# Selected Immigration Consequences of Certain Georgia Offenses

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**Introduction**

**1. Using the Chart.** In *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010), the U.S. Supreme Court held that the Sixth Amendment requires defense counsel to provide affirmative and competent advice regarding immigration consequences to noncitizen defendants. The Court made clear that a failure to provide any advice is constitutionally deficient performance. The Court also found that the specificity of the advice required by counsel will depend on the clarity of the law—that counsel must provide specific and correct advice when the law is clear, and more generalized advice in cases where the law is unclear. The certainty of counsel's advice may vary, but the duty does not. As required by the ABA and NLADA professional standards referenced in *Padilla*, to adequately represent a noncitizen defendant, defense counsel has a duty in each case to determine the defendant's immigration status and criminal history. Based on this information, counsel must analyze the specific immigration consequences carried by the proposed plea for the particular client. Without doing this individualized analysis, defense counsel will be unable to determine whether the immigration consequences are clear. In some cases counsel will be able to advise that the plea is nearly certain to have a particular immigration consequence, while in other cases counsel may need to advise that there is a risk that the plea will have a particular immigration consequence but that the law is not clear. The purpose of this chart is to assist counsel in that effort. The chart analyzes adverse immigration consequences that may flow from conviction of selected Georgia offenses and suggests how to avoid these consequences. **Note that additional immigration consequences not listed here may arise from these offenses, such as the denial of naturalization, inadmissibility, or the denial of discretionary relief.** The chart is organized numerically by statute. The "Key Concepts" box below describes the immigration significance of certain state dispositions, sentences, and crime classifications.

**2. Sending comments about the Chart.** Please contact us to disagree with an analysis, report a new case, suggest other offenses for us to discuss, propose other alternate "safer" pleas, or provide other comments. Please send your comments to sejal@nationalimmigrationproject.org.

**3. Disclaimer and Note to Users.** Immigration consequences of crimes are a complex and constantly changing area of law. Practitioners should use this chart as a starting point rather than as a substitute for legal research. For a more detailed analysis of offenses and arguments, see *Immigration Law and Crimes* available at: http://west.thomson.com/store/product.asp?product_id=13514773 . Because this chart is meant for criminal defense attorneys, it presents a conservative analysis of the immigration consequences of conviction.

**KEY CONCEPTS**

* **Avoid an aggravated felony (AF) conviction if possible.** *See* 8 U.S.C. 1101(a)(43) for definition. A noncitizen with an AF conviction, even a longtime legal permanent resident, has virtually no defense or relief to deportation, will be held in mandatory detention, and will be barred from returning to the U.S. for life. Crimes of violence, theft offenses, and certain other offenses require a conviction AND a sentence of one year or more to constitute an AF. Other offense categories, such as "drug trafficking," murder, rape, sexual abuse of a minor, and fraud over $10,000 require only a conviction to constitute an AF.

* The definition of a "**conviction**" for immigration purposes is at 8 U.S.C. §1101(a)(48)(A*)*. A first offender plea is considered a conviction under this definition. Pre-trial diversion and pre-trial drug diversion are not considered convictions, assuming there is no up-front guilty plea, nolo plea or admission of facts to support a finding of guilt.

* Pursuant to 8 U.S.C. 1101(a)(48)(B), a "**sentence**" is any period of incarceration ordered by the court which is imposed or suspended in whole or in part. Any period of confinement, even if suspended, will be considered a sentence of imprisonment. Ask the judge to strike out any reference to a jail term or confinement on the sentencing form when your client is sentenced to probation or if the sentence is otherwise suspended.

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* If a defendant pleads to multiple counts of the same offense, immigration authorities treat the sentence for each count separately. A theft offense with a sentence of 1 year or more is an aggravated felony. A noncitizen defendant who receives 11 months for 3 counts of theft has not been convicted of an aggravated felony because the defendant did not receive a year's sentence for any of the theft convictions.

* In general, immigration judges must look to the elements of the offense, not the underlying facts, to determine whether a noncitizen is deportable. *Matter of Silva-Trevino*, however, altered the analysis used to determine whether an offense constitutes a crime involving moral turpitude and permits immigration judges in certain cases to examine extrinsic evidence outside of the record of conviction, including police reports, to assess whether the ***conduct*** underlying a conviction involves moral turpitude. 24 I&N Dec. 687 (A.G. 2008). The 11th Circuit, alongside the 3rd and 4th Circuits, has rejected the *Silva-Trevino* analysis, but it may still apply to noncitizens whose deportation proceedings are held outside of these jurisdictions.

**Acknowledgments**

Sejal Zota and Dan Kesselbrenner are the principal authors of the chart. We are grateful to the Open Society Foundations and the Ford Foundation for funding the Defending Immigrants Partnership. 

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| STATUTE | OFFENSE | AGGRAVATED FELONY (AF)? | CRIME INVOLVING MORAL TURPITUDE (CIMT)? | OTHER GROUNDS OF DEPORTABILITY? | COMMENTS |
|---|---|---|---|---|---|
| **Attempts, Conspiracies** | | | | | |
| O.C.G.A. § 16-4-1 | Attempt | Yes, under 8 U.S.C. §1101(a)(43)(U) if substantive offense is AF.[1] | Yes, if substantive offense is CIMT.[2] | Yes, if substantive offense is firearm offense or controlled substance offense. | If possible, plead to attempt to commit an offense that does not involve fraud or trigger other immigration consequences. |
| O.C.G.A. § 16-4-8 | Conspiracy | Yes, under 8 U.S.C. §1101(a)(43)(U) if substantive offense is AF.[3] | Yes, if substantive offense is CIMT. | Yes, if substantive offense is firearm offense or controlled substance offense.[4] | If possible, plead to conspiracy to commit an offense that does not involve fraud or trigger other immigration consequences. |
| O.C.G.A. § 16-4-7 | Criminal solicitation | Possibly, if substantive offense is AF.[5] | Probably, if substantive offense is CIMT. | Probably, if substantive offense is firearm offense or controlled substance offense.[6] | |
| **Crimes Against the Person** | | | | | |
| O.C.G.A. § 16-5-1 | Murder | Yes | Yes | | |

[1] *Kamagate v. Ashcroft*, 385 F.3d 144 (2d Cir. 2004). In *Matter of Onyido*, 22 I. & N. Dec. 552 (BIA 1999), the Board held that a noncitizen who received nothing for his attempted fraud was still deportable where the amount sought exceeded $10,000.

[2] *Matter of Katsansis*, 14 I. & N. Dec. 266 (BIA 1973).

[3] *Kamagate v. Ashcroft*, 385 F.3d 144 (2d Cir. 2004).

[4] *See, e.g., Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (holding that conviction for conspiracy to export firearms is a firearm offense because it involves a conspiracy to commit a firearm offense).

[5] *Matter of Guerrero* clarifies that solicitation offenses are not included in the aggravated felony ground covering attempts and conspiracies, 8 U.S.C. § 1101(a)(43)(U), but may be considered aggravated felonies under substantive grounds, such as crime of violence. 25 I. & N. Dec. 631 (BIA 2011) (holding that solicitation to commit a "crime of violence" is itself a crime of violence aggravated felony under 8 U.S.C. § 1101(a)(43)(F)).

[6] Outside of the Ninth Circuit, the BIA treats a conviction for solicitation of a controlled substance as a deportable offense under the controlled substance ground of deportability. *Matter of Corilla-Vidal*, 24 I&N Dec. 768 (BIA 2009). In the Ninth Circuit, the controlling cases are *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (holding that solicitation to commit drug trafficking is not an aggravated felony) and *Coronado-Durazo v. I.N.S*, 123 F.3d 1322 (9th Cir. 1997) (holding that solicitation to possess a controlled substance is not a deportable offense).

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|---|---|---|---|---|---|
| O.C.G.A. § 16-5-2 | Voluntary manslaughter | Yes, a crime of violence if sentence of 1 year or more, under 8 U.S.C. §1101(a)(43)(F) | Yes[7] | | Keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on sentencing form if client is sentenced to probation |
| O.C.G.A. § 16-5-3 | Involuntary manslaughter | If sentence of 1 year or more, subsection (a) is possibly a crime of violence if the underlying unlawful act proven is a crime of violence under 8 U.S.C. §1101(a)(43)(F). Subsection (b) is probably not an AF. | Subsection (a) is probably a CIMT if the underlying unlawful act is a CIMT[8]<br>Unlikely for subsection (b)[9] | | If possible, plead to subsection (b) to avoid CIMT or AF.<br>Keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on sentencing form if client is sentenced to probation |
| O.C.G.A. § 16-5-20 | Simple assault | If sentence of 1 year, subsection (a)(1) is probably a crime of violence, and subsection (a)(2) is possibly a crime of violence under 8 U.S.C. §1101(a)(43)(F).[10] | Subsection (a)(1) is probably a CIMT,[11] and (a)(2) may be a CIMT[12] | If victim is family member, may be deportable offense for "crime of domestic violence." | If possible, plead to disorderly conduct to avoid immigration consequences<br>If you must plead, plea to (a)(2) or O.C.G.A. § 16-5-23.1(a)(1) is preferable |

[7] *Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994).

[8] *See* Silva-Trevino note in "Key Concepts." In the 11th Circuit, offense will constitute a CIMT only if the record of conviction shows that the underlying misdemeanor offense is a CIMT. In another jurisdiction, it depends on whether an inquiry indicates extrinsic evidence of *conduct* involving moral turpitude.

[9] While it is possible that the DHS may wrongly charge your client with a CIMT for conviction under section (b) because the offense involves death, this offense appears to lack any degree of scienter which is required under *Matter of Silva-Trevino* to constitute a CIMT. 24 I&N Dec. 687 (A.G. 2008).

[10] Misdemeanor offenses can only constitute a crime of violence under 18 U.S.C. §16(a), which the Board and many courts have found requires an *intentional use of force. Matter of Velasquez,* 25 I. & N. Dec. 278 (BIA 2010). Because subsection (a)(2) is a general intent crime and does not have an element of "use of force," it should not constitute a crime of violence aggravated felony. But there is bad, out-of-step case law in the 11th Circuit. *See, e.g., U.S. v. Griffith*, 455 F.3d 1339 (11th Cir. 2006).

[11] ICE charges this offense as a CIMT. *See Matter of Solon*, 24 I&N Dec. 239 (BIA 2007).

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| STATUTE | OFFENSE | AGGRAVATED FELONY (AF)? | CRIME INVOLVING MORAL TURPITUDE (CIMT)? | OTHER GROUNDS OF DEPORTABILITY? | COMMENTS |
|---|---|---|---|---|---|
| | | | | | Keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on sentencing form if client is sentenced to probation |
| O.C.G.A. § 16-5-21 | Aggravated assault | Probably a crime of violence if sentence of 1 year or more, under 8 U.S.C. §1101(a)(43)(F). | Probably | If victim is family member, may be deportable offense for "crime of domestic violence." | Keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on sentencing form if client is sentenced to probation<br>Keep record clear of any domestic relationship. |
| O.C.G.A. § 16-5-23 | Simple Battery | If sentence of 1 year, section (a)(1) is possibly a crime of violence,[13] and section (a)(2) is a crime of violence under 8 U.S.C. §1101(a)(43)(F).[14] | Section (a)(1) is not a CIMT,[15] and section (a)(2) is probably a CIMT.[16] | If victim is family member, may be deportable offense for "crime of domestic violence." | Plead to disorderly conduct to avoid CIMT and AF<br>If not possible, plead affirmatively to (a)(1) to possibly |

[12] This offense should not constitute a CIMT under Board case law on simple assault, *see, e.g., Matter of Short,* 20 I. & N. Dec. 236 (BIA 1989), but ICE may still wrongly charge it as such. This offense does not contain any intent to assault. *Jackson v. State*, 276 Ga. 408 (2003).

[13] Subsection (a)(1) should not constitute an AF crime of violence because it covers an insulting or provoking touching that does not result in injury, and under *Johnson v. US*, mere offensive touching, spitting, or *de minimis* force is insufficient. 130 S.Ct. 1265, 1271 (2010) (force means "violent force … capable of causing physical pain or injury to another person"); *Matter of Velasquez,* 25 I. & N. Dec. 278 (BIA 2010); *but see U.S. v. Griffith*, 455 F.3d 1339 (11th Cir. 2006) (O.C.G.A. § 16-5-23(a)(1) is a crime of violence for federal sentencing purposes*).* This case has been abrogated by *Johnson v. U.S*., but ICE still charges battery as a crime of violence.

[14] *Hernandez v. U.S. Atty. Gen*. 513 F.3d 1336 (11th Cir. 2008)(O.C.G.A. § 16-5-23(a)(2) is categorically an aggravated felony crime of violence).

[15] This is not a CIMT, but ICE may still overcharge. *Matter of Sanudo,* 23 I. & N. Dec. 968 (BIA 2006) (offense is not CIMT where it covers only insulting touching with no injury).

[16] *Matter of Solon,* 24 I. & N. Dec. 239 (BIA 2007) (where statute requires intentional conduct and results in physical injury, offense is a CIMT).

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| STATUTE | OFFENSE | AGGRAVATED FELONY (AF)? | CRIME INVOLVING MORAL TURPITUDE (CIMT)? | OTHER GROUNDS OF DEPORTABILITY? | COMMENTS |
|---|---|---|---|---|---|
| | | | | | avoid CIMT and AF<br>Keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on sentencing form if client is sentenced to probation<br>Keep record clear of any domestic relationship. |
| O.C.G.A. §§ 16-5-23(f), 16-5-23.1(f) | Family violence battery | If sentence of 1 year or more, 16-5-23(a)(1) is possibly a crime of violence, and 16-5-23 (a)(2) and 16-5-23.1 are probably crime of violence under 8 U.S.C. §1101(a)(43)(F).[17] | Unlikely for conviction under 16-5-23(a)(1)[18]<br>Probably for convictions under 16-5-23.1 and 16-5-23(a)(2) | Possibly a "crime of domestic violence" under (a)(1) and probably under (a)(2) if protected family member under 8 U.S.C. § 1227(a)(2)(E)(i). | Keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on sentencing form if client is sentenced to probation<br>Plead to (a)(1) to possibly avoid CIMT |
| O.C.G.A. § 16-5-24 | Aggravated battery | Probably a crime of violence if sentence of 1 year or more, under 8 U.S.C. §1101(a)(43)(F). | Probably | If victim is family member, may be deportable offense for "crime of domestic violence." | Keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on sentencing form if client is sentenced to probation<br>Keep record clear of any domestic relationship. |
| O.C.G.A. § 16-5-40 | Kidnapping | Yes, if sentence of 1 year or more, under 8 U.S.C. §1101(a)(43)(F). | Yes | | Keep sentence less than 1 year, even if suspended, or ask judge |

[17] *See* footnote 13, *supra*

[18] *Matter of Sanudo,* 23 I. & N. Dec. 968 (BIA 2006). This is not a CIMT, but ICE may still charge it as such.

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|---|---|---|---|---|---|
| | | | | | to strike out reference to jail term or confinement on sentencing form when client is sentenced to probation |
| O.C.G.A. § 16-5-60(b) | Reckless conduct | Unlikely to be crime of violence even if sentence of 1 year since offense does not require intentional mental state.[19] | Probably[20] | | Plead to disorderly conduct to avoid CIMT |
| O.C.G.A. § 16-5-95 | Violation of family violence order | No | Probably not | Yes. Deportability for domestic violence under 8 U.S.C. §1227(a)(2)(E)(ii). | |
| O.C.G.A. § 16-6-1 | Rape | Yes, under rape ground, 8 U.S.C. §1101(a)(43)(A), regardless of sentence. | Yes | | |
| O.C.G.A. § 16-6-4(a) | Child molestation | Probably a sexual abuse of a minor AF under 8 U.S.C. §1101(a)(43)(A) regardless of sentence. | Yes | Probably a deportable offense under child abuse ground of deportability.[21] | If possible, plead to battery, section (a)(1), but may still be deportable for child abuse.<br>If amended, keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on sentencing form when client is sentenced to |

[19] Misdemeanor offenses can only constitute a crime of violence under 18 U.S.C. §16(a), which requires more than a reckless use of force. *Matter of Velasquez,* 25 I. & N. Dec. 278 (BIA 2010); *see also United States v. Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010)(holding that offense with mens rea of recklessness does not satisfy the "use of physical force" requirement under sentencing guideline's definition of "crime of violence, which is almost identical to definition of 18 U.S.C. § 16(a)).

[20] *Keungne v. U.S.*, 561 F.3d 1281(11th Cir. 2009), but there is an argument that an offense that involves recklessness will not be considered a CIMT without an element of serious bodily injury. *Matter of Fualaau*, 21 I. & N. Dec. 475 (BIA 1996).

[21] 8 U.S.C. §1227(a)(2)(E)

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|---|---|---|---|---|---|
| | | | | | probation |
| O.C.G.A. § 16-6-9 | Prostitution | No | Yes | Engaging in prostitution is also ground of inadmissibility. | If possible, plead to disorderly conduct to avoid immigration consequences |
| O.C.G.A. § 16-6-10 | Keeping a place of prostitution | Possibly, under managing a prostitution business ground under 8 U.S.C. §1101(a)(43)(K)(i), regardless of sentence.[22] | Probably[23] | | |
| **Crimes Against Property** | | | | | |
| O.C.G.A. § 16-7-1 | Burglary | Yes, if convicted of breaking into a building, and sentence of one year or more under 8 U.S.C. §1101(a)(43)(G).[24] | Yes, if record of conviction reveals an intent to commit theft or offense that is a CIMT.[25] | | If possible, plead to criminal trespass, subsection (b)<br>Keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on sentencing form when client is |

[22] Because Georgia law defines prostitution to include conduct outside of sexual intercourse and thus more broadly than federal immigration law, there is an argument that O.C.G.A. §16-6-10 is not a "managing prostitution business" AF. *See Prus v. Holder*, 660 F.3d 144 (2011) (New York promoting prostitution in the third degree is not an AF as it punishes conduct outside of sexual intercourse).

[23] *Matter of P*, 3 I. & N. Dec. 20 (BIA 1947).

[24] This offense is not an AF burglary if a vessel or vehicle is broken into. *Matter of Perez*, 22 I. & N. Dec. 1325 (BIA 2000). The federal courts have generally reached the same conclusion. *See e.g., U.S. v. Martinez-Garcia*, 268 F.3d 460 (7th Cir. 2001); *Lopez-Elias v. Reno*, 209 f.3d 788 (5th Cir. 2000).

[25] *See* Silva-Trevino note in "Key Concepts." In the 11th Circuit, if the record of conviction merely establishes that the defendant sought to commit "any felony" (and not necessarily a felony that is a CIMT) then it is not a CIMT. *Matter of M–*, 2 I. & N. Dec. 721 (BIA 1946). In another jurisdiction, it depends on whether inquiry indicates any extrinsic evidence of intent to commit an offense that is a CIMT.

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|---|---|---|---|---|---|
| | | | | | sentenced to probation<br>If not possible, plead to committing a non-CIMT felony in the course of burglary.[26] |
| O.C.G.A. § 16-7-21 | Criminal Trespass | If sentence of 1 year, subsection (a) is possibly a crime of violence, but subsection (b) is not a crime of violence. | Probably under subsection (a) because of intentional damage element,[27] but no under subsection (b) | No | Plead to subsection (b) to avoid adverse immigration consequences. |
| O.C.G.A. § 16-7-22 | Criminal damage to property in the first degree | Probably a crime of violence if sentence of 1 year or more. | Probably for both sections | | Keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on sentencing form when client is sentenced to probation<br>Limit factual basis to elements of offense |
| O.C.G.A. § 16-7-23 | Criminal damage to property in the second degree | If sentence of 1 year or more, section (a)(1) is probably a crime of violence, and section (a)(2) is probably a crime of violence if record indicates conviction is for intentional conduct. | Yes, under section (a)(1) and probably under section (a)(2). | | If possible, plead to criminal trespass, subsection (b)<br>Keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on sentencing form when client is sentenced to probation |
| O.C.G.A. § 16-7-60 | Arson in the first and second degree | Probably, a crime of violence, if sentence of | Probably | | Keep sentence less than 1 year, even if suspended, or ask judge |

[26] *Matter of Ahortalejo*, 25 I&N Dec. 425 (BIA 2011) (holding that when statute of conviction is divisible, an affirmative plea to an offense covered by the statute that does not involve moral turpitude precludes further inquiry).

[27] *Matter of Ruiz-Lopez*, 25 I. & N. Dec. 551 (2011).

| STATUTE | OFFENSE | AGGRAVATED FELONY (AF)? | CRIME INVOLVING MORAL TURPITUDE (CIMT)? | OTHER GROUNDS OF DEPORTABILITY? | COMMENTS |
|---|---|---|---|---|---|
| | | one year or more.<br><br>Possibly, as a federal arson offense under 8 U.S.C. § 1101(a)(43)(E)(i).[28] | | | to strike out reference to jail term or confinement on sentencing form when client is sentenced to probation<br><br>If possible, plead to 2nd D criminal damage for reckless conduct to avoid AF<br><br>Otherwise plead to a(5) and try to keep out of record that damaged property belonged to someone other than defendant. There is an argument that burning of one's own property is not a crime of violence.[29] |
| **Crimes Involving Theft** | | | | | |
| O.C.G.A. § 16-8-2 | Theft by Taking | Yes, if sentence of 1 year or more under 8 U.S.C. § 1101(a)(43)(G). | Yes, if record demonstrates that the offense involves a permanent taking.[30] | | Plead affirmatively to a temporary taking.[31]<br><br>Keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on |

[28] There is a good argument that O.C.G.A. §16-7-60 does not constitute a federal arson offense, which requires a malicious intent. *Matter of Bautista*, 25 I. & N. Dec. 616 (BIA 2011).

[29] *Jordison v. Gonzalez,* 501 F.3d 1134 (9th Cir. 2007); *Tran v. Gonzalez*, 414 F.3d 404 (3d Cir. 2005).

[30] For a taking to be a theft offense that involves moral turpitude, a permanent taking must be intended. *See, e.g., Matter of Grazley,* 14 I&N Dec. 330, 333 (BIA 1973). Georgia theft by taking is a divisible offense because it may cover a temporary taking. *See, e.g., Payne v. State*, 687 S.E.2d 851 (Ga.App. 2009); *Smith v. State*, 323 S.E.2d 257 (Ga.App. 1984). In the 11th Circuit, a conviction of this offense would only be a CIMT if the record of conviction established this was a permanent taking. In other jurisdictions, it depends on whether an inquiry indicates extrinsic evidence of a permanent taking. *See* Silva-Trevino note in "Key Concepts."

[31] *Matter of Ahortalejo*, 25 I&N Dec. 425 (BIA 2011) (holding that when statute of conviction is divisible, an affirmative plea to an offense covered by the statute that does not involve moral turpitude precludes further inquiry).

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|---|---|---|---|---|---|
| | | | | | sentencing form when client is sentenced to probation |
| O.C.G.A. § 16-8-7 | Theft by Receiving | Yes, if sentence of 1 year or more under 8 U.S.C. §1101(a)(43)(G). | Yes | | Keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on sentencing form when client is sentenced to probation |
| O.C.G.A. § 16-8-14 | Theft by Shoplifting | Yes, if plea is to "intent to deprive" and sentence of 1 year or more, under 8 U.S.C. §1101(a)(43)(G).<br><br>No, if plea is to "intent to appropriate."[32] | Yes | | If possible, plead affirmatively to intent to appropriate.<br>Keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on sentencing form when client is sentenced to probation |
| O.C.G.A. § 16-8-18 | Entering an Auto | Probably, as attempted theft under 8 U.S.C. § 1101(a)(43)(U) if record shows intent to commit theft and if sentence of 1 year or more.[33] | Yes, if record reveals intent to commit offense that is a CIMT.[34] | | Have record reflect intent to commit felony, instead of theft.<br>If possible, plead affirmatively to a temporary taking.[35] |

[32] In *Ramos v. U.S. Atty. Gen*., --- F.3d ----, 2013 WL 599552 (11th Cir. Feb. 19, 2013), the Eleventh Circuit found that a conviction under O.C.G.A. 16-8-14 with an intent to appropriate does not qualify as a theft aggravated felony under 8 USC § 1101(a)(43)(G). A violation of the statute with an intent to deprive would, however, constitute an aggravated felony.

[33] This offense is not an AF burglary for immigration purposes, but may be an attempted theft offense if record shows intent to commit a theft. *Matter of Perez*, 22 I. & N. Dec. 1325 (BIA 2000); *Bunty Ngeth v. Mukasey*, 545 F.3d 796 (9th Cir. 2009); *U.S. v. Martinez-Garcia*, 268 F.3d 460 (7th Cir. 2001).

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|---|---|---|---|---|---|
| | | | | | Keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on sentencing form when client is sentenced to probation |
| O.C.G.A. § 16-8-41 | Armed robbery | Yes, if sentence of 1 year or more, under 8 U.S.C. §1101(a)(43)(F)&(G). | Yes | If record of conviction establishes that weapon is a firearm, then defendant would be deportable for firearm offense. | Keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on sentencing form when client is sentenced to probation |
| **Forgery and Crimes Against the Currency** | | | | | |
| O.C.G.A. §§ 16-9-1, 16-9-2 | Forgery 1st & 2nd Degree | Yes, under forgery AF ground under 8 U.S.C. §1101(a)(43)(R) if defendant receives a sentence of a year or more.<br>Possibly, under fraud ground if loss to the victim exceeds $10,000, under 8 U.S.C. §1101(a)(43)(M). | Yes[36] | | Avoid sentence of a year, even if suspended, and plead to a specific loss finding of $10,000 or less |
| O.C.G.A. § 16-9- | Deposit Account Fraud | Yes, if loss to the victim | Yes[37] | | Plead to a specific loss finding of |

[34] *See* Silva-Trevino note in "Key Concepts." In the 11th Circuit, offense will constitute a CIMT only if the record of conviction shows intent to commit a CIMT, not if record merely establishes that defendant sought to commit "any felony." In another jurisdiction, it depends on whether an inquiry indicates extrinsic evidence of an intent to commit CIMT.

[35] *See, e.g., Wala v. Mukasey,* 511 F.3d 102 (2d Cir. 2007) and footnote 32, *supra.*

[36] *Jordan v. DeGeorge*, 341 U.S. 223 (1951) (holding that any offense that has fraud as an element is a crime involving moral turpitude).

[37] *Matter of Bart*, 20 I&N Dec. 436 (BIA 1992).

# Selected Immigration Consequences of Certain Georgia Offenses

Zota & Kesselbrenner – Defending Immigrants Partnership

| STATUTE | OFFENSE | AGGRAVATED FELONY (AF)? | CRIME INVOLVING MORAL TURPITUDE (CIMT)? | OTHER GROUNDS OF DEPORTABILITY? | COMMENTS |
|---|---|---|---|---|---|
| 20(a) | | exceeds $10,000 under 8 U.S.C. §1101(a)(43)(M). | | | $10,000 or less |
| **Crimes against Public Order and Safety** | | | | | |
| O.C.G.A. § 16-10-24 | Obstruction | If sentence of 1 year or more, subsection (a) is probably obstruction AF under 8 U.S.C. § 1101(a)(43)(s) and subsection (b) is probably a crime of violence under 8 U.S.C. § 1101(a)(43)(F). | Possibly[38] | | Keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on sentencing form when client is sentenced to probation<br>If possible, allocate to "hinders" under subsection (a), instead of "obstructs," which may constitute a safer plea. |
| O.C.G.A. § 16-10-25 | Giving false name, address, or birthdate to law enforcement officer | Possibly as obstruction AF under 8 U.S.C. § 1101(a)(43)(S) if sentence of one year or more | Probably | | Keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on sentencing form when client is sentenced to probation |
| O.C.G.A. §16-11 -32 | Affray | No | No | | Plead to this instead of other offenses that have adverse immigration consequences. |
| O.C.G.A. § 16-11-39 | Disorderly conduct | No | No | | |
| O.C.G.A. § 16-11-126 | Carrying a concealed weapon | Possibly a crime of violence if sentence of 1 year or more, under 8 U.S.C. §1101(a)(43)(F). | No | A firearm offense if record of conviction establishes that weapon was gun. | Keep sentence less than 1 year, even if suspended, or ask judge to strike out reference to jail term or confinement on sentencing form when client is sentenced to probation |

[38] Depends on whether record of conviction or inquiry indicates evidence of assault resulting in bodily injury to officer or use of deadly weapon. *Matter of Danesh*, 19 I. & N. Dec. 669 (BIA 1994). *See* Silva-Trevino note in "Key Concepts."

# Selected Immigration Consequences of Certain Georgia Offenses

Zota & Kesselbrenner – Defending Immigrants Partnership

| STATUTE | OFFENSE | AGGRAVATED FELONY (AF)? | CRIME INVOLVING MORAL TURPITUDE (CIMT)? | OTHER GROUNDS OF DEPORTABILITY? | COMMENTS |
|---|---|---|---|---|---|
| | | | | | If pleading to subsection that covers weapons beyond firearms (such as subsection (a)), try to keep out of record of conviction that weapon is firearm |

# Selected Immigration Consequences of Certain Georgia Offenses

Zota & Kesselbrenner – Defending Immigrants Partnership

| STATUTE | OFFENSE | AGGRAVATED FELONY? | CRIME INVOLVING MORAL TURPITUDE? | OTHER GROUNDS OF DEPORTABILITY? | COMMENTS |
|---|---|---|---|---|---|
| **Controlled Substance Offenses** | | | | | |
| O.C.G.A. § 16-13-30(a) | Possession of a controlled substance | No, if this is first drug offense unless drug is flunitrazepam, then drug trafficking under 8 U.S.C. §1101(a)(43)(B).<br><br>Possibly drug trafficking if prosecuted as a subsequent/recidivist drug offense under 8 U.S.C. §1101(a)(43)(B). | No | Yes, controlled substance offense<br><br>Controlled substance offense is also ground of inadmissibility.[39] | If possible keep out of record of conviction identification of the drug involved.[40]<br><br>Avoid conviction, especially if government prosecuting as subsequent offense.<br><br>For undocumented immigrants, there may not be any available relief. |
| O.C.G.A. § 16-13-30(b) | Manufacture, deliver, distribute, dispense, administer, sell, or possess with intent to distribute a controlled substance | Probably drug trafficking under 8 U.S.C. §1101(a)(43)(B). | Yes[41] | Yes, controlled substance offense<br><br>Controlled substance offense is also ground of inadmissibility | Avoid conviction<br><br>Reduce to straight possession to avoid AF<br><br>If possible, plead to administering, there is a good argument this would not constitute drug trafficking.[42] |

[39] 8 U.S.C. § 1182(a)(2)(C).

[40] *Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965); *see Gousse v. Ashcroft*, 339 F.3d 91 (2d Cir. 2003)(if state list of controlled substances is broader than the federal list and if the record of conviction does not identify the drug involved, then a conviction under state statute may not be a drug trafficking AF or controlled substance offense). Georgia's schedules of controlled substances appears to be broader than the federal schedules as Georgia's covers Dextromorphan, which is no longer covered by the federal schedules. O.C.G.A. § 16-13-25.

[41] *See*, *e.g.*, *Matter of Khourn*, 21 I & N Dec. 293 (BIA 1992).

[42] There is no federal offense of administering, and the definition of "trafficking" does not appear to cover administering. *See generally Lopez v*. Gonzales, 549 *U.S.* 47 (2006). *See also Quiroz v. Holder*, 2012 WL 3125136 (1st Cir. 2012).

# Selected Immigration Consequences of Certain Georgia Offenses

Zota & Kesselbrenner – Defending Immigrants Partnership

| | | | | | |
|---|---|---|---|---|---|
| | | | | | Keep out of record of conviction identification of the drug involved.[43] |
| **STATUTE** | **OFFENSE** | **AGGRAVATED FELONY?** | **CRIME INVOLVING MORAL TURPITUDE?** | **OTHER GROUNDS OF DEPORTABILITY?** | **COMMENTS** |
| O.C.G.A. § 16-13-30(j) | Possession of marijuana | No if this is a first drug offense. Possibly drug trafficking if prosecuted as a subsequent/recidivist drug offense under 8 U.S.C. §1101(a)(43)(B). | No | Yes, controlled substance offense<br>Also inadmissible offense<br>There is an exception to deportability for a single conviction of possessing 30g or less of marijuana. | Establish in plea colloquy that amount of marijuana involved is less than 30 grams to avoid deportability on controlled substance ground |
| O.C.G.A. § 16-13-30(j) | Manufacture, delivery, distribution, dispensing, administering, sale, or possession with intent to distribute marijuana | Probably drug trafficking under 8 U.S.C. §1101(a)(43)(B). | Yes[44] | Yes, controlled substance offense<br>Also inadmissible offense | Reduce to straight possession to avoid AF<br>If possible, plead to administering, there is a good argument this would not constitute drug trafficking.[45]<br>Leave out of record of conviction any evidence that marijuana was distributed for remuneration.[46] |
| **Motor Vehicle offenses** | | | | | |
| O.C.G.A. § 40-5-121 | Driving while license suspended or revoked | No | No | No | Avoid pleading to this offense and DUI at the same time. |
| O.C.G.A. § 40-6-391 | Driving under the | No | No[47] | No | Avoid pleading to this offense |

[43] *See* footnote 43 *supra.*

[44] *See*, *e.g.*, *Matter of Khourn*, 21 I & N Dec. 293 (BIA 1992).

[45] There is no federal offense of administering, and the definition of "trafficking" does not seem to cover administering. *See generally Lopez v. Gonzales*, 549 U.S. 47 (2006). *See also Quiroz v. Holder*, 2012 WL 3125136 (1st Cir. 2012).

[46] There is an argument that this is not a drug trafficking AF if this is first drug conviction and government cannot show that transfer occurred for remuneration. *See Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008); *Thomas v. Att'y Gen.*, 625 F.3d 134 (3d Cir. 2010); *but see Matter of Aruna*, 24 I & N Dec. 452 (BIA 2008).

| | | | | | |
|---|---|---|---|---|---|
| | influence (alcohol) | | | | and suspended liscense at the same time. |
| O.C.G.A. § 40-6-391 | Driving under the influence (drugs) | No | No | Yes, under controlled substance ground | If possible, keep controlled substance out of record |

[47] *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188 (BIA 1999) (holding that Arizona conviction for aggravated DUI with element of driving with a revoked license was a CIMT); *but see* Hernandez-Martinez v. Ashcroft, 329 F.3d 1117 (9th Cir. 2003) (reaching opposite conclusion about same Arizona statute).