)(A)(i).)

Recommendation: Conspiracy to commit a crime involves moral turpitude when the underlying crime does.

Aggravated Felony Analysis: If the underlying offense would be an aggravated felony, 8 U.S.C. 1101(a)(43)(U) states that a "conspiracy" will also be an aggravated felony.

Recommendation: Conspiracy to commit a crime is an aggravated felony when the underlying crime is.

Chapter 782 – Homicide

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§ 782.051 – Attempted Felony Murder

Note: *The statutory offense of attempted felony murder was created effective October 1, 1998. Prior to that date, attempted felony murder was prosecuted under a "common-law" theory by applying the law of attempts to the crime of felony murder. This "common-law" version of felony murder was held to be nonexistent by the Supreme Court of Florida in* State v. Gray, *654 So. 2d 552 (Fla. 1995)*

§ 782.051(1) & (2) – Attempted Felony Murder (Act By Perpetrator)

Elements:

1) Defendant perpetrates or attempts to perpetrate any felony.
2) Defendant commits, aids, or abets an intentional act that is not an essential element of the felony that could – but does not – cause the death of another.

Crime of Moral Turpitude Analysis: The BIA has held that attempted murder is a crime involving moral turpitude. *Matter of Sanchez-Linn*, 20 I&N Dec. 362 (BIA 1991); *Matter of Awaijane*, 14 I&N Dec. 117 (BIA 1972). These cases, however, provide little, if no, analysis of what aspects of attempted murder make it a crime of moral turpitude. The FL offense of Attempted Felony Murder (Act by Perpetrator), unlike the common law crime of attempted murder, does not require that the defendant intend to murder the victim. Rather, it only requires that the defendant perpetrate (or attempt to perpetrate) any felony and that the defendant "commits, aids, or abets an intentional act that is not an essential element of the felony that could—but does not—cause the death of another." The crime therefore has less of a *mens rea* requirement than manslaughter (see below). In cases in which the underlying felony is itself a crime of moral turpitude (as demonstrated by the record of conviction), it is likely that the BIA would find that attempted felony murder also involves moral turpitude. It is less clear what would happen if the underlying felony did not involve moral turpitude. Given the lack of analysis in the BIA decisions on attempted murder, it is uncertain whether the BIA would consider attempted felony murder a crime of moral turpitude.

Recommendation: Given the uncertainty in the case law, attempted felony murder should be listed as possibly a crime of moral turpitude.

Aggravated Felony Analysis: The BIA has held that attempted murder is an aggravated felony as "murder" under the aggravated felony definition, 8 U.S.C. 1101(a)(43)(A). *In re Punu*, 22 I&N Dec. 224 (BIA 1998). Attempt offenses are treated the same as offenses where the crime was completed. 8 U.S.C. 1101(a)(43)(U). As discussed above, however, the FL attempted felony murder statute differs significantly from common law murder in that it does not require an intent to kill. Rather, it only requires that the defendant commit a felony and take an intentional action that is not an element of the felony offense that could result in someone's death. This should be sufficient to distinguish the FL offense from common law murder. However, the crime could also be an aggravated felony as a crime of violence if the defendant is sentenced to a year or more of imprisonment. Under 18 U.S.C. 16(b), the analysis is whether the crime "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." In a case where the underlying felony is itself a crime of violence (as demonstrated by the record of conviction), it is likely that the offense of attempted felony murder will be considered an aggravated felony. If, however, the underlying felony is not a crime of violence, it is less clear whether the crime is an aggravated felony. The analysis depends on whether the additional element of taking an intentional act that "could" result in someone's death makes the offense one in which there is a "substantial risk that physical force" would be used.

Recommendation: Given the uncertainty in the case law, attempted felony murder should be listed as possibly an aggravated felony as a crime of violence if a one-year sentence to imprisonment is imposed, especially if the underlying felony is a crime of violence. It is probably not an aggravated felony as a "murder" conviction.

§ 782.051(1) & (2) – Attempted Felony Murder (Injury Caused By Non-Perpetrator)

Elements:

1) Defendant perpetrates or attempts to perpetrate any felony enumerated in § 782.04(3).
2) A person is injured during the perpetration or attempted perpetration of the felony.
3) The injury is caused by a person not engaged in the perpetration or attempted perpetration of the felony.

Crime of Moral Turpitude Analysis: The link between the defendant and the victim is even more attenuated than in attempted felony murder (Act by Perpetrator). This makes it more likely that the offense would be a crime involving moral turpitude only if the underlying offense is.

Recommendation: Attempted felony murder (injury caused by non-perpetrator) is probably not a crime involving moral turpitude.

Aggravated Felony Analysis: In a case where the underlying felony is itself a crime of violence (as demonstrated by the record of conviction), it is likely that the offense of attempted felony murder will be considered an aggravated felony. If, however, the underlying felony is not a crime of violence, it is less clear whether the crime is an aggravated felony. The analysis depends on whether the additional element of an injury caused by a person not involved in perpetrating the crime makes the offense one in which there is a "substantial risk that physical force" would be used.

Recommendation: Given the uncertainty in the case law, attempted felony murder should be listed as possibly an aggravated felony as a crime of violence if a one-year sentence to imprisonment is imposed, especially if the underlying felony is a crime of violence.

§ 782.07 Manslaughter

Elements:

1) The victim is dead.
2) Either:
    a. The defendant intentionally caused the death of the victim;
    b. The defendant intentionally procured the death of the victim; or
    c. The death of the victim was caused by the **culpable negligence** of the defendant.

    ["Culpable negligence is more than a failure to use ordinary care toward others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard for the safety and welfare of the public, or such an indifference to the rights of others as is equivalent to an intentional violation of such rights.

    "The negligent act or omission must have been committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury." Fla. Standard Jury Instructions.]

3) The killing was not justifiable or excusable.

Crime of Moral Turpitude Analysis: The Florida statute does not distinguish between voluntary and involuntary manslaughter. Older BIA caselaw held that involuntary manslaughter is not a CMT, whereas voluntary manslaughter is. *Matter of Lopez*, 13 I&N Dec. 725 (BIA 1971); *Matter of Ghunaim*, 15 I&N Dec. 269 (BIA 1975); *Matter of Sanchez-Marin*, 11 I&N Dec. 264 (BIA 1965); *Matter of B-*, 4 I&N Dec. 493 (BIA 1951). However, in *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994), the BIA reevaluated these cases in light of its subsequent decisions holding that criminally reckless behavior can involve moral turpitude. In *Franklin*, the BIA concluded: "the precedent decisions cited above which contain the categorical statement that involuntary manslaughter is not a crime involving moral turpitude are hereby modified. The Board's decision in *Matter of Szegedi*, holding that a conviction for 'homicide by reckless conduct' was not a crime involving moral turpitude because the conviction did not require 'a specific intent to kill,' is hereby overruled." In *Franklin*, the BIA evaluated a Missouri involuntary manslaughter statute and concluded that it involves moral turpitude because it involves the "reckless" cause of another's death. Under Missouri law, "recklessness" involves a "conscious" disregard of a "substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." The BIA has defined recklessness as requiring a "conscious" disregard of a "substantial risk." *Franklin* at 15.

The FL manslaughter statute refers to "culpable negligence" rather than recklessness. There is a risk that FL "culpable negligence" fits under the BIA's definition of recklessness because it includes the "reckless disregard of human life" and requires a "conscious" act. However, because it is possible to fall within the definition for having "an entire want of care as to raise a presumption of a conscious indifference to consequences" or "a grossly careless disregard for the safety and welfare of the public," it is possible to argue that "culpable negligence" includes a lesser *mens rea* than recklessness.

Recommendation: Because of the chance that the BIA will interpret FL's "culpable negligence" *mens rea* as meeting its definition of "recklessness," manslaughter should be listed a probably a crime of moral turpitude.

Aggravated Felony Analysis: Manslaughter is not an aggravated felony as a crime of "murder." However, it could be classified as a "crime of violence" under 18 USC 16(a) or (b). If it is a crime of violence, defendants who receive a year of imprisonment or more will be classified as aggravated felons. There are two parts to the "crime of violence" definition. Under section 16(a), a crime is a "crime of violence" if it has as an "element" the "use, attempted use, or threatened use of physical force against the person or property of another." The FL manslaughter statute does not meet this test. Under section 16(b), however, an offense is a "crime of violence" if it is a "felony" that, "by its nature, involves a substantial risk that *physical force* against the person or property of another may be used in the course of committing the offense (emphasis added)."

The BIA, in *Matter of Alcantar*, 20 I&N Dec. 801 (BIA 1994), analyzed an Illinois involuntary manslaughter statute and held that it was a crime of violence under section 16(b) because it involved "reckless behavior" which "'by its nature' involves a substantial risk of physical force against the person or property of another." *Alcantar* at 28 (citing *U.S. v. Springfield*, 829 F.2d 860 (9th Cir. 1987). Note: this case appears to reject the argument that there is a difference between a substantial risk of injury and a substantial risk that physical force was used. *See Matter of Sweetser* (child neglect statute not a crime of violence because acts of omission are included). Acts of omission, which clearly do not involve the use of force, can constitute manslaughter under the Florida statute. *But see In re Martin*, 23 I&N Dec. 491 (BIA 2002) (third degree, misdemeanor assault under a Connecticut statute was a crime of violence under 18 USC 16(a)).

Similar to the crime of moral turpitude analysis, the analysis of whether the FL manslaughter statute is a "crime of violence" will likely depend on whether "culpable negligence" fits the BIA's definition of recklessness.

Recommendation: Because of the chance that the BIA will interpret FL's "culpable negligence" *mens rea* as meeting its definition of "recklessness," manslaughter should be listed as probably an aggravated felony as a crime of violence if a one-year sentence to imprisonment or more is imposed.

§ **782.07(2) – Aggravated Manslaughter of an Elderly Person or Disabled Adult**

Elements:

1. The Defendant by culpable negligence:
    a. failed or omitted to provide the victim with the care, supervision, and services necessary to maintain the victim's physical or mental health; or
    b. failed to make a reasonable effort to protect the victim from abuse, neglect, or exploitation by another person.
2. In so doing, the defendant caused the death of the victim.
3. the Defendant was a caregiver for the victim.
4. the Victim was:
    a. a person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who has one or more physical or mental limitations that restrict the person's ability to perform the normal activities of daily living; or
    b. a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired.
    Neglect of an elderly person or disabled adult may be based on repeated conduct or on a single incident or omission that resulted in, or reasonably could have been expected to result in, serious physical or mental injury, or a substantial risk of death, to a the victim.

"[Culpable negligence is more than a failure to use ordinary care for others. For negligence to be called culpable negligence, it must be gross and flagrant. The negligence must be committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily harm."

Note: *§ 782.07(2) states: "A person who causes the death of any elderly person or disabled adult by culpable negligence under § 825.102(3) commits aggravated manslaughter of an elderly person or disabled adult, a felony of the first degree …" This language appears to exclude* willful *neglect of an elderly person or disabled adult under § 825.102(3), which applies to a person who "willfully or by culpable negligence neglects a child."*

Immigration Analysis: Same as aggravated manslaughter of a child, § 782.07(3).

§ **782.07(3) – Aggravated Manslaughter of a Child**

1. The Defendant by culpable negligence:
    a. failed or omitted to provide the victim with the care, supervision, and services necessary to maintain the victim's physical or mental health; or
    b. failed to make a reasonable effort to protect the victim from abuse, neglect, or exploitation by another person.
2. In so doing, the defendant caused the death of the victim.
3. the Defendant was a caregiver for the victim.
4. the Victim was under the age of 18 years.

Neglect of a child may be based on repeated conduct or on a single incident or omission that resulted in, or reasonably could have been expected to result in, serious physical or mental injury, or a substantial risk of death, to a child.

"[Culpable negligence is more than a failure to use ordinary care for others. For negligence to be called culpable negligence, it must be gross and flagrant. The negligence must be committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily harm."

Note: *§ 782.07(3) states: "A person who causes the death of any person under the age of 18 by culpable negligence under § 827.03(3) commits aggravated manslaughter of a child, a felony of the first degree …" This language appears to exclude* willful *neglect of a child under § 827.03(3), which applies to a person who "willfully or by culpable negligence neglects a child."*

Crime of Moral Turpitude Analysis: The Florida statute does not distinguish between voluntary and involuntary manslaughter. Older Board of Immigration Appeals (BIA) case law held that involuntary manslaughter is not a crime of moral turpitude, whereas voluntary manslaughter is. *Matter of Lopez*, 13 I&N Dec. 725 (BIA 1971); *Matter of Ghunaim*, 15 I&N Dec. 269 (BIA 1975); *Matter of Sanchez-Marin*, 11 I&N Dec. 264 (BIA 1965); *Matter of B-*, 4 I&N Dec. 493 (BIA 1951). However, in *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994), the BIA reevaluated these cases in light of its subsequent decisions holding that *criminally reckless* behavior can involve moral turpitude. In *Franklin*, the BIA concluded: "the precedent decisions cited above which contain the categorical statement that involuntary manslaughter is not a crime involving moral turpitude are hereby modified. The Board's decision in *Matter of Szegedi*, holding that a conviction for 'homicide by reckless conduct' was not a crime involving moral turpitude because the conviction did not require 'a specific intent to kill,' is hereby overruled." In *Franklin*, the BIA evaluated a Missouri involuntary manslaughter statute and concluded that it involves moral turpitude because it involves the "reckless" cause of another's death. Under Missouri law, "recklessness" involves a "conscious" disregard of a "substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." The BIA has defined recklessness as requiring a "conscious" disregard of a "substantial risk." *Franklin* at 15.

The FL aggravated manslaughter of a child statute refers to "culpable negligence" rather than recklessness. It is possible that FL "culpable negligence" fits under the BIA's definition of recklessness because it includes the "reckless disregard of human life" and requires a "conscious" act. However, because FL's "culpable negligence" definition *also* includes "an entire want of care as to raise a presumption of a conscious indifference to

consequences" or "a grossly careless disregard for the safety and welfare of the public," it is possible to argue that the minimal *mens rea* required to commit "culpable negligence" is something less than recklessness, as defined by the BIA.

It is possible that the BIA or the Eleventh Circuit will find that the *mens rea* of culpable negligence is sufficient to support a finding of moral turpitude in a manslaughter case, because it is more severe than even gross negligence. *Turner v. PCR*, 754 So. 2d 683, 687 n. 3 (S.Ct. Fla. 2000) (distinguishing culpable negligence from gross negligence).

Moreover, the courts may find that aggravated manslaughter of a child is a crime of moral turpitude regardless of the *mens rea* of the crime because the crime involves the death of a *child*. Recently, the Eleventh Circuit held that aggravated child abuse is a crime involving moral turpitude. In *Garcia v. Attorney General*, 329 F.3d 1217 (11th Cir. 2003), held that aggravated child abuse under Florida law is a crime of moral turpitude "[b]ased upon the inherent nature of the crime of aggravated child abuse." The court did not engage in any other reasoning to reach this conclusion, but cited to the Ninth Circuit's decision in *Guerrero de Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969) as support. The court summarized the decision in that case as finding that the infliction of "cruel corporal punishment or injury upon a child is so offensive to American ethics as to end the debate of whether moral turpitude was involved in the crime of child beating." *Id*. at 1222. Although the *mens rea* requirement for the crime of aggravated manslaughter of a child is lesser than the requirement for aggravated child abuse, it, in my professional opinion, is likely that the Eleventh Circuit will find that aggravated manslaughter of a child is a crime of moral turpitude because it will find that the crime, like aggravated child abuse, is "offensive to American ethics."

Importantly, the government routinely charges all forms of manslaughter in Florida as a crime involving moral turpitude.

If a client is going to plead guilty to aggravated manslaughter of a child, it should be made clear at the plea hearing that she is pleading guilty to the "culpable negligence" element of the crime based on "grossly careless disregard" only. This *may* help in any later argument about whether or not the crime is a "crime of moral turpitude."

Recommendation: Aggravated manslaughter of a child should be listed as probably a crime involving moral turpitude.

Aggravated Felony Analysis: Aggravated manslaughter of a crime is not an aggravated felony as a crime of "murder." 8 U.S.C. § 1101(a)(43)(A). However, it could be classified as an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) as a "crime of violence," as defined under 18 U.S.C. § 16(a) or (b). A crime of violence is an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if the sentence received is "imprisonment" of at least a year (regardless of any suspension of the term of imprisonment).

There are two parts to the "crime of violence" definition. Under § 16(a), an offense is a "crime of violence" if it has as an "element" the "use, attempted use, or threatened use of physical force against the person or property of another." The FL manslaughter statute does not meet this test. Under § 16(b), however, an offense is a "crime of violence" if it is a "felony" that, "by its nature, involves a substantial risk that *physical force* against the person or property of another may be used in the course of committing the offense (emphasis added)."

The BIA, in *Matter of Alcantar*, 20 I&N Dec. 801 (BIA 1994), analyzed an Illinois involuntary manslaughter statute and held that it was a crime of violence under section 16(b) because it involved "reckless behavior" which "'by its nature' involves a substantial risk of physical force against the person or property of another." *Alcantar* at 28 (citing *U.S. v. Springfield*, 829 F.2d 860 (9th Cir. 1987)). Given that the BIA's analysis turned on the crime involving "reckless behavior," the analysis of whether the FL manslaughter statute is a "crime of violence" will likely depend on whether "culpable negligence" fits the BIA's definition of recklessness (see above discussion).

Recommendation: Aggravated manslaughter of a child (with a sentence of a year or more *imprisonment*) is probably going to be considered an aggravated felony.

§ 784.011 – Assault

Elements:

3) The defendant intentionally and unlawfully threatened, either by word or act, to do violence to the victim.
4) At the time, the defendant appeared to have the ability to carry out the threat.
5) The act of the defendant created in the mind of the victim a well-founded fear that the violence was about to take place.

Crime of Moral Turpitude Analysis: Numerous BIA cases have held that simple assault does not involve moral turpitude if the offense does not involve the use of a deadly weapon, evil intent, or reckless conduct. *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1992); *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992); *Matter of E*, 1 I&N Dec. 505 (BIA 1943). Because the FL assault statute does not contain any of these elements, it is not a crime of moral turpitude.

Aggravated Felony Analysis: Florida assault is a second degree misdemeanor punishable by up to 60 days incarceration. Because the maximum possible punishment is under a year, it cannot be considered an aggravated felony as a crime of violence.

Domestic Violence Ground of Deportation: Noncitizens are subject to deportation for having been convicted of a crime of domestic violence after September 30, 1996. This deportation ground applies to any noncitizen "who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment." The term "crime of domestic violence" means any crime of violence as defined in 18 U.S.C. 16 against a person committed "by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government."

In Florida, the government routinely charges noncitizens with assault or battery offenses under this ground of deportation whenever the police arrest affidavit or record of conviction shows that the victim falls within a category described above. While the government should not be permitted to rely on a police arrest affidavit to establish that a crime is one involving domestic violence, the government routinely does so and this practice has been accepted by certain immigration judges. The argument that police arrest affidavits are not part of the record of conviction is complicated in Florida because the state is permitted to use the arrest affidavit as the charging document in misdemeanor cases if the case is charged under the county ordinance stating that all violations of state law are also violations of the county ordinance. In practice, however, an "information" is filed as the charging document in most domestic violence cases.

Recommendation: This offense may fall within the domestic violence ground of deportation.

§ 784.021 – Aggravated Assault

Elements:

1) The defendant intentionally and unlawfully threatened, either by word or act, to do violence to the victim.
2) At the time, the defendant appeared to have the ability to carry out the threat.
3) The act of the defendant created in the mind of the victim a well-founded fear that the violence was about to take place.
4) The assault was made either:
    a. with a deadly weapon [but without the intent to kill]; or
    b. with the intent to commit a felony upon the victim.

Crime of Moral Turpitude Analysis: The BIA has ruled in many cases that assault with a deadly weapon is a crime of moral turpitude. *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976); *Matter of O-*, 3 I&N Dec. 193 (BIA 1948); *Matter of P-*, 2 I&N Dec. 5 (Att. Gen. 1947); *Matter of N-*, 2 I&N Dec. 201 (BIA 1944); *Matter of R--*, 1 I&N Dec. 209 (BIA 1942). *But see* Carr v. INS, 86 F.3d 949 (9th Cir. 1996) (conviction under Washington law of assault with a deadly weapon is not a crime of moral turpitude). The Attorney General has also ruled that assault without a deadly weapon but with intent to do great bodily harm is a crime of moral turpitude. *Matter of P-*, 3 I&N Dec. 5 (BIA 1947). Where there is an "aggravating dimension" in an assault offense, the BIA has also found moral turpitude. *See In re Fualaau*, 21 I&N Dec. 475 (BIA 1996) (citing *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988).

The Florida aggravated assault statute contains two prongs. The offense includes use of a deadly weapon or the intent to commit "a felony" upon the victim. There is no requirement that the assault be made with the intent to do great bodily harm. Defendants unambiguously convicted under the "deadly weapon" prong of the statute will likely be convicted of a crime of moral turpitude. Whether or not defendants convicted under the "intent to commit a felony" prong will be convicted of a crime of moral turpitude likely depends on whether the "felony" that is being charged is itself a crime of moral turpitude. *Matter of Short*, 20 I&N Dec. 136 (BIA 1989) (assault with intent to commit a felony is not a CMT unless the underlying felony involves moral turpitude) (Note: As a practical matter, it is very rare for an individual to be charged under this prong of the aggravated assault statute.)

Recommendation: Aggravated assault is probably a crime involving moral turpitude.

Aggravated Felony Analysis: The definition of an aggravated felony includes any "crime of violence" for which a term of "imprisonment" of a year or more is imposed. In *In re Martin*, 23 I&N Dec. 491 (BIA 2002), the BIA found that third degree misdemeanor assault under a Connecticut statute was a crime of violence under 18 U.S.C. 16(a), which defines a "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Although the Connecticut statute did not explicitly contain as an "element" the "use, attempted use, or threatened use of physical force," the BIA nonetheless held that it did because "the Second Circuit's criminal jurisprudence recognizes assault as an 'offense that generically involves use of force against another person.'" The BIA also relied on other circuit case law for the proposition that "state-law assault offenses involving the intentional infliction of physical injury have 'as an element the use of physical force.'"

Under the Florida statute, the use, attempted use, or threatened use of physical force is not an explicit element of the crime. However, the victim must have been aware that the defendant was "about to" inflict violence on him or her. And the defendant must have been acting "intentionally and unlawfully." As a result, it is likely that the BIA would analyze the Florida statute as requiring the intentional threat of inflicting physical injury and, following its case law, equate this as the threat of use of physical force. Even though neither the BIA nor the Eleventh Circuit has ruled on the question, it is likely that the Florida statute would be found to be a "crime of violence." Because aggravated assault is a felony, defendants who receive a year or more of imprisonment will likely be convicted of an aggravated felony. Defendants should attempt to plea to a sentence of less than a year.

Recommendation: Aggravated assault is probably an aggravated felony as a crime of violence if a year or more imprisonment is imposed.

Domestic Violence Ground of Deportation: Same analysis as for assault under § 784.011, except that aggravated assault is a felony and cannot be charged by the arrest affidavit.

Firearm Ground of Deportation: Noncitizens are subject to deportation for having been convicted of a firearm offense. If the record of conviction shows that the "deadly weapon" used was a firearm, the conviction will likely also be considered a firearm offense.

§ 784.03 – Battery; felony battery

Elements:

Either:

a. The defendant intentionally touched or struck the victim against his or her will; or
b. The defendant intentionally caused bodily harm to the victim.

Battery is a felony if the defendant has a prior conviction for battery, aggravated battery, or felony battery.

Crime of Moral Turpitude Analysis: Battery is typically not considered a crime of moral turpitude if the offense does not require "great bodily harm," the use of a deadly weapon, or another aggravating factor. Because the Florida battery statute does not contain any of these elements, it is not a crime of moral turpitude.

Recommendation: Battery is not a crime involving moral turpitude.

Aggravated Felony Analysis: For the same reasons discussed above regarding aggravated assault under § 784.021, battery is likely a crime of violence within the meaning of the aggravated felony definition. Defendants should seek to avoid the maximum punishment of a year's imprisonment in order to avoid being considered an aggravated felon.

Recommendation: Battery is probably an aggravated felony as a crime of violence, but only if the maximum penalty of a years' imprisonment is imposed.

Domestic Violence Ground of Deportation: Same analysis as for assault under § 784.011.

§ 784.041 – Felony Battery

Elements:

1) The defendant actually and intentionally touched the victim.
2) The defendant caused great bodily harm, permanent disability, or permanent disfigurement to the victim.

Note: Felony battery under § 784.041 differs from aggravated battery under § 784.045(1)(a) in that the defendant need not intend to cause great bodily harm, permanent disability, or permanent disfigurement. See Lewis v. State, *817 So. 2d 933 (Fla. 4th DCA 2002)*.

Crime of Moral Turpitude Analysis: The Attorney General has held that assault with intent to do great bodily harm is a crime of moral turpitude. *Matter of P-*, 2 I&N Dec. 5 (Att. Gen. 1947). The Florida statute does not require an *intent* to great bodily harm, but the *causation* of great bodily harm is an element of the offense. In *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992), the BIA found that an assault offense that had causation of great bodily harm as an element nonetheless did not contain moral turpitude because it required only a showing of "criminal negligence" regarding the causation of great bodily harm (rather than recklessness or specific intent). The Florida statute requires an intentional assault but defendants are strictly liable for the causation of great bodily harm. Because the Florida statute requires no intent whatsoever regarding injury, not even a negligent one, it should not be a crime of moral turpitude under the BIA's analysis in *Matter of Perez-Contreras.* However, because of the lack of controlling case law on this issue, defendants should not rely on this conclusion in making decisions about whether or not to take a plea offer under this statute.

Recommendation: Felony battery may be a crime involving moral turpitude.

Aggravated Felony Analysis: For the same reasons discussed above regarding aggravated assault under § 784.021, felony battery is likely a crime of violence within the meaning of the aggravated felony definition if a sentence of one year or more is imposed.

Domestic Violence Ground of Deportation: Same analysis as for assault under § 784.011.

§ 784.045 – Aggravated Battery

§ 784.045(1)(a)(1) – Aggravated Battery – Harm/Disability/Disfigurement

Elements:

1) The defendant committed a battery on the victim by either:

a. intentionally touching or striking the victim against his or her will; or
b. intentionally causing bodily harm to the victim.

2) In committing the battery, the defendant intentionally or knowingly caused great bodily harm, permanent disability, or permanent disfigurement to the victim.

Crime of Moral Turpitude Analysis: The Attorney General has held that assault with intent to do great bodily harm is a crime of moral turpitude. *Matter of P-*, 2 I&N Dec. 5 (Att. Gen. 1947). Because Florida's offense requires that the defendant "intentionally or knowingly" cause "great bodily harm," it will likely be held a crime of moral turpitude. (However, one could argue that the minimum conduct required for violating the statute is "knowledge" instead of "intent" and try to distinguish the case law on this point.)

Recommendation: Assault with intent to do great bodily harm is probably a crime involving moral turpitude.

Aggravated Felony Analysis: For the same reasons discussed above regarding aggravated assault under § 784.021, this offense is likely a crime of violence within the meaning of the aggravated felony definition if a sentence of one year or more is imposed.

Domestic Violence Ground of Deportation: Same analysis as for assault under § 784.011

§ 784.045(1)(a)(2) – Aggravated Battery – Deadly Weapon

Elements:

1) The defendant committed a battery on the victim by either:
   a. intentionally touching or striking the victim against his or her will; or
   b. intentionally causing bodily harm to the victim.
2) In committing the battery, the defendant used a deadly weapon.

Crime of Moral Turpitude Analysis: The BIA has ruled in many cases that assault with a deadly weapon is a crime of moral turpitude, regardless of whether the defendant intended to harm the victim. *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976); *Matter of O-*, 3 I&N Dec. 193 (BIA 1948); *Matter of P-*, 2 I&N Dec. 5 (Att. Gen. 1947); *Matter of N-*, 2 I&N Dec. 201 (BIA 1944); *Matter of R--*, 1 I&N Dec. 209 (BIA 1942). *But see Carr v. INS*, 86 F.3d 949 (9th Cir. 1996) (conviction under Washington law of assault with a deadly weapon is not a crime of moral turpitude because there was no intent to cause injury or harm). Because use of a deadly weapon is required under the Florida statute, the offense is very likely a crime of moral turpitude.

Recommendation: Assault with a deadly weapon is probably a crime involving moral turpitude.

Aggravated Felony Analysis: For the same reasons discussed above regarding aggravated assault under § 784.021, this offense is probably a crime of violence within the meaning of the aggravated felony definition.

Domestic Violence Ground of Deportation: Same analysis as for assault under § 784.011.

Firearm Ground of Deportation: If the record of conviction shows that a firearm was the "deadly weapon" used during the commission of the crime, the offense will be considered a firearm offense and subject the person to deportation under the firearm ground of deportation.

§ 784.045(1)(b) – Aggravated Battery – Pregnant Woman

Elements:

1) The defendant committed a battery on the victim by either:
   c. intentionally touching or striking the victim against his or her will; or
   d. intentionally causing bodily harm to the victim.
2) In committing the battery, the defendant knew or should have known the victim was pregnant.

Crime of Moral Turpitude Analysis: Neither the BIA nor the Eleventh Circuit has ruled on whether battery on a pregnant woman is a crime of moral turpitude. The Florida statute is essentially simple battery with the added element that the defendant "knew or should have known the victim was pregnant." Since simple battery is routinely not considered a crime involving moral turpitude, the question becomes whether the victim's status as pregnant changes the analysis. The answer to this is unclear. The analysis typically depends on whether a deadly weapon was involved or whether the crime involved an intent to do great bodily harm. Neither factor is present under this statute. However, the BIA has held that an "aggravating dimension" to an assault or battery crime, including victim status, can make it a crime involving moral turpitude. In the case of assault or battery on a law enforcement official, the BIA has held that the crime is one involving moral turpitude if the crime 1) resulted in bodily harm to the victim and 2) it required that the defendant know the victim was a law enforcement officer. *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). If a law enforcement victim is equated with a pregnant victim, the analysis under *Matter of Danesh* would require that the victim suffer bodily harm. Under the Florida statute, an intentional touching or striking against the victim's will, not bodily harm, is all that is required. If the record of conviction does not make clear that the victim suffered bodily harm, there is an argument that, even under *Matter of Danesh*, a conviction under Florida's aggravated battery on a pregnant woman is not a crime involving moral turpitude.

Recommendation: Aggravated battery on a pregnant woman is possibly a crime involving moral turpitude.

Aggravated Felony Analysis: For the same reasons discussed above regarding aggravated assault under § 784.021, this offense is likely a crime of violence within the meaning of the aggravated felony definition if a one-year prison sentence or more is imposed.

Domestic Violence Ground of Deportation: Same analysis as for assault under § 784.011.

§ 784.047 – Violating Protection Injunction

Elements:

1) The defendant violated an injunction for protection against repeat violence issued pursuant to § 784.046, or a foreign protection order accorded full faith and credit pursuant to § 741.315.
2) The defendant did so by:
    a. Refusing to vacate the dwelling that the parties share;
    b. Going to the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member;
    c. Committing an act of repeat violence against the petitioner;
    d. Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner; or
    e. Telephoning, contacting, or otherwise communicating with the petitioner directly or indirectly, unless the injunction specifically allows indirect contact through a third party.

Crime of Moral Turpitude Analysis: Neither the BIA nor the Eleventh Circuit has held that violation of a protection order is a crime of moral turpitude. However, the BIA has held that criminal contempt under New York law for violating a protection order is a crime involving moral turpitude. *In re Aldabesheh*, 22 I&N Dec. 983 (BIA 1999). Violation of the New York statute required the intentional placement of the victim protected by the order "in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon, dangerous instrument or what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm or by means of a threat or threats. In contrast, the minimum conduct required by the Florida statute is refusing to vacate a shared dwelling or having contact or communication with the victim. No harm or threat of harm is required. As such, it is unlikely that the Florida statute would be found to involve moral turpitude.

Recommendation: This offense is probably not a crime involving moral turpitude.

Aggravated Felony Analysis: Since use of force or threat of use of force is not required, this offense will not be considered an aggravated felony as a crime of violence.

Domestic Violence Ground of Deportation: This offense, if occurring after September 30, 1996, will make a noncitizen subject to deportation under the domestic violence ground of deportation. The domestic violence ground of deportation explicitly includes violation of a protection order.

Recommendation: This offense falls within the domestic violence ground of deportation if it occurred after September 30, 1996.

§ 784.048 – Stalking

§ 784.048(2) – Stalking

Elements:

1) The defendant willfully, maliciously, and repeatedly followed or harassed the victim.

"Harass" means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.

Crime of Moral Turpitude Analysis: In *Matter of Ajami*, Int. Dec. 3405 (BIA 1999), the BIA held that aggravated stalking under a Michigan statute was a crime involving moral turpitude. The statute at issue in that case required 1) a willful act, 2) a course of conduct rather than a single act, and 3) a credible threat that caused fear in the victim. Because the Florida statute only requires following or harassment and not a "credible threat," it may not be considered a crime involving moral turpitude.

Recommendation: Stalking is possibly a crime of moral turpitude.

Aggravated Felony Analysis: Since use of force or threat of use of force is not required, this offense is probably not an aggravated felony as a crime of violence if a sentence of one-year imprisonment or more is imposed.

Domestic Violence Ground of Deportation: This offense, if occurring after September 30, 1996, will make a noncitizen subject to deportation under the domestic violence ground of deportation. The domestic violence ground of deportation explicitly includes stalking.

§ 784.048(3) – Aggravated Stalking – Credible Threat

Elements:

1) The defendant willfully, maliciously, and repeatedly followed or harassed the victim.
2) The defendant made a credible threat with the intent to place the victim in reasonable fear of death or bodily injury.

"Harass" means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.

"Credible threat" means a threat made with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause bodily injury to, a person.

Crime of Moral Turpitude Analysis: In *Matter of Ajami*, Int. Dec. 3405 (BIA 1999), the BIA held that aggravated stalking under a Michigan statute was a crime involving moral turpitude. The statute at issue in that case was similar to the Florida statute in that it required 1) a willful act, 2) a course of conduct rather than a single act, and 3) a credible threat that caused fear in the victim. It is highly likely that the BIA will find that Florida's aggravated stalking statute is a crime involving moral turpitude.

Recommendation: Florida aggravated stalking should be listed as a crime involving moral turpitude.

Aggravated Felony Analysis: Aggravated stalking under Florida law is most likely a crime of violence within the aggravated felony definition. As a result, a defendant sentenced to a year or more imprisonment for aggravated

stalking is likely convicted of an aggravated felony. Under 18 U.S.C. 16(a), the crime is probably a crime of violence because it has as an element the threatened use of physical force. It is probably also a crime of violence under 16(b) because it is "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

Recommendation: Florida aggravated stalking with a sentence of one year or more imprisonment should be listed as an aggravated felony.

Domestic Violence Ground of Deportation: This offense, if occurring after September 30, 1996, will make a noncitizen subject to deportation under the domestic violence ground of deportation. The domestic violence ground of deportation explicitly includes stalking.

§ 784.048(4) – Aggravated Stalking – Violation of Protective Order

Elements:

1) The defendant willfully, maliciously, and repeatedly followed or harassed the victim.
2) The defendant did so in violation of:
    a. an injunction for protection against repeat violence.
    b. an injunction for protection against domestic violence.
    c. any other court imposed prohibition of conduct toward the victim or the victim's property.

"Harass" means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.

Crime of Moral Turpitude Analysis: In *Matter of Ajami*, Int. Dec. 3405 (BIA 1999), the BIA held that aggravated stalking under a Michigan statute was a crime involving moral turpitude. The statute at issue in that case required 1) a willful act, 2) a course of conduct rather than a single act, and 3) a credible threat that caused fear in the victim. Because the Florida statute only requires conduct less than a "credible threat," it may not be considered a crime involving moral turpitude.

Recommendation: This offense is possibly a crime involving moral turpitude.

Aggravated Felony Analysis: Since use of force or threat of use of force is not required, this offense should not be considered an aggravated felony as a crime of violence.

Domestic Violence Ground of Deportation: This offense, if occurring after September 30, 1996, will make a noncitizen subject to deportation under the domestic violence ground of deportation. The domestic violence ground of deportation explicitly includes stalking.

§ 784.048(5) – Aggravated Stalking – Victim Under 16

Elements:

1) The defendant willfully, maliciously, and repeatedly followed or harassed the victim.
2) At the time of the defendant's actions, the victim was under 16 years of age.

"Harass" means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.

Immigration analysis: Same as for stalking under § 784.048(2).

§ 784.05 Culpable Negligence

§ 784.05(1) – Culpable Negligence – Exposure to Injury

Elements:

1) The defendant exposed the victim to personal injury. [Actual injury is not required.]
2) The defendant did so through culpable negligence.

"[C]ulpable negligence is more than a failure to use ordinary care for others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard for human life, or for the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard for the safety and welfare of the public, or shows such an indifference to the rights of others as is equivalent to an intentional violation of such rights." Fla. Standard Jury Instr.

Crime of Moral Turpitude Analysis: Neither the BIA nor the Eleventh Circuit has ruled on whether the Florida culpable negligence statute, or one like it, is a crime involving moral turpitude. Given that the traditional indicia of moral turpitude are absent (malicious intent, contrary to the morals of society, fraud, recklessness or specific intent), it is unlikely to be found to involve moral turpitude.

Recommendation: Culpable negligence is probably not a crime of moral turpitude.

Aggravated Felony Analysis: This offense is probably not a crime of violence under the BIA's reasoning in *In re Sweetser*, 22 I&N Dec. 709 (BIA 1999). In *Sweetser*, the BIA held that criminally negligent child abuse under Colorado law was not a "crime of violence" within the meaning of the aggravated felony definition. The court found the required *mens rea* for the crime was irrelevant to the analysis and focused instead on whether the crime inherently involved a "substantial risk that physical force" would be used. 18 U.S.C. § 16(b) (defining crime of violence as a felony that "by its nature, involves a substantial risk that *physical force* against the person or property of another may be used in the course of committing the offense") (emphasis added). The court held that, because the record of conviction in the case showed that the defendant was convicted of permitting "a child to be unreasonably placed in a situation which poses a threat," the crime was not a crime of violence. The BIA reasoned that "[n]o force or violence is necessary. Instead, only an act of omission is required for a conviction under this portion of the state criminal statute."

Given that Florida culpable negligence, like the statute at issues in *Sweetser*, criminalizes acts of omission, it is possible that the offense will not be considered a crime of violence.

Recommendation: Culpable negligence is probably not a crime of violence aggravated felony, even if a one year sentence to imprisonment is imposed.

§ 784.05(2) – Culpable Negligence – Actual Personal Injury

Elements:

1) The defendant inflicted actual personal injury on the victim.
2) The defendant did so through culpable negligence.

"[C]ulpable negligence is more than a failure to use ordinary care for others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard for human life, or for the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard for the safety and welfare of the public, or shows such an indifference to the rights of others as is equivalent to an intentional violation of such rights." Fla. Standard Jury Instr.

Immigration Analysis: Same as for § 784.05(1) – Culpable Negligence – Exposure to Injury.

§ 784.05(3) – Culpable Negligence – Leaving Loaded Firearm Accessible to Minor

Elements:

1) The defendant exposed the victim to personal injury.
2) The defendant did so by leaving a loaded firearm within the reach or easy access of a minor.
3) The defendant did so through culpable negligence.
4) The minor obtained the firearm and used the firearm to inflict injury or death upon himself or herself or any other person.

"[C]ulpable negligence is more than a failure to use ordinary care for others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard for human life, or for the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard for the safety and welfare of the public, or shows such an indifference to the rights of others as is equivalent to an intentional violation of such rights." Fla. Standard Jury Instr.

Crime of Moral Turpitude and Aggravated Felony Analyses: Same as for § 784.05(1) – Culpable Negligence – Exposure to Injury.

Firearm Ground of Deportation: If the defendant violates the statute by storing or leaving a loaded firearm within access of a minor, this crime will be considered a firearm offense within the meaning of the firearm ground of deportation.

§ 784.07 Assaults & Batteries of LEOs, Firefighters, & Other Specified Officers[1]

Assault on a LEO, Firefighter, or Other Specified Officer

Elements:

1) The defendant intentionally and unlawfully threatened, either by word or act, to do violence to the victim.
2) At the time, the defendant appeared to have the ability to carry out the threat.
3) The act of the defendant created in the mind of the victim a well-founded fear that the violence was about to take place.
4) The victim was at the time a LEO, Firefighter, or Other Specified Officer.
5) The defendant knew the victim was a LEO, Firefighter, or Other Specified Officer.
6) At the time of the assault, the victim was engaged in the lawful performance of his or her duties.

Crime of Moral Turpitude Analysis: In *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988), the BIA found that aggravated assault against a peace officer under a Texas statute was a crime of moral turpitude because 1) it resulted in bodily harm to the victim; and 2) it required that the defendant know the victim was a peace officer. Because the Florida statute does not require that the defendant inflict bodily harm, it should not be a crime of moral turpitude under *Matter of Danesh*. Defendants should be advised, however, that the government routinely charges this crime as a crime involving moral turpitude.

Recommendation: This offense is possibly a crime involving moral turpitude.

Aggravated Felony Analysis: Same as for assault.

Aggravated Assault on a LEO, Firefighter, or Other Specified Officer

Elements:

The defendant intentionally and unlawfully threatened, either by word or act, to do violence to the victim.

1) At the time, the defendant appeared to have the ability to carry out the threat.
2) The act of the defendant created in the mind of the victim a well-founded fear that the violence was about to take place.
3) The assault was made either:
    c. with a deadly weapon [but without the intent to kill]; or
    d. with the intent to commit a felony upon the victim.
5) The victim was at the time a LEO, Firefighter, or Other Specified Officer.
6) The defendant knew the victim was a LEO, Firefighter, or Other Specified Officer.
7) At the time of the assault, the victim was engaged in the lawful performance of his or her duties.

[1] *See* § 784.07(2).

There is a 3-year minimum-mandatory sentence if the victim is a LEO.

Crime of Moral Turpitude Analysis: Same as for aggravated assault.

Aggravated Felony Analysis: Same as for assault.

Firearm Ground of Deportation: If the record of conviction shows that the deadly weapon was a firearm, the offense will be considered a firearm offense within the meaning of the firearm ground of deportation.

Battery on a LEO, Firefighter, or Other Specified Officer

Elements:

1) The defendant committed a battery on the victim by either:
    a. intentionally touching or striking the victim against his or her will; or
    b. intentionally causing bodily harm to the victim.
2) The victim was at the time a LEO, Firefighter, or Other Specified Officer.
3) The defendant knew the victim was a LEO, Firefighter, or Other Specified Officer.
4) At the time of the assault, the victim was engaged in the lawful performance of his or her duties.

There is a 3-year minimum-mandatory sentence if the defendant possessed a firearm or destructive device during the commission of the offense. There is a 8-year minimum-mandatory sentence if the defendant possessed a semiautomatic firearm and its high-capacity detachable box magazine or a machine gun during the commission of the offense.

Crime of Moral Turpitude Analysis: In *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988), the BIA found that aggravated assault against a peace officer under a Texas statute was a crime of moral turpitude because 1) it resulted in bodily harm to the victim; and 2) it required that the defendant know the victim was a peace officer. The Florida statute requires either 1) an intentional touching or striking of the victim against his or her will; *or* 2) the intentional causation of bodily harm to the victim. The statute is therefore divisible. If the defendant is unambiguously convicted under the prong of the statute involving bodily harm, he or she will probably be considered to have a CMT under *Matter of Danesh*. However, an ambiguous record of conviction or a conviction that clearly was under the intentional touching or striking prong of the statute should not be a CMT. However, defendants should be warned that the government routinely charges all convictions under this statute as crimes involving moral turpitude.

Aggravated Felony Analysis: Same as for battery.

Firearm Ground of Deportation: If the defendant possessed a firearm or destructive device during the commission of the offense, she or he will be subject to a sentencing enhancement. Because the firearm enhancement is not an element of the offense, however, it should not convert this offense into a firearm offense under the firearm ground of deportation.

Aggravated Battery on a LEO, Firefighter, or Other Specified Officer – Harm/Dis ability/Disfigurement

Elements:

1) The defendant committed a battery on the victim by either:
    a. intentionally touching or striking the victim against his or her will; or
    b. intentionally causing bodily harm to the victim.
2) In committing the battery, the defendant intentionally or knowingly caused great bodily harm, permanent disability, or permanent disfigurement to the victim.
3) The victim was at the time a LEO, Firefighter, or Other Specified Officer.
4) The defendant knew the victim was a LEO, Firefighter, or Other Specified Officer.
5) At the time of the assault, the victim was engaged in the lawful performance of his or her duties.

There is a 5-year minimum-mandatory sentence if the victim is a LEO.

Crime of Moral Turpitude Analysis: This is straightforwardly a crime involving moral turpitude under *Matter of Danesh*.

Aggravated Felony Analysis: Same as for aggravated battery.

Aggravated Battery on a LEO, Firefighter, or Other Specified Officer – Deadly Weapon

Elements:

1) The defendant committed a battery on the victim by either:
    a. intentionally touching or striking the victim against his or her will; or
    b. intentionally causing bodily harm to the victim.
2) In committing the battery, the defendant used a deadly weapon.
3) The victim was at the time a LEO, Firefighter, or Other Specified Officer.
4) The defendant knew the victim was a LEO, Firefighter, or Other Specified Officer.
5) At the time of the assault, the victim was engaged in the lawful performance of his or her duties.

There is a 5-year minimum-mandatory sentence if the victim is a LEO.

Crime of Moral Turpitude Analysis: Same as for aggravated battery with a deadly weapon.

Aggravated Felony Analysis: Same as for aggravated battery with a deadly weapon.

Firearm Ground of Deportation: Same as for aggravated battery with a deadly weapon.

§ 784.08 Assault or Battery on a Person 65 Years of Age or Older

Assault on the Elderly

1) The defendant intentionally and unlawfully threatened, either by word or act, to do violence to the victim.
2) At the time, the defendant appeared to have the ability to carry out the threat.
3) The act of the defendant created in the mind of the victim a well-founded fear that the violence was about to take place.
4) The victim was at the time 65 years of age or older.

Crime of Moral Turpitude Analysis: Neither the BIA nor the Eleventh Circuit has ruled on whether assault or battery on a person 65 years of age or older is a crime of moral turpitude. The Florida statute is essentially simple assault with the added element that the victim was 65 years of age. Since simple assault is routinely not considered a crime involving moral turpitude, the question becomes whether the victim's age changes the analysis. The answer to this is unclear. The BIA has held that an "aggravating dimension" to an assault or battery crime, including victim status, can make it a crime involving moral turpitude. In the case of assault or battery on a law enforcement official, the BIA has held that the crime is one involving moral turpitude if the crime 1) resulted in bodily harm to the victim and 2) it required that the defendant know the victim was a law enforcement officer. *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). If a law enforcement victim were equated with a victim 65 years of age or older, the analysis under *Matter of Danesh* would require that the victim suffer bodily harm. Under the Florida statute, a threat to do violence, not bodily harm, is all that is required. If the record of conviction does not make clear that the victim suffered bodily harm, there is an argument that, even under *Matter of Danesh*, a conviction under Florida's aggravated battery on a person 65 or older is not a crime involving moral turpitude.

Recommendation: Assault on the elderly is possibly a crime involving moral turpitude.

Aggravated Felony Analysis: Same as for § 784.021 – Aggravated Assault.

Aggravated Assault on a Person 65 Years of Age or Older

Elements:

1) The defendant intentionally and unlawfully threatened, either by word or act, to do violence to the victim.

2) At the time, the defendant appeared to have the ability to carry out the threat.
3) The act of the defendant created in the mind of the victim a well-founded fear that the violence was about to take place.
4) The assault was made either:
    a. with a deadly weapon [but without the intent to kill]; or
    b. with the intent to commit a felony upon the victim.
5) The victim was at the time 65 years of age or older.

There is a 3-year minimum-mandatory sentence.

Crime of Moral Turpitude Analysis: Same as for § 784.021 – Aggravated Assault.

Aggravated Felony Analysis: Same as for § 784.021 – Aggravated Assault.

Firearm Ground of Deportation: Same as for § 784.021 – Aggravated Assault.

Battery on a Person 65 Years of Age or Older

Elements:
1) The defendant committed a battery on the victim by either:
    a. intentionally touching or striking the victim against his or her will; or
    b. intentionally causing bodily harm to the victim.
2) The victim was at the time 65 years of age or older.

Crime of Moral Turpitude Analysis: Same as for § 784.08 Assault or Battery on a Person 65 Years of Age or Older.

Aggravated Felony Analysis: Same as for § 784.08 Assault or Battery on a Person 65 Years of Age or Older.

Aggravated Battery on a Person 65 Years of Age or Older – Harm/Disability/Disfigurement

Elements:
5) The defendant committed a battery on the victim by either:
    a. intentionally touching or striking the victim against his or her will; or
    b. intentionally causing bodily harm to the victim.
6) In committing the battery, the defendant intentionally or knowingly caused great bodily harm, permanent disability, or permanent disfigurement to the victim.
7) The victim was at the time 65 years of age or older.

There is a 3-year minimum-mandatory sentence.

Crime of Moral Turpitude Analysis: Same as for § 784.045(1)(a)(1) – Aggravated Battery – Harm/ Disability/Disfigurement.

Aggravated Felony Analysis: Same as for § 784.045(1)(a)(1) – Aggravated Battery – Harm/Disability/Disfigurement.

Aggravated Battery on a Person 65 Years of Age or Older – Deadly Weapon

Elements:
6) The defendant committed a battery on the victim by either:
    a. intentionally touching or striking the victim against his or her will; or
    b. intentionally causing bodily harm to the victim.
7) In committing the battery, the defendant used a deadly weapon.
8) The victim was at the time 65 years of age or older.

There is a 3-year minimum-mandatory sentence.

Crime of Moral Turpitude Analysis: Same as for § 784.045(1)(a)(2) – Aggravated Battery – Deadly Weapon.

Aggravated Felony Analysis: Same as for § 784.045(1)(a)(2) – Aggravated Battery – Deadly Weapon.

Firearm Ground of Deportation: Same as for § 784.045(1)(a)(2) – Aggravated Battery – Deadly Weapon.

Chapter 787 – Kidnapping, False Imprisonment

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§ 787.01 -- Kidnapping

Elements:
1. Defendant forcibly, secretly, or by threat confined, abducted, or imprisoned the victim against his her will. (Confinement of a child under the age of 13 is against his or her will if such confinement is without the consent of his or her parent or legal guardian.)
2. Defendant had no lawful authority.
3. Defendant acted with intent to:
    a. hold for ransom or reward or as a shield or hostage.
    b. commit or facilitate commission of an applicable felony.
    c. inflict bodily harm upon or to terrorize the victim or another person.
    d. interfere with the performance of any governmental or political function.

Crime of Moral Turpitude Analysis: There is not much case law regarding whether kidnapping is a crime of moral turpitude. Only one of the cases often cited to for the proposition that kidnapping involves moral turpitude actually held that the kidnapping statute at issue in the case involved moral turpitude. *Matter of P-*, 5 I&N Dec. 444 (BIA 1953) (finding that the federal statute outlawing the transportation of a person in interstate commerce unlawfully and knowing for the purpose of ransom is a crime of moral turpitude). *Compare with Matter of Nakoi*, 14 I&N Dec. 208 (BIA 1972) (acknowledging that the case did not raise the issue of whether kidnapping was a crime of moral turpitude); *Matter of C-M-*, 9 I&N Dec. 487, 488 (BIA 1961) (same). However, the BIA, in dicta, has stated that kidnapping is a crime of moral turpitude. *In re Torres-Varela*, 23 I&N Dec. 78 (BIA 2001) (citing *In re Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999) (listing "kidnapping" as a involving moral turpitude because it involves an act of "baseness of depravity" even though there is no element of fraud and sometimes no "explicit element of evil intent"); *Matter of Nakoi*, 14 I&N Dec. 208 (BIA 1972) (characterizing as "well established" the fact that kidnapping is a crime of moral turpitude but citing to *Matter of P-* only). The Fifth Circuit, in *Hamdan v. INS*, 98 F.3d 183 (5th Cir. 1996), remanded a case to the BIA after finding that the BIA had not sufficiently analyzed whether the Louisiana simple kidnapping statute involved moral turpitude. The Court found that the Louisiana statute was "substantively distinguishable" from the federal kidnapping statute at issue in *Matter of P-* because it "does not include ransom and expressly includes removal by a parent."

Recommendation: While there are arguments why kidnapping under the Florida statute, which is divisible, does not involve moral turpitude, the law is very unsettled and the only BIA cases discussing the matter state generally that kidnapping involves moral turpitude. The crime should be listed as probably involving moral turpitude.

Aggravated Felony Analysis: Although there is no BIA or Eleventh Circuit case law directly on point, it is likely that a conviction under the Florida kidnapping statute would be considered a crime of violence within the meaning of the aggravated felony definition. The statute requires that the defendant "forcibly" or "by threat" confine, abduct, or imprison the victim. This is likely to be considered the use or threatened use of physical force under the crime of violence definition.

Recommendation: Florida kidnapping will most likely be considered an aggravated felony as a crime of violence if a sentence of a year or more is imposed.

§ 787.02 -- False Imprisonment

1. Defendant forcibly secretly by threat confined, abducted, imprisoned, or restrained the victim against his her will. (Confinement of a child under the age of 13 is against his or her will if such confinement is without the consent of his or her parent or legal guardian.)
2. Defendant had no lawful authority.

Immigration analysis: Same as for § 787.01, Kidnapping.

Chapter 800 – Lewdness; Indecent Exposure

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§ 800.04 – Lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age

Elements:
The victim was under the age of sixteen.
The defendant

1. made an assault on or handled or fondled the victim in a lewd, lascivious or indecent manner; or
2. committed upon the victim or forced or enticed the victim to commit actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, actual lewd exhibition of the genitals, or any act or conduct which simulated that sexual battery was being or would be committed on the victim; or
3. committed an act upon the victim was penetrated by an object; or
4. knowingly committed a lewd or lascivious act in the presence of the victim.

["lewd," "lascivious" and "indecent" mean the same thing: a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing the act]

Crime of Moral Turpitude Analysis: Lewd or lascivious conduct involving a child has consistently been held to involve moral turpitude. *Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966). *See also Ramsey v. INS*, 55 F.3d 580, 582 (11th Cir. 1995) (court stating in dicta that "[I]t is uncontroverted" that lewd assault under Florida law is a crime involving moral turpitude).

Recommendation: Lewd or lascivious exhibition is a crime involving moral turpitude.

Aggravated Felony Analysis: The Eleventh Circuit, in *U.S. v. Padilla-Reyes*, 247 F.3d 1158 (11th Cir. 2001), held that a conviction under this statute was "sexual abuse of a minor" within the meaning of the aggravated felony definition. 8 U.S.C. 1101(a)(43)(A). The court found that "sexual abuse of a minor" includes conduct where there is no contact with the victim.

There is also the possibility that a one year sentence to imprisonment for this offense constitutes an aggravated felony as a crime of violence. The Eleventh Circuit, in *Ramsey v. INS*, 55 F.3d 580 (11th Cir. 1995), held that lewd assault under Florida Statute 777.04(1), 800.04(1) was an aggravated felony as a crime of violence. The offense involves the handling, fondling, or assaulting of a child under the age of 16 in a lewd, lascivious, or indecent manner without committing the crime of sexual battery. The court reasoned that the crime "might be accomplished without the use of physical force," but decided that "the offense is a felony which involves a substantial risk that physical force may be used against the victim in the course of committing the offense."

Recommendation: Lewd or lascivious exhibition is an aggravated felony, regardless of the sentence.

Chapter 806 – Arson and Criminal Mischief

§ 806.01(1) – Arson – First Degree

Elements:

1. The defendant damaged, or caused to be damaged, a *structure* or its contents by fire or explosion;
2. The damage was done willfully and unlawfully or while the defendant was engaged in the commission of a felony;
3. The structure was either:
    a. a dwelling;
    b. an institution where persons are normally present, or where the damage occurred during normal hours of occupancy; or
    c. a *structure* which the defendant knew to be occupied or had reasonable grounds to believe to be occupied.

[A "structure" includes cars, boats, and airplanes.]

Crime of Moral Turpitude Analysis: The BIA has held that arson under other state statutes is a crime involving moral turpitude. *Matter of T*, 6 I&N Dec. 835 (BIA 1955) (concluding without reasoning that arson of a dwelling is a CMT); *Matter of S*, 3 I&N Dec. 617 (BIA 1949) (willful attempted arson is a CMT because it requires a purposeful act with "an evil intention"). The Ninth Circuit Courts of Appeals have made the same finding. *Borromeo v. INS*, 213 F.3d 641 (9th Cir. 2000) ("[a]rson is a crime that involves an 'act of baseness or depravity contrary to accepted moral standards'") (citations and internal quotations omitted). The Florida statute is divisible because it requires that the damage was done willfully and unlawfully or while the defendant was engaged in the commission of a felony. If the record of conviction is clear that the damage was done "willfully and unlawfully," it is probable that the offense will be considered to involve moral turpitude under *Matter of S*. If the record of conviction is ambiguous or shows that the defendant did the damage while committing a felony, the analysis is less clear.

Recommendation: Arson is probably a crime involving moral turpitude.

Aggravated Felony Analysis: The BIA, in *In re Palacios-Pinera*, 22 I&N Dec. 434 (BIA 1998), held that first degree arson under an Alaskan statute was an aggravated felony as a crime of violence. The BIA's somewhat cursory analysis concluded that "the intentional starting of a fire or causing an explosion ordinarily would lead to the substantial risk of damaging property of another." Moreover, the court found that "since there is a risk the fire or explosion will encroach upon another structure and that structure may be occupied, arson involves a substantial risk to another person." Equating this risk with a substantial risk that physical force will be used, the BIA found that arson under the Alaskan statute was a crime of violence. Although the Alaska statute required both the intentional damaging of property and recklessly placing another person in danger of serious physical injury, the BIA's analysis appears to infer the latter element in all arson cases. Thus, although Florida's arson statute does not require recklessly placing another in danger, it is possible that the BIA will not view this distinction as meaningful. It may be possible to distinguish the Florida statute on the ground that the term "structure" includes cars, boats, and airplanes. Given the focus in *Palacios-Pinera* on the likelihood that the fire or explosion will "encroach" on another structure that might be occupied, it may be possible to distinguish the Florida statute because of the broad definition of structure.

Recommendation: A conviction for arson with a sentence of a year or more imprisonment is probably an aggravated felony as a crime of violence.

§ 806.01(2) – Arson

Elements:
The defendant

1. The defendant damaged, or caused to be damaged, a structure by fire or explosion;

2. The damage was done willfully and unlawfully or while the defendant was engaged in the commission of a felony;

Immigration analysis: Same as for § 806.01(1) – Arson.

§ 806.013 – Criminal Mischief

Elements:
The defendant

1. injured or damaged the property of another;
2. the injury or damage was done willfully and maliciously.

["Willfully" means intentionally, knowingly and purposely. "Maliciously" means wrongfully, intentionally, without legal justification or excuse, and with the knowledge that injury or damage will or may be caused to another person or the property of another person.]

Crime of Moral Turpitude Analysis: In *Matter of N-*, 8 I&N Dec. 466 (BIA 1959), the BIA held that a conviction under a Delaware statute very much like the Florida statute did not involve moral turpitude. The BIA reasoned that the statute was very broad in scope, encompassing offenses perpetrated maliciously as well as offenses accompanied by negligence or carelessness. In the case at issue, the BIA could not determine from the record of conviction whether the offense was done "maliciously." This reasoning suggests, however, that the result would have been different if the record of conviction had shown a malicious intent. *See also Matter of B-*, 2 I&N Dec. 867 (BIA 1947) (willfully damaging mail boxes and other property not a CMT because the statute does not "require base or depraved conduct."); *Matter of C-*, 2 I&N Dec. 716 (BIA 1947) (damaging private property not a CMT because statute involved willful conduct but not "malice"). In other cases, the BIA has found that crimes similar to criminal mischief involve moral turpitude. In *Matter of M-*, 3 I&N Dec. 272 (BIA 1948), the BIA held that a conviction under the Oregon statute for malicious and wanton injury to property involved moral turpitude. It is unclear from the decision whether this conclusion came from the fact that the indictment used the terms "maliciously" and "wantonly" or whether the BIA found that the actual crime, which involved killing animals belonging to another, was "vile and vicious." *See also Matter of R*, 5 I&N Dec. 612 (BIA 1954) (citing to Matter of M- for the proposition that malicious destruction of property involves moral turpitude).

The Florida statute requires the willful and malicious injury or damage to the property of another. Although the statute requires a showing of "maliciousness," the definition of maliciousness does not appear to encompass "base or depraved conduct" or an act that was "vile and vicious." Also, if the damage to the property is $200 or less, the crime is a second degree misdemeanor and would qualify a person for the "petty offense" exception to the crime of moral turpitude ground of inadmissibility.

Recommendation: Criminal mischief is probably not a crime involving moral turpitude.

Aggravated Felony Analysis: The statute does not require force or the threat of use of force and therefore is most likely not a "crime of violence" within the meaning of the aggravated felony definition. Even if a one year sentence of imprisonment is imposed, it will not be considered an aggravated felony.

Recommendation: Criminal mischief is not an aggravated felony, even if a year of imprisonment is imposed.

Chapter 810 – Burglary and Trespass

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§ 810.02 – Burglary

Elements:
1. The defendant entered or remained in a structure or conveyance owned by another;
2. The defendant did not have permission to enter or remain in the structure or conveyance;

3. At the time of the entry or remaining in, the defendant had a fully-formed, conscious intent to commit a crime in the structure or conveyance.

["Conveyance" means any motor vehicle, ship, vessel, railroad car, trailer, aircraft, or sleeping car.]

Note: Prior to 2001, the "remaining in" provision applied only to the act of surreptitiously remaining in the structure or conveyance. Effective July 1, 2001, the statute also includes "remaining in" the structure or conveyance (1) after permission to remain has been withdrawn; or (2) to commit or attempt any forcible felony.

Crime of Moral Turpitude Analysis: Burglary has been held to be a crime of moral turpitude when the underlying offense is theft. *In the Matter of R--*, 1 I&N Dec. 540 (BIA 1943); *In the Matter of V-T-*, 2 I&N Dec. 213 (BIA 1944). The BIA has held that burglary is not a crime of moral turpitude when the underlying crime is not specified. *In the Matter of M--*, 2 I&N Dec. 721 (BIA 1946).

Recommendation: Burglary is a crime of moral turpitude if the underlying offense is a crime of moral turpitude.

Aggravated Felony Analysis ("Burglary" ground): INA 101(a)(43)(G) makes an aggravated felony any "theft offense (including receipt of stolen property) or *burglary* offense for which the term of imprisonment at least one year." The statute refers to the generic crime of "burglary" rather than a specific federal statute or other definition. Under Supreme Court and BIA decisions, the offense of "burglary" has three elements: 1) an unlawful or unprivileged entry into, or remaining in, 2) a building or structure, and 3) with intent to commit a crime. *Taylor v. United States*, 495 U.S. 575 (1990), *Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000) (holding that burglary of a vehicle under Texas law was not a burglary offenses within the meaning of the aggravated felony definition). Under these decisions, a state definition of burglary must substantially correspond to the generic federal definition.

The Florida statute appears to satisfy the first element of the *Taylor* definition, namely "an unlawful or unprivileged entry into, or remaining in." The Florida statute requires either that the defendant did not have permission to enter or that the defendant did not have permission to remain in the structure or conveyance. However, the Florida statute does not necessarily satisfy the second *Taylor* element, namely that the burglary be to a building or structure rather than to a vehicle or other conveyance. The Florida statute includes both structures and conveyances. If the record of conviction specifies that the burglary was to a conveyance or if the record of conviction is ambiguous (e.g., simply tracks the language of the statute), then the Florida burglary conviction may not be an aggravated felony. Attorneys defending people charged with entering a dwelling/structure should endeavor to keep the record of conviction clean of any references to what place was entered and pled to entry with intent to commit "any felony" or "grand or petit larceny or any felony."

Recommendation: Burglary for which a sentence of imprisonment of a year or longer was given is possibly an aggravated felony under INA 101(a)(43)(G). Whether or not the offense is an aggravated felony depends on whether the record of conviction clarifies that the burglary was to a dwelling/structure rather than a conveyance. If the record of conviction makes clear that the burglary was to a dwelling or structure, then it is an aggravated felony.

Aggravated Felony Analysis ("Crime of Violence" ground): Burglary may also be an aggravated felony as a crime of violence. INA 101(a)(43)(f) makes an aggravated felony any "crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year." Section 16 of Title 18 defines a crime of violence as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be *used* in the course of committing the offense." Because Florida burglary offenses are all felonies (punishable by a year or more), they could be classified as aggravated felonies as crimes of violence if burglary, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." There is no controlling case law on whether burglary to a conveyance inherently involves this substantial risk of physical force. *See United States v. Becker*, 919 F.2d 568 (9th Cir. 1990) (holding that burglary to a vehicle is not a crime of violence). There is no way to know how the BIA or the Eleventh Circuit will rule on this question. As a result, even in cases where they record of conviction is ambiguous or shows that the burglary was to a conveyance, the offense could be considered an aggravated felony as a crime of violence if a sentence of a year or more imprisonment is imposed.

Recommendation: Burglary for which a sentence of imprisonment of a year or longer was given is possibly an aggravated felony under INA 101(a)(43)(G) as a crime of violence. Burglary of a conveyance may not be a crime of violence, but there is no controlling caselaw on this issue.

§ 810.06 – Possession of burglary tools

Elements:
The defendant

1. had in his/her possession a tool, machine, or implement;
2. intended to use the tool in the commission of a burglary or trespass;
3. intended to commit a burglary or trespass; and
4. did some overt act toward the commission of a burglary or trespass.

Crime of Moral Turpitude Analysis: There is BIA case law stating that possession of burglary tools is not a crime of moral turpitude if the record of conviction does not show that the crime the person intended to commit was itself a crime of moral turpitude. *Matter of S*, 6 I&N Dec. 769 (BIA 1995); *Matter of B*, 6 I&N Dec. 98 (BIA 1954).

Recommendation: Possession of burglary tools is a crime of moral turpitude if the underlying offense is a crime of moral turpitude.

Aggravated Felony Analysis: Possession of burglary tools is not an enumerated aggravated felony offense. Since it is a distinct crime from "burglary," it most likely does not fall within the burglary aggravated felony provision, INA 101(a)(43)(G).

Recommendation: Florida crime of possession of burglary tools is possibly aggravated felony.

§ 810.08 – Trespass in structure or conveyance

Elements:

1. The defendant willfully entered or remained in a structure or conveyance or having been authorized, licensed, invited to enter or remain in the structure or conveyance, willfully refused to depart after having been warned by the owner or other authorized person to depart;
2. The structure or conveyance was in the lawful possession of the owner or lessee.
3. The defendant's entry or remaing in the property was without the permission, express or implied, of the owner, lessee or any other person authorized to give that permission;

Crime of Moral Turpitude Analysis: Trespass is only a crime of moral turpitude where it has as an essential element the intent to commit theft. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979). Since the Florida trespass statute does not contain this element, it is not a crime of moral turpitude.

Recommendation: Florida trespass is not a crime of moral turpitude.

Aggravated Felony Analysis: Florida trespass does not appear to fall into any aggravated felony provisions.

Recommendation: Florida trespass is not an aggravated felony.

Firearm Ground of Deportation: A conviction under part (c) of the FL trespass statute could be a firearm offense and therefore make the defendant deportable under the firearm ground of deportation, INA 237(a)(2)(C). Conviction under this subsection requires a finding that the defendant was armed with a firearm or other dangerous weapon. If the record of conviction is clear that the weapon was a firearm, then the crime could trigger the firearm ground of deportation.

§ 810.09 – Trespass on property other than structure or conveyance

Elements:

1. The defendant willfully entered or remained on property other than a structure or conveyance;
2. The property was owned by or in the lawful possession of the owner or lessee;
3. Notice not to enter or remain in the property had been give by actual communication to the defendant or posting, fencing, cultivation of the property;
4. The defendant's entry or remaining was without the permission, express or implied, of the owner or lessee or any other person authorized to give that permission.

Immigration Analysis: Same as for § 810.08, trespass in structure or conveyance.

Chapter 812 – Theft, Robbery, and Related Crimes

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§ 812.014 – Theft

Elements:
The defendant

1. knowingly and unlawfully obtained (endeavored to obtain) the property of the victim.
2. intended to deprive the victim of the property, either permanently or temporarily.

Crime of Moral Turpitude Analysis: While many BIA cases have held that theft is a crime of moral turpitude, there is a clear rule thefts involving temporary takings are *not* crimes of moral turpitude. *See, e.g., Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) (theft is a crime involving moral turpitude only when a "permanent taking" is intended); *Matter of D*, 1 I&N Dec. 143 (BIA 1941) (offense not a crime involving moral turpitude because statute in question could include a mere temporary taking, as well as a permanent deprivation of the vehicle); *Matter of P*, 2 I&N Dec. 887 (BIA 1947) (joyriding is not a crime involving moral turpitude because it involves the temporary taking of property). It would seem that, if the record of conviction makes it clear that the taking was temporary or, if it is ambiguous, convictions under the Florida statute would not be crimes involving moral turpitude. In practice in *felony* cases, the state charges the crime by parroting the "either temporarily or permanently" language of the theft statute. In *misdemeanor* cases, the state is allowed to charge the crime using the arrest affidavit of the police. In these cases, the government has an argument that the record of conviction includes the arrest affidavit. However, there is a bigger problem. In several cases, the BIA has permitted inferences to be made regarding whether a theft involved a permanent or temporary taking by looking beyond the record of conviction. For example, in *Matter of N*, 3 I&N Dec. 723 (BIA 1949), the BIA inferred that a taking was permanent because the defendant stole clothes and then sold them for cash. It is unclear what other inferences the BIA would sanction in this context.

While there is a decent argument that many convictions under the Florida theft statute are not crimes involving moral turpitude (especially in felony cases where the record of conviction tracks the statutory language), it is unclear what inferences the BIA will permit to be drawn from the record of conviction to establish whether the deprivation of property was permanent or temporary. The government routinely charges Florida theft as a CMT and defense attorneys should work on the assumption that it is.

Recommendation: Theft is probably a crime involving moral turpitude.

Aggravated felony analysis: A conviction under the Florida theft statute with a sentence of a term of imprisonment of a year or more likely falls within the aggravated felony definition at 101(a)(43)(G). The BIA has held that theft statutes involving temporary takings fall within the definition of theft contained in the meaning of the aggravated felony theft provision. *Matter of V-Z-S-*, Int. Dec. 3434 (BIA 2000).

Recommendation: We should definitely list as an aggravated felony any Florida theft offense for which a sentence of a year or more term of imprisonment has been given.

§ 812.019 – Dealing in stolen property

§ 802.019(1) Dealing in Stolen Property (Fencing)

Elements:

1. The defendant trafficked in or endeavored to traffic in property;
2. The property was stolen;
3. The defendant knew or should have known the property was stolen.

Crime of Moral Turpitude Analysis: Numerous cases relating to trafficking stolen goods have held that the crime does involve moral turpitude when guilty knowledge is an essential element of the offense. *Matter of Salvail*, 17 I&N Dec. 19 (BIA 1979); *Matter of Patel*, 15 I&N Dec. 212 (BIA 1975); *Matter of Chen*, 10 I&N Dec. 671 (BIA 1964); *Matter of VDB*, 8 I&N Dec. 608 (BIA 1960); *Matter of A*, 7 I&N Dec. 626 (BIA 1957); *Matter of Z*, 7 I&N Dec. 253 (BIA 1956); *Matter of R*, 6 I&N Dec. 772 (BIA 1955); *Matter of L*, 6 I&N Dec. 666 (BIA 1955). *But see Matter of S*, 4 I&N Dec. 365 (BIA 1951) (admission of receiving stolen goods under a statute that does not require knowledge or intent but merely circumstances which should lead defendant to make inquiry, does not involve moral turpitude). The Florida statute requires that the defendant knew or should have known the property was stolen. If the record of conviction shows that the defendant had actual knowledge, the offense will fall squarely within the BIA case law cited above. If the record of conviction shows that the defendant "should have known" or if the record is ambiguous, it is possible that the offense would not involve moral turpitude under the reasoning in *Matter of S*.

Recommendation: Dealing in stolen property (fencing) is possibly a crime involving moral turpitude.

Aggravated Felony Analysis: INA 101(a)(43)(G) makes an aggravated felony any "theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year." The BIA's definition of the "theft" in the aggravated felony definition "is broader than the common-law definition of that term" and includes state statutes outlawing temporary takings. *In re V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000). Because the Florida dealing in stolen property involves "theft" as an element, it will be considered a theft offense under the aggravated felony definition. The fact that the Florida theft statute includes temporary takings does not change this analysis because the BIA in *In re V-Z-S-* held that temporary takings are included in the aggravated felony definition of "theft."

Recommendation: Dealing in stolen property (fencing) is an aggravated felony if the defendant receives a sentence to imprisonment of a year or more.

§ 802.019(2) Dealing in Stolen Property (Organizing)

Elements:
The defendant

4. initiated, organized, planned, financed, directed, managed, or supervised the theft of property;
5. trafficked in the property.

["traffic" means to sell, transfer, distribute, dispense, or otherwise dispose of property]

Crime of Moral Turpitude Analysis: Dealing in Stolen Property (Organizing) requires that the defendant be involved in the theft. The statute also requires that the defendant trafficked in the property, which would mean that the theft was permanent rather than temporary. See analysis of theft above.

Recommendation: Dealing in stolen property (organizing) is a crime involving moral turpitude.

Aggravated Felony Analysis: Same as for § 812.019 – Dealing in stolen property.

§ 812.13 – Robbery

Elements:

1. The defendant took the property from the victim;

2. Force, violence, assault, or putting in fear was used in the course of the taking;
3. The property taken was of some value, and;
4. The taking was with the intent to permanently or temporarily deprive the victim of the property.

Crime of Moral Turpitude Analysis: Many cases have held that robbery involves moral turpitude because it requires force or threat of force against the victim. *Matter of Martin*, 18 I&N Dec. 226 (BIA 1982); *Matter of Rodriguez-Palma*, 17 I&N Dec. 465 (BIA 1980); *Matter of Quadra*, 11 I&N Dec. 457 (BIA 1966)*; Matter of Z*, 5 I&N Dec. 383 (BIA 1953). Because Florida robbery has an element the use of force or "putting in fear," it is likely a crime of moral turpitude.

Recommendation: Florida robbery is a crime of moral turpitude.

Aggravated Felony Analysis: INA 101(a)(43)(f) makes an aggravated felony any "crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year." Section 16 of Title 18 defines a crime of violence as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be *used* in the course of committing the offense." Because Florida robbery has an element the use of force or "putting in fear," it is likely a aggravated felony as a crime of violence if the sentence is a year or more of imprisonment.

Recommendation: Florida robbery is an aggravated felony if the sentence received is a year or longer of imprisonment.

§ 812.133 – Carjacking

Elements:
The defendant

1. The defendant took a motor vehicle from the victim;
2. Force, violence, assault, or putting in fear was used in the course of the taking;
3. The taking was with the intent to permanently or temporarily deprive the victim of the motor vehicle.

Crime of Moral Turpitude Analysis: Because Florida carjacking, like robbery, involves the use of force or "putting in fear," it is most likely a crime of moral turpitude. *Matter of Martin*, 18 I&N Dec. 226 (BIA 1982); *Matter of Rodriguez-Palma*, 17 I&N Dec. 465 (BIA 1980); *Matter of Quadra*, 11 I&N Dec. 457 (BIA 1966)*; Matter of Z*, 5 I&N Dec. 383 (BIA 1953).

Recommendation: Florida carjacking is a crime of moral turpitude.

Aggravated Felony Analysis: Florida carjacking is Florida robbery where the property involved is a motor vehicle. Carjacking is an aggravated felony for the same reasons that robbery is.

Recommendation: Florida carjacking is an aggravated felony if the sentence received is a year or longer of imprisonment.

Chapter 827 – Child Abuse

§ **827.03(1) -- Child Abuse**

Elements:
1. The defendant
    a. intentionally inflicted physical or mental injury upon the victim;
    b. committed an intentional act that could reasonably be expected to result in physical or mental injury to the victim; or

c. actively encouraged another person to commit an act that resulted in or could reasonably have been expected to result in physical or mental injury to the victim.

2. the victim was under the age of 18 years.

*Crime of Moral Turpitude Analysis***:** Neither the BIA nor the Eleventh Circuit has ruled on whether the Florida child abuse statute, or a statute like it, is a crime involving moral turpitude. Because the statute involves injury but not great bodily injury, there is an argument that it does not involve moral turpitude (see battery analysis above). However, because it involves injury to a child, it is possible that it would be held to be a crime involving moral turpitude. In *Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969), the Ninth Circuit held that the willful infliction of "cruel or inhuman corporal punishment or injury" on a child is a crime of moral turpitude because such a crime is "so offensive American ethics that the fact that it was done purposely or willingly . . . ends debate on whether moral turpitude was involved." The court further stated: "When the crime is this heinous, willful conduct and moral turpitude are synonymous terms." The Eleventh Circuit cited with approval this decision in a case finding that *aggravated* child abuse under the Florida statute is a crime involving moral turpitude (see discussion below). *Garcia v. Attorney General*, 329 F.3d 1217 (11th Cir. 2003). However, the Florida statute for simple child abuse differs in important ways from the statute at issue in *Garcia*. The injury to the child need not be "cruel or inhuman," the second prong of the statute does not require specific intent to inflict injury, and the statute criminalizes both mental and physical injury.

Recommendation: Child abuse is possibly a crime involving moral turpitude.

Aggravated Felony Analysis: In *In re Sweetser*, 22 I&N Dec. 709 (BIA 1999), the BIA held that child abuse under Colorado law was not a crime of violence within the meaning of the aggravated felony definition because no force or violence was necessary to violate the part of the statute under which the defendant was convicted. The BIA found that the defendant had been convicted of that portion of the Colorado statute that criminalized the act of permitting "'a child to be unreasonably placed in a situation which poses a threat.'" The BIA reasoned that this act "does not involve a substantial risk that the respondent will use physical force during the commission of the offense" and that "only an act of omission is required for a conviction under this portion of the state criminal statute." at 16-17.

The second prong of the FL child abuse statute, which criminalizes an intentional act that could reasonably be expected to result in physical or mental injury to the child is similar to the statute analyzed in *Sweetser*. It, like the statute in *Sweetser*, criminalizes an intentional act that puts a child in a situation where he or she could reasonably be expected to be harmed. Thus, unless it is clear that the defendant was convicted under the first prong of the FL statute, child abuse should not be considered a crime of violence.

Moreover, both the first and the second prongs of the FL statute criminalize "mental" injury as well as "physical" injury. There is an argument that acts specifically intended to cause mental injury do not involve the use or threat of force and therefore are not crimes of violence.

Despite these analyzes, a criminal defendant should expect that the government will charge him or her as an aggravated felon if he or she receives a sentence of one year or more. Because of the lack of controlling case law interpreting the FL statute, defendants should not rely on the above arguments that child abuse is not a crime of violence.

Recommendation: Child abuse is possibly a crime of violence aggravated felony if the sentence received is a year or more imprisonment.

§ 827.03(2) -- Aggravated Child Abuse

Elements:

1. The Defendant
   a. committed aggravated battery upon the victim
   b. willfully tortured the victim
   c. maliciously punished the victim, or
   d. willfully and unlawfully caged the victim
   e. knowingly or willfully committed child abuse upon the victim and in so doing caused great bodily harm, permanent disability, or permanent disfigurement.

2. The victim was under the age of 18 years.

Crime of Moral Turpitude: The Eleventh Circuit, in *Garcia v. Attorney General*, 329 F.3d 1217 (11th Cir. 2003), held that aggravated child abuse under Florida law is a crime of moral turpitude "[b]ased upon the inherent nature of the crime of aggravated child abuse." The court did not engage in any other reasoning to reach this conclusion, but cited to the Ninth Circuit's decision in *Guerrero de Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969) for support. The court summarized the decision in that case as finding that the infliction of "cruel corporal punishment or injury upon a child is so offensive to American ethics as to end the debate of whether moral turpitude was involved in the crime of child beating." *Nodahl* at 1222. Given the controlling Eleventh Circuit decision, aggravated child abuse is a crime of moral turpitude.

Recommendation: Aggravated child abuse is a crime of moral turpitude.

Aggravated Felony Analysis: The definition of an aggravated felony includes any "crime of violence" for which a term of "imprisonment" of a year or more is imposed. Under 18 U.S.C. 16(b), an offense is a "crime of violence" if it is a felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Because the Florida aggravated child abuse statute requires an aggravated battery, a willful torture, malicious punishment, or willful caging of a child, it is likely that courts would find that there is a substantial risk of physical force being used during the commission of the crime.

Recommendation: Aggravated child abuse is likely an aggravated felony if the term of imprisonment is a year or longer.

§ 827.03(3)(b) -- Child Neglect (Great Bodily Harm, Permanent Disability, or Permanent Disfigurement)

Elements:
1. The Defendant
    a. willfully or by culpable negligence failed or omitted to provide the victim with the care, supervision, and services necessary to maintain the victim's physical or mental health
    b. failed to make a reasonable effort to protect the victim from abuse, neglect, or exploitation by another person.
2. In so doing, the defendant caused *great bodily harm, permanent disability, or permanent disfigurement* to the victim.
3. the Defendant was a caregiver for the victim.
4. the Victim was under the age of 18 years.

Neglect of a child may be based on repeated conduct or on a single incident or omission that resulted in, or reasonably could have been expected to result in, serious physical or mental injury, or a substantial risk of death, to a child.

"[C]ulpable negligence is more than a failure to use ordinary care for others. For negligence to be called culpable negligence, it must be gross and flagrant. The negligence must be committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily harm."

Crime of Moral Turpitude Analysis: Neither the BIA nor the Eleventh Circuit has ruled on whether the Florida child neglect statute, or a statute like it, is a crime involving moral turpitude. For defendants convicted under subsection (b) of the statute, there is a significant possibility that their crime will be found to involve moral turpitude because it requires "great bodily harm, permanent disability, or permanent disfigurement." It therefore differs from simple battery and assault and is more akin to aggravated assault and battery. Moreover, because the crime involves injury to a *child*, there is some chance that it would be held to be a crime involving moral turpitude. In *Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969), the Ninth Circuit held that the *willful* infliction of "cruel or inhuman corporal punishment or injury" on a child is a crime of moral turpitude because such a crime is "so offensive American ethics that the fact that it was done purposely or willingly . . . ends debate on whether moral turpitude was involved." The court further stated: "When the crime is this heinous, willful conduct and moral turpitude are synonymous terms." The Eleventh

Circuit cited with approval this decision in a case finding that *aggravated* child abuse under the Florida statute is a crime involving moral turpitude (see discussion below). *Garcia v. Attorney General*, 329 F.3d 1217 (11th Cir. 2003). However, the Florida statute for negligent child abuse differs in important ways from the statute at issue in *Garcia*. Under the Florida statute, there is no *mens rea* of "wilfullness" to cause an injury, and the statute criminalizes both *mental* and physical injury.

Recommendation: A conviction under subsection (b) of the Florida child neglect statute will probably be considered a crime of moral turpitude.

Aggravated Felony Analysis: The BIA, in *In re Sweetser*, 22 I&N Dec. 709 (BIA 1999), held that criminally negligent child abuse under Colorado law was not a "crime of violence" within the meaning of the aggravated felony definition. The court found the required *mens rea* for the crime was irrelevant to the analysis and focused instead on whether the crime inherently involved a "substantial risk that physical force" would be used. 18 U.S.C. § 16(b) (defining crime of violence as a felony that "by its nature, involves a substantial risk that *physical force* against the person or property of another may be used in the course of committing the offense") (emphasis added). The court held that, because the record of conviction in the case showed that the defendant was convicted of permitting "a child to be unreasonably placed in a situation which poses a threat," the crime was not a crime of violence. The BIA reasoned that "[n]o force or violence is necessary. Instead, only an act of omission is required for a conviction under this portion of the state criminal statute."

Similarly, the Florida child neglect statute does not require the use or threat of use of force. It, like the Colorado statute, criminalizes acts of omission and requires a "reasonable" standard of care. However, the Florida statute requires a showing of "great bodily harm, permanent disability, or permanent disfigurement" whereas the Colorado statute only required "injury to a child's life or health" or "unreason[able] place[ment] in a situation which poses a threat of injury to the child's life or health." Because the added elements in the Florida statute, it may be considered a crime of violence under the aggravated felony definition.

Recommendation: Florida negligent child abuse with great bodily harm is possibly a crime of violence. If the defendant is sentenced to a year or more imprisonment, it could be considered an aggravated felony.

§ 827.03(3)(a) -- Child Neglect (Without Great Bodily Harm, Permanent Disability, or Permanent Disfigurement)

Elements:
1. The Defendant willfully or by culpable negligence:
    a. failed or omitted to provide the victim with the care, supervision, and services necessary to maintain the victim's physical or mental health; or
    b. failed to make a reasonable effort to protect the victim from abuse, neglect, or exploitation by another person.
2. the Defendant was a caregiver for the victim.
3. the Victim was under the age of 18 years.

Neglect of a child may be based on repeated conduct or on a single incident or omission that resulted in, or reasonably could have been expected to result in, serious physical or mental injury, or a substantial risk of death, to a child.

"[Culpable negligence is more than a failure to use ordinary care for others. For negligence to be called culpable negligence, it must be gross and flagrant. The negligence must be committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily harm."

Crime of Moral Turpitude Analysis: Neither the BIA nor the Eleventh Circuit has ruled on whether the Florida child neglect statute, or a statute like it, is a crime involving moral turpitude. Unlike subsection (b), subsection (a) requires some harm to the child but not great bodily injury (or even "injury"). As such, there is an argument that it does not involve moral turpitude for the reasons that simple assault and battery are not considered crimes of moral

turpitude. However, because it involves injury to a *child*, there is some chance that it would be held to be a crime involving moral turpitude. In *Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969), the Ninth Circuit held that the *willful* infliction of "cruel or inhuman corporal punishment or injury" on a child is a crime of moral turpitude because such a crime is "so offensive American ethics that the fact that it was done purposely or willingly . . . ends debate on whether moral turpitude was involved." The court further stated: "When the crime is this heinous, willful conduct and moral turpitude are synonymous terms." The Eleventh Circuit cited with approval this decision in a case finding that *aggravated* child abuse under the Florida statute is a crime involving moral turpitude (see discussion below). *Garcia v. Attorney General*, 329 F.3d 1217 (11th Cir. 2003). However, the Florida statute for negligent child abuse differs in important ways from the statute at issue in *Garcia*. Under the Florida statute, there is no *mens rea* of "wilfullness," there is no requirement of "injury," and the statute criminalizes both *mental* and physical injury.

Recommendation: A conviction under subsection (a) of the Florida child neglect statute is probably not a crime of moral turpitude.

Aggravated Felony Analysis: The BIA, in *In re Sweetser*, 22 I&N Dec. 709 (BIA 1999), held that criminally negligent child abuse under Colorado law was not a "crime of violence" within the meaning of the aggravated felony definition. The court found the required *mens rea* for the crime was irrelevant to the analysis and focused instead on whether the crime inherently involved a "substantial risk that physical force" would be used. 18 U.S.C. § 16(b) (defining crime of violence as a felony that "by its nature, involves a substantial risk that *physical force* against the person or property of another may be used in the course of committing the offense") (emphasis added). The court held that, because the record of conviction in the case showed that the defendant was convicted of permitting "a child to be unreasonably placed in a situation which poses a threat," the crime was not a crime of violence. The BIA reasoned that "[n]o force or violence is necessary. Instead, only an act of omission is required for a conviction under this portion of the state criminal statute."

Similarly, the Florida child neglect statute does not require the use or threat of use of force. It, like the Colorado statute, criminalizes acts of omission and requires a "reasonable" standard of care.

Recommendation: Florida negligent child abuse statute (without great bodily harm) is probably not a crime of violence aggravated felony, even if a sentence of a year or more imprisonment is imposed.

§ 827.04(1)(a) Contributing to the Delinquency of a Minor (By Act)

Elements:
1. The defendant committed an act which caused, tended to cause, encouraged or contributed to the victim becoming a delinquent child or dependent child or child in need of services.
2. The victim was under the age of 18 years.

Crime of Moral Turpitude Analysis: Older BIA case law has interpreted various state statutes relating to contributing to the delinquency of a minor. The BIA has stated repeatedly that these statutes are usually very broad and encompass both turpitudinous and nonturpitudinous behavior. *Matter of R-P-*, 4 I&N Dec. 607, at *4 (BIA 1952). As articulated in *Matter of C-*, 5 I&N Dec. 65 (BIA 1953), one test is whether the record of conviction reveals whether lewd and lascivious acts were involved. *Id*. *See also Matter of R-P-*, 4 I&N Dec. 607 (BIA 1952) (finding moral turpitude because record of conviction revealed that acts were "immoral" and involved "very young children"); *Matter of C-*, 2 I&N Dec. 220 (BIA 1944) (finding no moral turpitude when record showed that 22 year old defendant "induced a girl 14 years old to absent herself from school to be with him"). In *Matter of P-*, 2 I&N Dec. 117 (BIA 1944), the BIA articulated the test as whether the record of conviction revealed that the act was done with "evil intent."

Recommendation: A conviction under the statute is probably not be considered a crime of moral turpitude unless the record of conviction refers to lewd and/or lascivious act.

Aggravated Felony Analysis: The statute does not have the use or threat of use of force as a element of the crime and therefore should not be considered a crime of violence under 18 U.S.C. 16(a). The offense is a first degree misdemeanor, not a felony, and therefore cannot be a crime of violence under 18 U.S.C. 16(b).

Recommendation: The offense is not an aggravated felony even if the defendant receives the maximum sentence of one year imprisonment.

§ 827.04(1)(a) Contributing to the Delinquency of a Minor (By Inducement)

Elements:
1. The defendant induced or endeavored to induce, by act, threat, command, or persuasion, the victim to commit or perform an act or follow a course of conduct, or live in a manner that caused or tended to cause the victim to become or remain a dependent child or delinquent child or child in need of services.
2. The victim was under the age of 18 years.

Crime of Moral Turpitude Analysis: Same as for § 827.04(1)(a) Contributing to the Delinquency of a Minor (By Act).

Aggravated Felony Analysis: Same as for § 827.04(1)(a) Contributing to the Delinquency of a Minor (By Act).

Chapter 831 – Forgery and Counterfeiting

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§ 831.01 – Forgery

Elements:
The defendant
1. falsely made, altered, forged, or counterfeited the document;
2. intended to injure or defraud some person or firm.

Crime of Moral Turpitude Analysis: The Supreme Court and the BIA have consistently held that forgery crimes involving an intent to defraud are crimes involving moral turpitude. *Jordan v. De George*, 341 U.S. 223 (1951); *Matter of Jimenez*, 14 I&N Dec. 442 (BIA 1973); *Matter of Jensen*, 10 I&N Dec. 747 (BIA 1964); *Matter of S*, 9 I&N Dec. 688 (BIA 1962). The Florida statute requires either an intent to defraud or an "intent to injure." If the record of conviction demonstrates that the crime involved only an intent to injure or if the record is ambiguous, it is unclear whether the crime would still be considered a crime involving moral turpitude. In *Matter of O'B*, 6 I&N Dec. 280 (BIA 1954), the BIA held that forgery was a crime involving moral turpitude despite the fact that it did not require an intent to defraud, but only a willful act. *But see Matter of Zangwill*, 18 I&N Dec. 22 (BIA 1981) (knowledge that a check is worthless under Florida law is not sufficient for finding of moral turpitude where no intent to defraud is required); *Matter of Balao*, 20 I&N Dec. 440 (BIA 1992) (same).

Recommendation: Forgery is possibly a considered a crime of moral turpitude.

Aggravated Felony Analysis: Forgery will probably be considered an aggravated felony under 8 U.S.C. 1101(a)(42)(M)(i) as an offense involving "fraud or deceit" if there is a victim and the loss to the victim is $10,000 or more. The sentence is irrelevant. As with the crime of moral turpitude analysis, there is some question about whether a Florida conviction where the record of conviction only shows an intent to "injure" (or an ambiguous record) would qualify. The aggravated felony definition expressly requires "fraud or deceit." *Note*: there are a number of cases interpreting what it means to have a "victim" with a "loss" of $10,000 or more.

A conviction for forgery with a sentence of a year or more imprisonment might also qualify as a "theft" offense within the meaning of the aggravated felony definition.

Also, a conviction for forgery with a sentence of a year or more imprisonment will likely qualify as a "forgery" offense under 8 U.S.C. 1101(a)(42)(R).

Recommendation: Forgery is probably an aggravated felony if either the loss to the victim is $10,000 or more or the sentence is to a year imprisonment or more.

§ 831.02 – Uttering forged instrument

Elements:
The defendant

1. passed or offered to pass as true a document;
2. knew the document to be false, altered, forged, or counterfeited;
3. intended to injure or defraud some person or firm.

Crime of Moral Turptidude Analysis: Same as for forgery, because uttering a forged instrument also requires either an intent to defraud or an intent to injure.

Aggravated Felony Analysis: Same as for forgery.

§ 831.07 – Forging bank bills, checks, drafts, or promissory notes

Elements:

1. The defendant falsely made, altered, forged, or counterfeited a document issued by an incorporated banking company established in this state, or the United States, or any foreign province, state, or government;
2. The document was a bank bill, check, draft, or promissory note payable to the bearer, or to the order of any person;
3. The defendant intended to injure or defraud the victim.

Crime of Moral Turpitude Analysis: Same as for forgery, as uttering a forged instrument also requires either an intent to defraud or an intent to injure.

Aggravated Felony Analysis: Same as for forgery.

§ 831.08 – Possessing 10 or more forged notes, bills, check, or drafts

Elements:

1. The defendant possessed 10 or more false, altered, forged, or counterfeit notes, bills of credit, bank bills, checks, or drafts;
2. The 10 or more false, altered, forged, or counterfeit notes, bills of credit, bank bills, checks, or drafts were all similar;
3. The defendant knew the documents to be false, altered, forged, or counterfeit;
4. The defendant intended to injure or defraud any person.

Crime of Moral Turpitude Analysis: Same as forgery, as the statute requires an "intent to utter and pass" the document "as true, and thereby to injure or defraud."

Aggravated Felony Analysis: Same as forgery.

§ 831.09 – Uttering forged notes, bills, checks, drafts, or promissory notes

Elements:

1. The defendant uttered or passed or tendered in payment as true a document;
2. The document was a false, altered, forged, or counterfeit note, a bank bill, a check, a draft, or a promissory note;
3. The defendant knew the document to be false, altered, forged, or counterfeit;
5. The defendant intended to injure or defraud any person.

Crime of Moral Turpitude Analysis: Same as forgery, as the statute requires either an intent to defraud or an intent to injure.

Aggravated Felony Analysis: Same as forgery.

831.31. Counterfeit controlled substance; sale manufacture, delivery, or possession with intent to sell, manufacture, or deliver

Elements:

1. The defendant sold, manufactured, or delivered a substance, or possessed the substance with the intent to sell, manufacture, or deliver it;
2. The substance was a counterfeit controlled substance. To be a counterfeit controlled substance, the substance must either:
   a. A controlled substance which, without authorization, has been marked (or placed in packaging marked) with the trademark, trade name, or other identifying mark of a manufacturer when the manufacturer did not in fact make the substance; or
   b. Any substance falsely identified as a controlled substance;
3. The defendant knew or should have known that the substance was a counterfeit controlled substance.

Crime of Moral Turpitude Analysis: Neither the Eleventh Circuit nor the BIA has considered whether this offense, or one like it, is a crime involving moral turpitude. The offense does not expressly require an intent to defraud. However, it is unclear whether the BIA would consider this offense similar to trafficking in actual controlled substances, which has been held to be a crime involving moral turpitude (see analysis below).

Recommendation: This offense is possibly a crime involving moral turpitude.

Aggravated Felony Analysis: In order for a state statute involving counterfeit drugs to be an aggravated felony, the offense must be a felony under state law and punishable under the Controlled Substances Act, 21 U.S.C. 801 et seq., the Controlled Substances Import and Export Act, 21 U.S.C. 951 et seq., or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. 1901 et seq., and constitute a felony under state law. 21 U.S.C. 802(6) includes substances in several schedules. Under 21 U.S.C. 813, "[a] controlled substance analogue shall, to the extent included for human consumption, be treated for purposes of any federal law as a controlled substance in Schedule I." 21 U.S.C. 802 defines a "controlled substance analogue" as 1) a substance "with chemical structures substantially similar to the chemical structure of a controlled substance in schedule I or II"; 2) a substance "which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II"; or 3) "with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II." There is an argument that substances that are not chemically similar to real controlled substances (e.g., baking powder) are not included in the federal definition. *See United States v. Washam*, 312 F.3d 926 (8th Cir. 2002). However, there is significant risk that courts could read clause 3 to include such substances, as long as the defendant represents the substance as a controlled substance. Such a reading would make the federal statute similar to the Florida statute, which prohibits the possession, sale, manufacture, or delivery of a substance "falsely identified" as a controlled substance.

Recommendation: If a felony under Florida law, this offense is probably an aggravated felony as a drug trafficking crime.

Controlled Substance Ground of Inadmissibility and Deportation: In order for an offense to fall within the controlled substance grounds of inadmissibility and deportation, the offense must "relate to" a controlled substance as defined in section 802 of Title 21. For the reasons stated above in the aggravated felony analysis, it is possible that even substances that are not chemically similar to controlled substances could fall within the federal definition of a controlled substance.

Recommendation: This offense probably falls within the controlled substance grounds of inadmissibility and deportability.

Chapter 832 – Violations Involving Checks and Drafts

§ 832.05(2) – Worthless check

Elements:
The defendant
1. drew, made, uttered, issued, delivered the check;
2. when there was not sufficient money on deposit in the bank to pay the check;
3. knew when he/she wrote the check that there was not sufficient money on deposit;
4. knew he had no arrangement or understanding with the bank for the payment of the check when it was presented;

The check was in the amount of $150.00 or more.
The person or business to whom the check was payable transferred it in exchange for goods or money.
The goods had some monetary value.

Crime of Moral Turpitude Analysis: The BIA, *Matter of Zangwill*, 18 I&N Dec. 22 (BIA 1981), held that issuing worthless checks under the Florida statute is not a crime involving moral turpitude because the statute does not require an intent to defraud, only knowledge of insufficient funds. More recently, the BIA reaffirmed this reasoning in *Matter of Balao*, 20 I&N Dec. 440 (BIA 1992). It appears that *Matter of Zangwill* overrules *Matter of M-*, 9 I&N Dec. 743 (BIA 1962), which equated knowledge of insufficient funds with intent to defraud.

Recommendation: Issuing worthless checks is not a crime involving moral turpitude.

Aggravated Felony Analysis: Under 8 U.S.C. 1101(a)(42)(M)(i), an offense involving "fraud or deceit" is an aggravated felony if the loss to the victim is $10,000 or more. Because issuing a worthless check under Florida law does not involve fraud, it should not be an aggravated felony.

Recommendation: Issuing worthless checks is not an aggravated felony.

Chapter 893 – Drug Abuse Prevention and Control

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§ 893.13(6)(a) & (6)(c) Possession of cannabis (20 grams or less)

Elements:
1. The defendant had actual or constructive possession of a substance;
2. The substance was cannabis;
3. The substance did not weigh more than 20 grams;
5. The defendant had knowledge of the presence of the substance.

Crime of Moral Turpitude Analysis: Simple possession of a controlled substance is typically not considered a crime involving moral turpitude. *See Matter of Abreu-Semino*, 12 I&N Dec. 775 (BIA 1968).
Recommendation: Simple possession of cannabis is probably not a crime involving moral turpitude.

Aggravated Felony Analysis: The aggravated felony definition includes any "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." The federal definition of a drug trafficking offense is any felony. In *United States v. Simon*, 168 F.3d 1271 (11th Cir. 1991) and *In re Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002), the Eleventh Circuit and the BIA respectively held that the state's characterization of whether the crime is a misdemeanor or felony controls whether the crime is a drug trafficking crime under the federal definition. Because possession of cannabis is a first degree misdemeanor punishable by imprisonment not exceeding a year, it is not an aggravated felony.

Recommendation: Possession of cannabis (not over 20 grams) is not an aggravated felony.
Controlled Substance Ground of Inadmissibility and Deportation: Any Florida offense "relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana" makes a person subject to deportation. Any such offense, including possession of 30 grams of marijuana or less, makes a person inadmissible to the United States.

Recommendation: Simple possession of not over 20 grams of cannabis does not make a person subject to deportation, but makes him or her inadmissible to the United States.

§ 893.13(6)(a) – Possession of cannabis (more than 20 grams)

Elements:

1. The defendant had actual or constructive possession of a substance;
2. The substance was cannabis;
3. The substance weighed more than 20 grams;
4. The defendant had knowledge of the presence of the substance.

Crime of Moral Turpitude Analysis: Same as for possession of cannabis under 20 grams.

Aggravated Felony Analysis: The aggravated felony definition includes any "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." The federal definition of a drug trafficking offense is any felony. In *United States v. Simon*, 168 F.3d 1271 (11th Cir. 1991) and *In re Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002), the Eleventh Circuit and the BIA respectively held that the state's characterization of whether the crime is a misdemeanor or felony controls whether the crime is a drug trafficking crime under the federal definition. Because possession of cannabis (more than 20 grams) is a felony, it is an aggravated felony as a drug trafficking crime.
Controlled Substance Ground of Inadmissibility and Deportation: Any Florida offense "relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana" makes a person subject to deportation. Any such offense, including possession of 30 grams of marijuana, also makes a person inadmissible to the United States.

Recommendation: Simple possession of over 20 grams of cannabis makes a person both deportable from and inadmissible to the United States.

§ 893.13(6)(a) – Possession of any controlled substance other than felony possession of cannabis

Elements:

1. The defendant had actual or constructive possession of a substance;
2. The substance was [controlled substance alleged];
4. The defendant had knowledge of the presence of the substance.

Immigration Analysis: Same as for § 893.13(6)(a) – Possession of cannabis (more than 20 grams).

§893.13(3) Delivery without consideration of cannabis (20 grams or less)

Elements:

1. The defendant delivered a substance;
2. The substance was cannabis;
3. The substance did not weigh more than 20 grams;
4. The defendant had knowledge of the illicit nature of the substance;
5. The defendant did not receive consideration for delivering the substance.

Crime of Moral Turpitude Analysis: The BIA held in *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997), that distribution of cocaine under a federal statute was a crime involving moral turpitude because drug distribution involves an "evil intent" and the statute at issue required "knowing or intentional" distribution of drugs. In so

holding, the BIA distinguished the case from *Matter of Abrue-Semino*, 12 I&N Dec. 775 (BIA 1968), which involved a "regulatory" statute that "did not require a knowing or intentional state of mind." Since delivery without consideration of cannabis requires knowledge or intent to deliver, it will likely be considered a crime involving moral turpitude.

Recommendation: Delivery without consideration of cannabis is probably a crime involving moral turpitude.

Aggravated Felony Analysis: The aggravated felony definition includes any "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." The federal definition of a drug trafficking offense is any felony. In *United States v. Simon*, 168 F.3d 1271 (11th Cir. 1991) and *In re Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002), the Eleventh Circuit and the BIA respectively held that the state's characterization of whether the crime is a misdemeanor or felony controls whether the crime is a drug trafficking crime under the federal definition. Because delivery of cannabis without consideration (20 grams or less) is a first degree misdemeanor punishable by imprisonment not exceeding a year, it is not an aggravated felony.

Recommendation: Delivery of cannabis without consideration (not over 20 grams) is not an aggravated felony.

Controlled Substance Ground of Inadmissibility and Deportation: Any Florida offense "relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving *possession for one's own use* of 30 grams or less of marijuana" makes a person subject to deportation (emphasis supplied). Any such offense, including possession of 30 grams of marijuana, also makes a person inadmissible to the United States. Delivery of cannabis without consideration (not over 20 grams) involves delivery rather than possession for one's own and therefore makes a person both deportable and inadmissible.

Recommendation: Delivery of cannabis without consideration (not over 20 grams) makes a person both deportable and inadmissible.

Drug Sale, Purchase, Manufacture, and Trafficking

The immigration analysis for all of the following Florida drug crimes is the same, see below.

§ 893.13(1)(a)1 – Sell, manufacture, or deliver cocaine (or other drugs)

§ 893.13(1)(a)2 – Sell, manufacture, or deliver cannabis (or other drugs)

§ 893.13(1)(c)1 – Sell, manufacture, or deliver cocaine (or other drugs) within 1,000 feet of a child care facility, school, or state, county, or municipal park or publicly owned recreational facility or community center

§ 893.13(1)(c)2 – Sell, manufacture, or deliver cannabis (or other drugs) within 1,000 feet of a child care facility, school, or state, county, or municipal park or publicly owned recreational facility or community center

§ 893.13(1)(d)1 – Sell, manufacture, or deliver cocaine (or other drugs) within 1,000 feet of a university

§ 893.13(1)(e)1 – Sell, manufacture, or deliver cocaine (or other drugs) within 1,000 feet of a property used for religious services or a specified business site

§ 893.13(1)(e)2 – Sell, manufacture, or deliver cannabis (or other drugs) within 1,000 feet of a property used for religious services or a specified business site

§ 893.13(1)(f)1 – Sell, manufacture, or deliver cocaine (or other drugs) within 1,000 feet of public housing facility

§ 893.13(1)(f)2 – Sell, manufacture, or deliver drugs within 1,000 feet of public housing facility

§ 893.13(2)(a)2 – Purchase of cannabis

§ 893.13(4)(a) – Deliver to minor cocaine (or other drugs)

§ 893.13(4)(b) – Deliver to minor cannabis (or other drugs)

§ 893.135(1)(a)1 – Trafficking in cannabis, more than 25 lbs, less than 2,000 lbs.

§ 893.135(1)(b)1.a – Trafficking in cocaine, more than 28 lbs, less than 200 lbs.

§ 893.135(1)(c)1.a – Trafficking in illegal drugs, more than 4 grams, less than 14 grams

§ 893.135(1)(d)1 – Trafficking in phencyclidine, more than 28 grams, less than 200 grams

§ 893.135(1)(e)1 – Trafficking in methaqualone, more than 200 grams, less than 5 kilograms

§ 893.135(1)(f)1 – Trafficking in amphetamine, more than 14 grams, less than 28 grams

§ 893.135(1)(g)1.a – Trafficking in flunitrazepam, 4 grams or more, less than 14 grams

§ 893.135(1)(h)1.a – Trafficking in gamma-hydroxybutyric acid (GHB), 1 kilo or more, less than 5 kilos

§ 893.135(1)(j)1.a – Trafficking in 1,4-Butanediol, 1 kilo or more, less than 5 kilos

§ 893.135(1)(k)2.a – Trafficking in Phenethylamines, 10 grams or more, less than 200 grams

Crime of Moral Turpitude Analysis: The BIA held in *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997), that distribution of cocaine under a federal statute was a crime involving moral turpitude because drug distribution involves an "evil intent" and the statute at issue required "knowing or intentional" distribution of drugs. In so holding, the BIA distinguished the case from *Matter of Abrue-Semino*, 12 I&N Dec. 775 (BIA 1968), which involved a "regulatory" statute that "did not require a knowing or intentional state of mind." Since all of the Florida drug sale, purchase, and trafficking statutes require knowledge or intent to deliver, they will likely be considered crimes involving moral turpitude.

Recommendation: All of these drug crimes are probably crimes involving moral turpitude.

Aggravated Felony Analysis: The aggravated felony definition includes any "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." The federal definition of a drug trafficking offense is any felony. In *United States v. Simon*, 168 F.3d 1271 (11th Cir. 1991) and *In re Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002), the Eleventh Circuit and the BIA respectively held that the state's characterization of whether the crime is a misdemeanor or felony controls whether the crime is a drug trafficking crime under the federal definition. Any felony Florida drug offense is therefore an aggravated felony, even if it is for simple possession.

Recommendation: Any felony Florida drug offense is an aggravated felony, regardless of the sentence.

Controlled Substance Ground of Inadmissibility and Deportation: Any Florida offense "relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana" makes a person subject to deportation. Any such offense, including possession of 30 grams of marijuana, also makes a person inadmissible to the United States. As such, all of the above crimes make a person both deportable from and inadmissible to the United States.

§ 893.147(1) – Use or possession of drug paraphernalia

Elements:

The defendant

1. used or had in his/her possession with intent to use drug paraphernalia;
2. had knowledge of the presence of the drug paraphernalia.

Crime of Moral Turpitude Analysis: There is no case law on this issue. But, one can infer that use or possession of drug paraphernalia does not involve moral turpitude because possessory drug offenses probably do not involve moral turpitude.

Aggravated Felony Analysis: An offense is an aggravated felony if it constitutes "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." The federal definition of a drug trafficking offense is any felony. In *United States v. Simon*, 168 F.3d 1271 (11th Cir. 1991) and *In re Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002), the Eleventh Circuit and the BIA respectively held that the state's characterization of whether the crime is a misdemeanor or felony controls whether the crime is a drug trafficking crime under the federal definition.

Because use or possession of drug paraphernalia is a first degree misdemeanor and not a felony, it is not an aggravated felony. (Even if it were a felony, it would not be an aggravated felony because use or possession of drug paraphernalia is not a federal crime. *See* 21 U.S.C. 863(a) (criminalizing sale, import, and export of drug paraphernalia only).

Controlled Substance Ground of Inadmissibility and Deportation: The question is whether use or possession of drug paraphernalia is an offense "relating to a controlled substance (as defined in section 802 of Title 21)." Section 802 of Title 21 references section 812 of Title 28, which contains a federal schedule of drugs. Of course, drug paraphernalia does not appear on this schedule. The government could nonetheless argue that use or possession of drug paraphernalia "relates to" one of these enumerated drugs, but this argument is flawed. Since no specific drug is referenced in use or possession of drug paraphernalia offenses, it is impossible to know whether the drug that the crime "relates to" actually appears on the federal schedule. Moreover, the relation between possession of drug paraphernalia and the list of controlled substances is attenuated in much the same way as driving under the influence of a controlled substance is. The latter crime is typically not considered a controlled substance offense within the meaning of the controlled substance grounds of inadmissibility and deportation.