

**GUIDE TO THE BASIC IMMIGRATION CONSEQUENCES
OF SELECT TENNESSEE OFFENSES**

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How to use this guide: Select Tennessee criminal offenses are listed in order of their code section. Under each offense, guidance is offered as to whether the offense would be classified by a judge as an “aggravated felony,” as a “crime involving moral turpitude,” or perhaps as some other type of offense carrying an immigration consequence.

Notice: This guide should not be relied upon as providing a definitive analysis, and it is *not* a substitute for counsel’s own research and analysis. It is updated on an ongoing basis. To give feedback, or to request an updated version, contact Michael Holley at mch9988@hotmail.com.

Suggestion: Useful guidance for analyzing these issues is available through similar guides posted on the National Immigration Project website at www.nationalimmigrationproject.org. Or consult a published treatise, such as the National Lawyer Guild’s *Immigration Law and Crimes*, by Dan Kasselbrenner and Lory Rosenberg.

Abbreviations:

- AGF: Aggravated felony, which triggers *virtually mandatory* deportation
- CMT: Crime involving moral turpitude, which, depending on circumstances, may trigger deportation proceedings
- COV: Crime of violence, which is an AGF if the sentence imposed is one year or more
- CSO: Controlled substance offense, which triggers deportation proceedings
- DVO: Domestic violence offense, which triggers deportation proceedings
- FAO: Firearms offense, which triggers deportation proceedings
- ROC: The “record of conviction.” This is the record created by the State in procuring the conviction, and it is limited to the indictment or other charging document, the judgment, any written plea agreement, any recorded plea colloquy, and/or any jury instructions and verdict form.

Appendices:

Appendix A of this Guide provides pertinent statutory definitions.

Appendix B provides an explanation of the categorical approach, which is the method that an immigration or federal judge must use to determine how to classify a conviction.

Select Tennessee Offenses

39-11-403, Facilitation of a felony

“Under this statute, a defendant is never convicted of a generic ‘facilitation of a felony’ charge. Rather, a defendant convicted for facilitation is always found to have facilitated a *specific* felony.” *United States v. Chandler*, 419 F.3d 484, 487 (6th Cir. 2005) (emphasis in original). Thus, an immigration judge should look at the elements involved in that specific facilitation offense. To do so, the judge should combine the elemental requirements of facilitation liability with the elements of the facilitated offense. *United States v. Vanhook*, 510 F.3d 569 (6th Cir. 2007). Language in *Vanhook* suggests that any Tennessee offense for facilitating a “crime of violence” would qualify as a crime of violence because of the risk of the injury created. *Id.* While this decision is not conclusive on this point under the immigration definition, it is likely that the Government would apply that rule in the immigration context.

39-12-101, Criminal Attempt

AGF: If the underlying offense would be an AGF, then the attempt would also be one. 8 U.S.C. § 1101(a)(43)(U).

CMT: If the underlying offense would be a CMT, then the attempt would also be one. *Matter of Katsansis*, 14 I. & N. Dec. 266 (BIA 1973).

39-12-102, Solicitation

AGF: It will likely be charged according to the same rule as for attempts and conspiracies, although 8 U.S.C. § 1101(a)(43)(U) does not include it, and the best view is that it is different and not included.

CMT: It will likely be charged according to the same rule as for attempts and conspiracies, although there is a strong argument that it should be treated as a non-CMT. *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001).

39-12-103, Criminal Conspiracy

AGF: If the underlying offense would be an AGF, then the conspiracy would also be one. 8 U.S.C. § 1101(a)(43)(U).

CMT: If the underlying offense would be a CMT, then the conspiracy would also be one. 8 U.S.C. § 1182(a)(2)(A)(i).

39-13-101, Assault.

AGF: No, because maximum punishment is less than one year. *See also Suazo-Perez v. Mukasey*, 512 F.3d 1222 (9th Cir. 2008) (when assault conviction might have merely involved offensive touching, it is not a COV).

CMT: No. *See Matter of Fualaau*, 21 I. & N. Dec. 475 (BIA 1992). But if the ROC shows that the offense involved causing physical injury to a police officer, it may be a CMT. *In re Danesh*, 19 I. & N. Dec. 669 (BIA 1988). Still, even if the ROC shows the victim was a police officer, it should not be deemed a CMT so long as it merely involved insulting or offensive touching. *Garcia-Meza v. Mukasey*, 516 F.3d 535 (7th Cir. 2008).

DVO: It depends. If the record of conviction will show that the offense was against a qualifying victim, and especially if it is under subsections (a) or (b) and not reckless, then it would likely be a DVO.

39-13-102, Aggravated Assault

AGF: Avoid, it depends. However, the Government will certainly treat any conviction as a COV if the sentence imposed is one year or more, and so the client must be forewarned that even a plea to reckless aggravated assault will likely trigger deportation proceedings.

There are two possibilities. First, if the ROC shows that the defendant was convicted of conduct involving intentional or knowing conduct (that is, if the conviction was obtained under Tenn. Code Ann. § 39-13-102(a)(1)(A), (a)(1)(B), (b), or (c)), then it will most likely be deemed a COV and thus an AGF if the sentence imposed is one year or more. *See, e.g., In re Martin*, 23 I. & N. Dec. 491 (BIA 2002).

But if the ROC shows that the defendant was convicted of conduct involving merely reckless conduct (that is, if the conviction was obtained under Tenn. Code Ann. § 39-13-102(a)(2)(A) or (a)(2)(B)), then the defendant has a very good argument that the conviction is not for a COV. Under Tennessee law, such a conviction could be procured by prosecuting for aggravated assault someone who drove recklessly and had an accident, causing ordinary or serious bodily injury to another. *State v. Gillon*, 15 S.W.3d 492 (Tenn. Crim. App. 1999); *State v. Bell*, 69 S.W.3d 171 (Tenn. 2002). The Sixth Circuit has held that Tennessee vehicular assault – which is committed by recklessly causing bodily injury to another while driving – is not a COV. *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006). *Portela's* logic would seem to dictate that a Tennessee reckless aggravated assault likewise is not a COV. *But see United States v. Mendoza-Mendoza*, 2007 U.S. App. LEXIS 20081 (6th Cir. Aug. 15, 2007) (unpublished; holding that Tennessee reckless aggravated assault is a COV at least when it involves the use or display of a deadly weapon).

CMT: Any conviction under subsection (a) or (b) is a CMT. *Matter of Fualaau*, 21 I. & N. Dec. 475 (BIA 1992). One under subsection (c) might not be a CMT, but The Government will charge it as one. *Id.*; *see also In re Aldabesheh*, 22 I. & N. Dec. 983 (BIA 1999) (dangerous conduct that violates a TRO is a CMT).

DVO: Same as for simple assault, *supra*.

39-13-103, Reckless Endangerment

AGF: It depends. It certainly is not an AGF unless this conduct involves a deadly weapon (because otherwise it would not even be punishable by one year). Moreover, even if punishable by over a year, this offense shouldn't be deemed a COV (or AGF) because the mens rea of recklessness does not suffice to establish a COV. *See United States v. Portela*, 469 F.3d 496 (6th Cir. 2006). *But see United States v. Mendoza-Mendoza*, 2007 U.S. App. LEXIS 20081 (6th Cir. Aug. 15, 2007) (unpublished; holding that Tennessee reckless aggravated assault is a COV at least when it involves the use or display of a deadly weapon). In any event, this offense should be avoided, and the Government will likely charge it as an AGF.

CMT: Probably is a CMT.

39-13-106, Vehicular Assault

AGF: No, the Sixth Circuit has held that this Tennessee offense is not a COV. *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006). Be aware, however, that the Government, operating in other circuits, may still try to charge it as a COV and AGF.

CMT: Most likely it is a CMT. *Matter of Fualaau*, 21 I. & N. Dec. 475 (BIA 1992). If the record of conviction establishes that death resulted, it is certainly a CMT. *Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994).

39-13-111, Domestic Assault

AGF: No, because the maximum punishment is less than one year.

CMT: No. *See Matter of Fualaau*, 21 I. & N. Dec. 475 (BIA 1992).

DVO: Yes.

39-13-202, First Degree Murder

AGF: Murder is an AGF under 8 U.S.C. § 1101(a)(43)(A).

CMT: Yes. *See, e.g., Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994).

39-13-210, Second Degree Murder

AGF: Yes. 8 U.S.C. § 1101(a)(43)(A); *see also* 8 U.S.C. § 1101(43)(B); *In re Vargas-Sarmiento*, 23 I. & N. Dec. 651 (BIA 2004). This is so even for the type of second-degree murder that results from unlawful drug distribution because the offense would be deemed a drug-trafficking offense.

CMT: Yes. This is so even for the type of second-degree murder that results from unlawful drug distribution. *See Matter of Khourn*, 21 I. & N. Dec. 1041 (BIA 1997).

39-13-211, Voluntary Manslaughter

AGF: Yes. *See In re Vargas-Sarmiento*, 23 I. & N. Dec. 651 (BIA 2004).

CMT: Yes. *See Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994).

39-13-212, Criminally Negligent Homicide

AGF: Avoid. The Government may decide to charge it as a COV (and thus as an AGF), but it probably is not a COV. That is so because the mens rea for the assault-like offense is mere criminal negligence. *In re Sweetser*, 22 I. & N. Dec. 709 (BIA 1999) (holding that permitting a child to be unreasonably placed in a situation which poses a threat is not a COV); *see also United States v. Portela*, 469 F.3d 496 (6th Cir. 2006) (holding that “recklessly causing bodily injury to another” is not a COV because the mens rea is mere recklessness). *Cf. State v. Gillon*, 15 S.W.3d 492 (Tenn. Crim. App. 1997) (demonstrating the type of merely negligent conduct that will support a conviction).

CMT: Avoid. Arguably this is not a CMT. “Criminal negligence” (unconscious and unreasonable disregard of danger) is a standard that is less serious than the “recklessness” required by *Matter of Franklin* 20 I. & N. Dec. 867 (BIA 1994) (which is the typical conscious disregard) for such an offense to qualify as a CMT.

39-13-213, Vehicular Homicide

AGF: Avoid because the Government may decide to charge it as a COV. But it should not be deemed a COV for the same reason that Tennessee Vehicular Assault is not a COV. *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006). *See Aggravated Assault*, Tenn. Code Ann. § 39-13-102, *supra*, for discussion.

CMT: Yes. *See, e.g., Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994).

39-13-215, Reckless Homicide

AGF: Avoid because the Government may decide to charge it as a COV. But it should not be deemed a COV for the same reason that Tennessee Vehicular Assault is not a COV. *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006). See Aggravated Assault, Tenn. Code Ann. § 39-13-102, *supra*, for discussion.

CMT: Yes. See, e.g., *Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994).

39-13-216, Assisted Suicide

AGF: Arguably this is not a COV because it is not committed “against” another, as required by the statutory definition of 18 U.S.C. § 16. Also, if the offense is of the subsection (a)(1) variety, it involves no use of force, and so should not be deemed a COV.

CMT: Undecided.

39-13-218, Aggravated Vehicular Homicide

AGF: Avoid because the Government may decide to charge it as a COV. But it should not be deemed a COV for the same reason that Tennessee Vehicular Assault is not a COV. *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006). See Aggravated Assault, Tenn. Code Ann. § 39-13-102, *supra*, for discussion.

CMT: Yes. See, e.g., *Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994).

39-13-302, False Imprisonment

AGF: No. This is not a COV because the maximum punishment is no more than one year imprisonment.

CMT: Uncertain, but avoid. The BIA cases involving the closely related offense of kidnapping mention kidnapping as a CMT, although no reason is given. *Matter of P-*, 5 I. & N. Dec. 444 (BIA 1953); *In re Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001); *but see Hamdan v. INS*, 98 F.3d 183 (5th Cir. 1996) (indicating Louisiana simple kidnapping is not a CMT.)

39-13-303, Kidnapping

AGF: It depends. But most instances will likely qualify as an AGF. Yes, a conviction is an AGF if (1) by force, or by threat of force, or involving involuntary servitude, and (2) a sentence in excess of one year imprisonment is imposed. It might not be an AGF if the ROC shows it was done by fraud, or if the ROC is No, if by fraud, or if the ROC does not reveal the way the offense was committed. But even a kidnapping committed by fraud might qualify as an AGF under the “fraud” offense category, so long as the fraud causes a loss of \$10,000 or more. See 8 U.S.C. § 1101(a)(43)(M).

CMT: Uncertain but avoid. The BIA cases involving kidnapping mention it as a CMT, although no reason is given. *Matter of P-*, 5 I. & N. Dec. 444 (BIA 1953); *In re Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001); *but see Hamdan v. INS*, 98 F.3d 183 (5th Cir. 1996) (indicating Louisiana simple kidnapping is not a CMT.)

39-13-304, Aggravated Kidnapping

AGF: Avoid. Same as Kidnapping, Tenn. Code Ann. § 39-13-303, *supra*, except that subsections (a)(3) and (a)(5) are certainly COV and thus they qualify as AGF if the punishment is one year or more.

CMT: Yes.

39-13-305, Especially Aggravated Kidnapping

AGF: Avoid. Same as Kidnapping, Tenn. Code Ann. § 39-13-303, *supra*, except that subsection (a)(1) is certainly a COV and thus AGF if the punishment is one year or more.

CMT: Yes.

39-13-401, Robbery

AGF: Yes, a COV.

CMT: Yes. *Matter of Martin*, 18 I. & N. Dec. 226 (BIA 1982).

39-13-402, -403, Aggravated Robbery

AGF: Yes.

CMT: Yes.

39-13-404, Carjacking

AGF: Yes, a COV because it is essentially a robbery offense. *See also In re Brevia-Perez*, 23 I. & N. Dec. 766 (BIA 2005) (holding that knowingly operating another's vehicle without consent is a COV). *But see United States v. Crowell*, 997 F.2d 146, 149-50 (6th Cir. 1993) (holding that an aggravated vehicle theft offense does not constitute a "crime of violence" under Sentencing Guidelines' definition).

CMT: Yes.

39-13-502, Aggravated Rape

AGF: Yes.

CMT: Yes.

39-13-503, Rape

AGF: Yes, although the statute might be divisible because, possibly, using fraud to commit a rape might not constitute a generic "rape" under the type of analysis required by *Taylor v. United States*, 495 U.S. 575 (1990). *But see United States v. Mack*, 53 F.3d 126 (6th Cir. 1995) (holding that sexual battery through deception is a "violent felony"); *Patel v. Ashcroft*, 401 F.3d 400 (6th Cir. 2005) (indicating that an offense is a COV when it involves a nonconsensual sexual act).

CMT: Yes.

39-13-504, Aggravated Sexual Battery

AGF: Yes. *See United States v. Hargrove*, 416 F.3d 486, 495 and n.3 (6th Cir. 2005) (summarizing Sixth Circuit holdings related to sex offenses).

CMT: Yes.

39-13-505, Sexual Battery

AGF: Yes.

CMT: Yes.

39-13-506, Statutory Rape

AGF: The Government will charge as AGF under 8 U.S.C. § 1101(a)(43)(A) as a “sexual abuse of a minor” offense. Dicta in *In Re Malta-Espinoza*, 23 I. & N. Dec. 656, 659 (BIA 2004) indicates this offense would be an AGF.

CMT: Arguably this is not a CMT, but the Government will charge it as a CMT.

39-13-511, Public Indecency - indecent exposure

AGF: The Government will charge as AGF if record of conviction supports that victim is a minor.

CMT: Yes.

39-13-523, Rape of a child

AGF: Yes on several bases.

CMT: Yes

39-13-527, Sexual Battery by an authority figure

AGF: Yes.

CMT: Yes.

39-13-528, Solicitation of a minor

AGF: Questionable. This offense is committed by soliciting a minor – or an undercover agent posing as a minor – to engage in a crime that would be the sexual abuse of a minor. The Government will charge this as a Sexual Abuse of a Minor offense under 8 U.S.C. § 1101(a)(43)(A), (U) and thus as an AGF. However, this offense arguably should not qualify as an AGF because it does not involve a sexual act. *See United States v. Rojas-Carillo*, 159 Fed. Appx. 630, 634-635 (6th Cir. 2005) (summarizing views on “sexual abuse of a minor” ground; indicating that an offense must involve a “sexual act” to be); *see also* 8 U.S.C. § 2243(a) (defining sexual abuse of a minor). This argument has been rejected by the Seventh Circuit in a case involving the solicitation of an undercover agent. *Hernandez-Alvarez v. Gonzales*, 432 F.3d 763 (7th Cir. 2005).

CMT: Yes.

39-13-529, Sexual activity involving a minor

AGF: Questionable for the reasons stated above in *Solicitation of a minor*, Tenn. Code Ann. § 39-13-528.

CMT: Yes.

39-14-103, Theft of Property

AGF: It depends. Theft is an AGF only if the sentence imposed is one year or more. *See* 8 U.S.C. § 1101(a)(43)(G).

CMT: Any theft conviction is a CMT. If the conviction is for misdemeanor theft, then it will *not* render a noncitizen deportable. If the conviction is for misdemeanor theft *and* the sentence imposed is for six months or less, then it will *not* render a noncitizen inadmissible.

39-14-104, Theft of Services

AGF: It depends. This is *not* a “theft” offense, under 8 U.S.C. § 1101(a)(43)(G) for AGF purposes. Nonetheless, some convictions will be an AGF because some will qualify as “fraud” offenses under 8 U.S.C. § 1101(a)(43)(M). A conviction will qualify as a “fraud” offense if the ROC shows both of two elements: (1) the amount of loss is \$10,000 or greater; and (2) the offense was done by fraud or deceit.

CMT: Yes.

39-14-106, Joyriding

AGF: No, but only because it cannot be punished by more than a year in prison. *See also United States v. Crowell*, 997 F.2d 146, 149-50 (6th Cir. 1993) (holding that an aggravated vehicle theft offense does not constitute a “crime of violence” under Sentencing Guidelines’ definition). *Cf. In re Brevia-Perez*, 23 I. & N. Dec. 766 (2005) (holding that felony offense of joyriding is a COV).

CMT: No because the offense does *not* include an intent to take the object permanently.

39-14-112, Extortion

AGF: It depends. If ROC shows that force or a threat of force was used to do the requisite “coercion,” then the offense is a COV. Or if the ROC shows it is a qualifying theft offense (meaning that: (1) the extortion was to deprive another of property permanently; and (2) and the punishment was imprisonment for at least one year), then it is an AGF. Otherwise, it is not an AGF.

CMT: Likely a CMT. *See Matter of G– T–*, 4 I. & N. Dec. 446 (BIA 1951).

39-14-114, Forgery.

AGF: Yes if at least a one-year sentence was imposed (which seems to be mandatory). 8 U.S.C. § 1101(a)(43)(R). Also, yes, if the amount of loss is \$10,000 or more. 8 U.S.C. § 1101(a)(43)(M). *Cf. In re Aldebesh*, 22 I. & N. Dec. 983 (BIA 1999).

CMT: Yes.

39-14-115, Criminal Simulation

AGF: Yes if at least a one-year sentence was imposed (which seems to be mandatory). 8 U.S.C. § 1101(a)(43)(R). Also, yes, if the amount of loss is \$10,000 or more. 8 U.S.C. § 1101(a)(43)(M). Although a merely possessory type of this offense is arguable *not* an AGF. *See Richards v. Ashcroft*, 400 F.3d 125 (2d Cir. 2005).

CMT: Yes.

39-14-118, Illegal possession or fraudulent use of Credit or Debit Card.

AGF: It depends. Yes, for subsection (b) of the statute if a at least a one-year sentence is imposed or if the amount of loss is \$10,000 or more. No, for subsection (a) of the statute if it is the Class B misdemeanor offense.

CMT: Yes, a conviction under subsection (b) is a CMT. But the effect of a conviction under subsection (a) is questionable. Subsection (a) might be considered a CMT (although the requisite intent to defraud is apparently not an element), but it will not result in deportation and will at least allow the alien rendered inadmissible to qualify for the petty-offense exception. Thus, a subsection (a) conviction punished as a Class B misdemeanor is likely a safe plea.

39-14-121, Worthless checks

Notably, this offense does not require an intent to defraud, but rather just knowledge of insufficient funds. The Sixth Circuit has found this distinction critical when holding that a conviction under this very statute is not a “crime of dishonesty.” *United States v. Barb*, 20 F.3d 694 (6th Cir. 1994).

AGF: It depends. Yes, an AGF, if the record shows both: (1) fraud in the commission; and (2) an amount of loss is in excess of \$10,000, then it is an AGF. Or if the ROC shows it is a qualifying theft offense (meaning that: (1) the extortion was to deprive another of property permanently; and (2) and the punishment was imprisonment for at least one year), then it is an AGF. Otherwise, it is not.

CMT: It depends. If the ROC shows fraud, it is a CMT. If the ROC does not necessarily establish fraud, then it is not a CMT. *Matter of Zangwill*, 18 I. & N. Dec. 22 (BIA 1981) (holding that Florida’s worthless-check offense, which embarks offenses involving mere knowledge of insufficient funds, is *not* a CMT).

39-14-150, Identity theft

AGF: Avoid. Might be charged as an offense “related to” forgery, *see Richards v. Ashcroft*, 400 F.3d 125 (2d Cir. 2005), or possibly fraud. 8 U.S.C. § 1101(a)(43)(M) (requiring amount of loss of \$10,000 to qualify as an AGF). Nonetheless, there is a strong argument that it is not an AGF.

CMT: It depends. Because it does not necessarily require an intent to defraud, it should not be a CMT unless the ROC establishes such an intent.

39-14-301, Arson

AGF: It depends. Even assuming that using fire is a “use of force,” this statute should be considered divisible under *Leocal v. Ashcroft*, 543 U.S. 1 (2004) because a person might knowingly use the fire to burn one’s own property. *See Tran v. Gonzalez*, 414 F.3d 404 (3d Cir. 2005). However, The Government will likely invoke *In re Palacios-Pinera*, 22 I. & N. Dec. 434 (BIA 1998) and charge it as a COV. First, it is best to seek a sentence of less than one year to avoid the *Palacios-Pinera* argument. If you can’t do that, you need to keep out of the ROC any language that establishes that the target property belonged to someone other than the defendant.

CMT: Yes, a CMT. *See Matter of S-*, 3 I. & N. Dec. 617 (BIA 1949).

39-14-302, Aggravated arson

AGF: This will most likely be deemed a COV, although it arguably should not be. The COV analysis should be the same as for Arson, § 39-14-301, *supra*. But the fact that the aggravators involve a third party either being injured or present may lead an immigration judge to find it a COV, notwithstanding *Leocal v. Ashcroft*, 543 U.S. 1 (2004) and *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006).

CMT: Yes, it is a CMT, for same reason as Arson, § 39-14-301, *supra*.

39-13-303, Setting fire to personal property or land

AGF: No. This should not be a COV for reasons stated in Arson, § 39-14-301, *supra*.

CMT: Avoid. This might be charged as a CMT; arguably it is not one. But seek a Reckless burning conviction, § 39-14-305, instead.

39-14-305, Reckless burning

AGF: No. This cannot be a COV because the maximum sentence is less than one year. *See also Tran v. Gonzalez*, 414 F.3d 404 (3d Cir. 2005).

CMT: No. This is not a CMT because it lacks an element of depraved intent.

39-14-402, Burglary

AGF: It depends. First, this is not an AGF if the sentence is less than one year. *See* 8 U.S.C. § 1101(a)(43)(F) [COV], (G) [Burglary offense]. Second, even if the sentence is one year or more, it should not be deemed an AGF if the ROC leaves open the possibility that the conviction is not a generic “burglary” and is not a COV. The ROC will leave this possibility open if it is possible that the conviction falls under (a)(4) (that is, if it is a burglary of a vehicle) or does not involve a theft (but if the ROC shows a burglary of a dwelling or business it can qualify as a COV. *See United States v. Vanhook*, 510 F.3d 569 (6th Cir. 2007).) Finally, you should avoid a ROC that shows that even a vehicular burglary offense involves driving the vehicle any distance, because such an offense may be treated by the Government as a COV. *See In re Brevia-Perez*, 23 I. & N. Dec. 766 (BIA 2005) (holding that joyriding is a COV); *but see United States v. Crowell*, 997 F.2d 146, 149-50 (6th Cir. 1993) (holding that an aggravated vehicle theft offense does not constitute a “crime of violence” under Sentencing Guidelines’ definition).

CMT: It depends. If the record of conviction does not show that the defendant intended to commit a CMT offense (such as theft), then it is not a CMT. That is, if the ROC merely establishes that the defendant sought to commit “any felony” (and not necessarily a felony that is a CMT) then it is not a CMT. *Matter of M-*, 2 I. & N. Dec. 721 (BIA 1946).

39-14-403, Aggravated Burglary

AGF: Yes. *See United States v. Nance*, 481 F.3d 882 (6th Cir. 2007) (holding that Tennessee aggravated burglary is a generic “burglary” offense).

CMT: It depends. If the record of conviction does not show that the defendant intended to commit a CMT offense (such as theft), then it is not a CMT. That is, if the ROC merely establishes that the defendant sought to commit “any felony” (and not necessarily a felony that is a CMT) then it is not a CMT. *Matter of M-*, 2 I. & N. Dec. 721 (BIA 1946).

39-14-404, Especially aggravated burglary

AGF: Yes.

CMT: It depends. If the record of conviction does not show that the defendant intended to commit a CMT offense (such as theft), then it is not a CMT. That is, if the ROC merely establishes that the defendant sought to commit “any felony” (and not necessarily a felony that is a CMT) then it is not a CMT. *Matter of M-*, 2 I. & N. Dec. 721 (BIA 1946).

39-14-405, Criminal trespass

AGF: No because the maximum sentence is 30 days. Moreover, it is not a “burglary” offense. *See United States v. Mahon*, 444 F.3d 530, 534 (6th Cir. 2006).

CMT: No. Trespass is only a CMT where it has as an essential element the intent to commit a theft. *Matter of Esfindiary*, 16 I. & N. Dec. 659 (BIA 1979).

39-14-406, Aggravated criminal trespass

Same as Criminal Trespass, § 39-14-405, *supra*. But keep any mention of a qualifying domestic relation being identified in the ROC as a victim or it might be charged as a DVO.

39-14-407, Trespass by motor vehicle.

Same as Criminal Trespass, § 39-14-405, *supra*. .

39-14-408, Vandalism

AGF: No. Even if the defendant gets a sentence of one year or more, this should not be a COV because there is no element of the use of force and it doesn't present the requisite risk of injury to another.

CMT: Avoid this because the Government might charge it as a CMT. Still, it should not be deemed a CMT because the statute doesn't require maliciousness or some other base intent. *See Matter of N-*, 8 I. & N. Dec. 466 (BIA 1959); *Matter of C-*, 2 I. & N. Dec. 716 (BIA 1947); *cf. Matter of R-*, 5 I. & N. Dec. 612 (BIA 1954).

P39-14-701, Possession of Burglary Tools

AGF: No.

CMT: It depends. If the ROC does not show that the crime intended to be committed during the intended burglary was a CMT, then it is not a CMT. *Matter of S-*, 6 I. & N. Dec. 769 (1955).

39-14-702, Possession of explosive components.

AGF: No, not punishable by a year or more.

CMT: No.

FAO: Yes.

39-14-903, Penalties for Money Laundering (incl. elements of offense).

AGF: It depends. If the amount of funds exceeds \$10,000, then it is an AGF. 8 U.S.C. § 1101(a)(43)(D).

CMT: Yes.

39-15-301 – Bigamy

AGF: No.

CMT: Yes.

39-15-302 – Incest

AGF: It depends. If ROC establishes that the victim was a minor, then it almost certainly an AGF, either as a COV or a sexual-abuse-of-minor offense under 8 U.S.C. § 1101(a)(43)(A). *See In re Malta-Espinoza*, 23 I. & N. Dec. 656 (BIA 2004). Of course, if the ROC establishes the use or threatened use of force, and the sentence imposed is one year or more, then it is certainly a COV and an AGF. *But see generally United States v. Sawyers*, 409 F.3d 732, 741-42 (6th Cir. 2005) (declining to hold that every sex offense involving a minor is a “crime of violence” under a definition similar to that of 18 U.S.C. § 16). Otherwise, if the ROC leaves open the possibility that the offense involved consensual sex between adults, it should not be deemed a COV or an AGF. *United States v. Hargrove*, 416 F.3d 486, 498-99 (6th Cir. 2005) (holding that an incest offense involving consenting adults is not a “violent felony” and expressing logic that would apply equally to the COV).

CMT: It depends. It will likely be charged as a CMT. *See In re Lopez-Meza*, 22 I. & N. Dec. 1188 (BIA 1999). But if the ROC fails to establish that this is *not* a case of intermarriage between an uncle/niece or aunt/nephew, then it is not a CMT. *Matter of B-*, 2 I. & N. Dec. 617 (BIA 1946).

39-16-102, Bribery of a Public Servant

AGF: Avoid. This will probably be charged as an AGF. *See United States v. Ko*, 1999 U.S. Dist. LEXIS 19369 (S.D.N.Y. Dec. 20, 1999); *United States v. Couto*, 311 F.3d 179 (2d Cir. 2002). But as the *Ko* court pointed out, it arguably is not an AGF because it is not explicitly covered by either of the bribery provisions of 8 U.S.C. § 1101(a)(43).

CMT: Yes. *Matter of V-*, 4 I. & N. Dec. 100 (BIA 1950).

39-16-107, Bribery of a Witness

AGF: Yes, assuming the term of imprisonment is at least one year. 8 U.S.C. § 1101(a)(43)(S).

CMT: Yes.

39-16-108, Bribing a Juror

AGF: Yes, assuming the term of imprisonment is at least one year. 8 U.S.C. § 1101(a)(43)(S).

CMT: Yes.

39-16-301, Criminal Impersonation.

AGF: No, because the maximum punishment is less than one year.

CMT: Most likely yes. A conviction under subsection (a) because a subsection (a) offense includes, as an element, an intent to injure or defraud. Arguably, a subsection (b) conviction is *not* a CMT because it does not include, as an element, an intent to defraud. *See Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2008) (holding that intentionally lying to a police officer is not a CMT because it lacks the element of an intent to defraud).

39-16-502, False Reports

AGF: It depends. At least subsections (a)(1) and (a)(2) are AGF because they relate to the obstruction of justice and require a sentence of more than one year. 8 U.S.C. § 1101(a)(43)(S). Subsection (a)(3) might be charged as an obstruction of justice aggravated felony; if the ROC supports it, it might also be charged as a COV.

CMT: Yes, although under certain circumstances one might argue that it is not. *See Blanco v. Mukasey*, 518 F.3d

714 (9th Cir. 2008) (holding that intentionally lying to a police officer is not a CMT because it lacks the element of an intent to defraud); *see generally Zaitona v. INS*, 9 F.3d 432, 437 (6th Cir. 1993).

39-16-503, Tampering with or fabricating evidence

AGF: Yes. 8 U.S.C. § 1101(a)(43)(S).

CMT: Yes.

39-16-504, Destruction of and tampering with governmental records

AGF: No.

CMT: Probably.

39-16-507, Coercion of witness.

AGF: Yes. 8 U.S.C. § 1101(a)(43)(S).

CMT: Yes.

39-16-508, Coercion of juror

AGF: Yes. 8 U.S.C. § 1101(a)(43)(S). Seek a disposition under § 39-16-509.

CMT: Yes.

39-16-509, Improper influence of a juror

AGF: No, not an AGF under 8 U.S.C. § 1101(a)(43)(S) because the sentence is less than one year.

CMT: Maybe not.

39-16-510, Retaliation for past action

AGF: Yes. This may be an AGF under 8 U.S.C. § 1101(a)(43)(S), for obstruction of justice offenses. Moreover, it will likely be a COV. *See United States v. Sawyers*, 409 F.3d 732, 742 (6th Cir. 2005) (holding that Tenn. Code Ann. § 39-16-510(a) retaliation conviction was a “violent felony,” for reasons that would likely entail that it is also a COV under 18 U.S.C. § 16).

CMT: Yes.

39-16-602, Resisting stop, frisk, halt, arrest or search

AGF: No because the maximum punishment is less than one year.

CMT: Avoid. It will likely be charged as a CMT. *But see Partyka v. AG of the United States*, 417 F.3d 408 (3rd Cir. 2005) (includes survey of BIA cases); *Zaranska v. United States*, 2005 U.S. Dist. LEXIS 17559 (E.D.N.Y. July 18, 2005); *Garcia-Meza v. Mukasey*, 516 F.3d 535 (7th Cir. 2008) (indicating that, if the ROC shows that the offense merely involved the offensive or insulting touching of an officer, it is not a CMT).

FAO: Will be a firearm offense if the ROC shows use of a firearm under subsection (d).

39-16-603, Evading arrest

AGF: It depends. A subsection (a) conviction is not an AGF because that type of conviction carries a maximum penalty of less than one year. Likewise, even though it is a felony, a subsection (b)(1) conviction should not be a COV, and thus should not be deemed an AGF, because it lacks the requisite risk of violence. *United States v. Foreman*, 436 F.3d 638 (6th Cir. 2006) (holding that Michigan fourth degree fleeing and eluding is not a “crime of violence” as defined by USSG § 2K2.1, under logic that would apply to COV under 18 U.S.C. § 16). However, a subsection (b)(2) conviction will likely be deemed a COV because of its aggravators. *See United States v. Martin*, 378 F.3d 578 (6th Cir. 2004) (holding Michigan third degree fleeing and eluding is a similarly defined “crime of violence”).

CMT: It depends. But if the ROC shows a vile or depraved intent, then it is certainly a CMT.

39-16-605, Escape from a penal institution

AGF: It depends. But if prosecuted as a felony offense and the sentence imposed is one year or more, it will likely be considered an AGF because it will likely be considered a COV. *See United States v. Goodman*, 519 F.3d 310 (6th Cir. 2008) (holding Tennessee escape, even a walkaway offense, is a “crime of violence” under a similar definition). However, it is arguable that an escape offense – especially a walkaway offense – does not satisfy the 18 U.S.C. § 16 definition of a COV, and thus is not an AGF. *See Patel v. Ashcroft*, 401 F.3d 400 (6th Cir. 2005) (explaining that the type of “force” required by 18 U.S.C. § 16’s definition of COV is force that would be used *as a means to complete* the intended offense); *see also United States v. Collier*, 493 F.3d 731 (6th Cir. 2007) (holding that some walkaway offenses do not even satisfy the relatively broad definition of a “violent felony”).

CMT: Yes.

39-16-702, Perjury

AGF: It depends. It is an AGF if prosecuted as a felony and results in a sentence of one year or more. 8 U.S.C. § 1101(a)(43)(P).

CMT: Yes.

39-16-703, Aggravated perjury

AGF: Yes, assuming a sentence of one year or more. 8 U.S.C. § 1101(a)(43)(S).

CMT: Yes.

39-16-705, Subornation of perjury

AGF: It depends. It is an AGF if prosecuted as a felony and results in a sentence of one year or more. 8 U.S.C. § 1101(a)(43)(S).

CMT: Yes.

39-17-15, Stalking

AGF: Maybe. If the sentence is less than one year (i.e., if it is a misdemeanor prosecuted under subsection (b)), then it should not be an AGF because the sentence is too short to qualify as a COV. If the conviction is comes under subsections (c) or (d) and carries a sentence of a year or more, then the Government will likely charge it as a COV and thus as an AGF. *See In re Malta-Espinoza*, 23 I. & N. Dec. 656, 659 (BIA 2004) (holding that stalking in violation of a protective order is a COV). It is arguable that such an offense is not a COV under the holding of *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006). Nonetheless, a

felony disposition under this statute must be avoided.

CMT:

DVO: Yes, stalking is specifically listed as a DVO. 8 U.S.C. § 1227(a)(2)(E)(i). Even Tennessee's misdemeanor stalking offense, under subsection (b), would appear to satisfy the generic meaning of "stalking," at least in the view of the Second Circuit. *Arriaga v. Mukasey*, ___ F.3d ___, 2008 U.S. App. LEXIS 6415 (2d Cir. March 27, 2008).

39-17-417, Manufacture, distribute, or possess with intent to distribute a controlled substance

AGF: Yes, any conviction is an AGF because any conviction under this section would be treated as a trafficking felony under federal law, 21 U.S.C. § 841(a). See *Lopez v. Gonzales*, 127 S.Ct. 625 (2006).

Notably, if the Tennessee's list of controlled substances is broader than the federal list, then a conviction under this provision might fail to be an AGF *when the ROC fails to identify the drug upon which the conviction is based*. *Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965); *Matter of Mena*, 17 I. & N. Dec. 38 (BIA 1979); *Matter of K- V- D-*, Int. Dec. 3422 (BIA 1999); see *Gousse v. Ashcroft*, 339 F.3d 91 (2d Cir. 2003). But note that such a claim will not be likely to arise in Tennessee since its criminal code aims to keep its list of controlled substance the same as the federal list. Tenn. Code Ann. § 39-17-403(d).

CMT: Yes, *In re Khourn*, 21 I. & N. Dec. 1041 (BIA 1997).

39-17-418, Simple Possession or Casual Exchange of controlled substance

AGF: It depends.

First, if the ROC establishes that the conviction is for "casual exchange," then it will be an AGF because federal law treats such an offense as a trafficking felony under 21 U.S.C. § 841(a). *Lopez v. Gonzales*, 127 S.Ct. 625 (2006). So, you must ensure the ROC specifies that the offense is for "simple possession," or at least that the ROC does not establish whether the conviction is for "simple possession" or for "casual exchange."

Second, if the offense is for "simple possession," then it will not be an AGF if incurred under subsections (a), (b), (c), or (d) because those offenses are not treated as felonies under federal law. *Lopez v. Gonzales*, 127 S.Ct. 625 (2006). This is the type of offense you should aim for, if incurring a conviction is necessary (because basically any conviction, except for simple possession of less than 30 grams of marijuana, will render the defendant deportable).

But beware that a conviction under subsection (e) – a recidivist felony offense – would, at least presently, be deemed an AGF because the defendant was charged and convicted as a recidivist. *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382 (BIA 2007). The Sixth Circuit has not yet ruled on this issue after *Lopez v. Gonzales*, and the rule could change for the better some day.

This *Carachuri-Rosendo* rule regarding recidivism could also change for the worse some day. The Seventh Circuit has already adopted a worse rule. In that circuit, *any second (or subsequent) conviction for simple possession* is an AGF, even if the state has not charged it under a recidivism provision. *United States v. Pacheco-Diaz*, 506 F.3d 545, 548-49 (7th Cir. 2007). Given the possibility that the *Pacheco-Diaz* rule could prevail in the end (despite its unreasonableness), it is far from safe to plea to any second or subsequent drug offense, even if it is one for simple possession.

Bottom line: If a conviction is necessary, seek one that is for "simple possession" and *not* imposed under the recidivism provision of subsection (e).

CMT: No.

CSO: Yes, unless it is the offender's first drug offense and it involves possession for one's own use of 30 grams or less of marijuana.

39-17-423, Counterfeit controlled substances.

AGF: No. These should *not* be deemed AGF offenses because there is no felony analogue in the federal statute. *See Lopez v. Gonzales*, 127 S.Ct. 625 (2006); *Desai v. Mukasey*, __ F.3d __, 2008 U.S. App. LEXIS 6470 (7th Cir. March 28, 2008) (describing this argument).

CMT: No, according to an unpublished decision of the BIA. *See Desai v. Mukasey*, __ F.3d __, 2008 U.S. App. LEXIS 6470 (7th Cir. March 28, 2008) (reporting this unpublished decision).

CSO: Questionable. According to the Seventh Circuit, such a trafficking offense is a CSO, and so a conviction under subsections (a), (b), or (c) will be a CSO. *Desai v. Mukasey*, __ F.3d __, 2008 U.S. App. LEXIS 6470 (7th Cir. March 28, 2008). But that decision is of questionable soundness, and could be rejected by the BIA or Sixth Circuit. Nonetheless, avoid it.

39-17-425, Drug paraphernalia,

AGF: It depends. If the offense involves the sale, offer for sale, shipment, or import/export of drug paraphernalia, then it might be deemed an AGF since such an offense is a felony under federal law (21 U.S.C. § 863). *See Lopez v. Gonzales*, 127 S.Ct. 625 (2006). If it is for simple possession or use of drug paraphernalia, then it should not be an AGF.

CSO: The relevant inquiry here is whether the offense is deemed a "controlled-substance offense." This will likely be deemed a CSO (and thus render the defendant deportable or inadmissible), but, if the paraphernalia is a marijuana pipe, it should be excluded (or allow for a waiver) under the exception for offenses relating to the possession of 30 grams or less of marijuana for personal use. *See Barraza v. Mukasey*, 519 F.3d 388 (7th Cir. 2008).

39-17-1302, Prohibited weapons

AGF: It depends. Yes, an AGF if it involves a federally-prohibited weapon, namely, an explosive weapon, machinegun, short-barrel (*viz.*, sawed-off) rifle, shortbarrel shotgun, or firearm silencer. *See* 8 U.S.C. § 1101(a)(43)(E). No, if it involves a hoax device, switchblade, knuckles, or other nonfirearm implement. So ensure that the ROC indicates the offense is one of the latter category, or at least that the ROC does not indicate which type of weapon is involved.

CMT: It depends. Not a CMT unless the ROC shows an intent to use in an offense such as an assault. *Compare Matter of Granados*, 16 I. & N. Dec. 726 (BIA 1980) *with* *Matter of S-*, 8 I. & N. Dec. 344 (BIA 1974). *Cf. United States v. Amos*, 501 F.3d 524 (6th Cir. 2007) (holding that the categorically unlawful possession of a sawed-off shotgun does not necessarily involve a serious potential risk to another).

FAO: It depends. It is divisible in the same way described above for an AGF.

39-17-1303, Unlawful sale, loan or gift of firearm.

AGF: It depends. Arguably it is categorically *not* an AGF since it is merely a misdemeanor offense. In any event, if the ROC allows that the conviction pertains to a switchblade knife, it is not an AGF. Also, it arguably is not an AGF if it involved a mere gift. *Cf. Kuhlali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (discussing "trafficking" definition).

CMT: No.

FAO: It depends. It is an FAO if the ROC shows it involved a firearm, not a switchblade.

39-17-1305, Possession of firearm where alcoholic beverages are served.

AGF: No.

CMT: No.

FAO: Yes.

39-17-1306, Carrying weapon during judicial proceedings.

AGF: No.

CMT: No.

FAO: It depends. If ROC shows the weapon is a firearm, then it is a FAO.

39-17-1307, Unlawful carrying or possession of a weapon.

AGF: It depends.

A conviction under subsection (a) is not a COV and not an AGF because the maximum punishment is less than a year.

A conviction under subsection (b) is an AGF because it is essentially equivalent to the federal felon-in-possession offense, 18 U.S.C. § 922(g)(1). *See* 8 U.S.C. § 1101(a)(43)(E)(ii); *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497 (7th Cir. 2008). Notably, *Negrete-Rodriguez* identifies an argument that could be made against this conclusion in the Sixth Circuit.

A conviction under subsection (c) or (d) is likely a COV and thus an AGF if the sentence is one year or more.

CMT: It depends. This is not a CMT unless the ROC shows intent to use the weapon in an offense such as an assault. *Compare Matter of Granados*, 16 I. & N. Dec. 726 (BIA 1980) *with Matter of S-*, 8 I. & N. Dec. 344 (BIA 1974).

FAO: It depends. If the ROC shows the weapon is a firearm, then it is a firearm offense. Thus, a conviction under subsection (c) certainly is not a firearms offense. But a conviction under subsection (c) could easily be deemed an AGF.

39-17-1309, Carrying weapons on school property.

AGF: It depends. This is not an AGF unless the ROC shows the weapon is a federally prohibited weapon, such as a machinegun, shortbarrel rifle, etc. *See* 26 U.S.C. § 5845 for list of federally prohibited weapons.

CMT: No.

FAO: It depends. If the ROC shows the weapon is a firearm, then it is a firearm offense.

39-17-1311, Carrying weapons on public parks, etc.

AGF: It depends. A conviction for this offense is not an AGF unless the ROC shows the weapon is a federally-

prohibited weapon, such as a machinegun, shortbarrel rifle, etc. See 26 U.S.C. § 5845 for list of federally prohibited weapons.

CMT: No.

FAO: It depends. If the ROC shows the weapon is a firearm, then it is a firearm offense.

39-17-1316, Sales of dangerous weapons.

AGF: Yes.

CMT: Uncertain.

FAO: Yes.

39-17-1321, Possession of handgun while under the influence

AGF: No.

CMT: No.

FAO: Yes.

55-10-205, Reckless driving

AGF: No.

CMT: No. *Matter of C-*, 2 I. & N. Dec. 716 (BIA 1947).

55-10-401, -403, Driving under the influence

AGF: No. Regardless the harm caused and the penalty imposed, this is not a COV and is not an AGF because, under Tennessee law, the offense has no mens rea component. *State v. Turner*, 953 S.W.2d 213, 215 (Tenn. Crim. App. 1996) (no mens rea); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (holding that, lacking a mens rea component, a DUI offense cannot be a COV).

CMT: No. This is not a CMT regardless the number of prior DUI's the offender has. *In re Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001); *cf. Begay v. United States*, __ U.S. __, 2008 U.S. LEXIS 3474 (April 16, 2008) (holding that recidivist DUI is not a "violent felony"). Notably, Tennessee lacks an offense, or an enhanced penalty, for committing a DUI on a suspended license. *In re Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001) (holding that DUI on a suspended license is a CMT).

55-10-416, Open container

AGF: No.

CMT: No.

Appendix A

Statutory Definitions

1. **Aggravated felony. 8 U.S.C. § 1101(a).**

(43) The term "aggravated felony" means--

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act [21 USCS § 802]), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18, United States Code (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded \$ 10,000;

(E) an offense described in--

(i) section 842 (h) or (i) of title 18, United States Code, or section 844 (d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g) (1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18, United States Code (relating to firearms offenses); or

(iii) section 5861 of the Internal Revenue Code of 1986 [26 USCS § 5861] (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18, United States Code (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18, United States Code (relating to child pornography);

(J) an offense described in section 1962 of title 18, United States Code (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that--

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of title 18, United States Code (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of title 18, United States Code (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in--

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18, United States Code;

(ii) section 601 of the National Security Act of 1947 [50 USCS 421] (relating to protecting the identity of undercover intelligence agents);
(iii) section 601 of the National Security Act of 1947 [50 USCS§ 421] (relating to protecting the identity of undercover agents);

(M) an offense that--

(i) involves fraud or deceit in which the loss to the victim or victims exceeds \$ 10,000; or
(ii) is described in section 7201 of the Internal Revenue Code of 1986 [26 USCS § 7201] (relating to tax evasion) in which the revenue loss to the Government exceeds \$ 10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 274(a) [8 USCS § 1324(a)(1)(A) or (2)] (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;

(O) an offense described in section 275(a) or 276 [8 USCS § 1325(a) of 1326] committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18, United States Code, or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

2. Crime involving moral turpitude.

This is defined by case law. Generally, an offense involves moral turpitude if it contains elements of fraud, theft, intent to cause great bodily harm, and sometimes lewdness, recklessness or malice.

3. Crime of violence. 18 U.S.C. § 16.

The term "crime of violence" means--

(a) 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

(b) 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.

4. Domestic violence offense. 8 U.S.C. § 1227(a)(2).

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children [and].

(i) Domestic violence, stalking, and child abuse. Any alien 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 is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18, United States Code) 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.

(ii) Violators of protection orders. Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

5. Firearm offense. 8 U.S.C. § 1227(a)(2).

(C) Certain firearm offenses. Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law is deportable.

6. Controlled substance offense. 8 U.S.C. § 1227(a)(2)(B).

(B) Controlled substances.

(i) Conviction. Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802, other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts. Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

Appendix B

The Categorical Approach

The proper method for determining whether a conviction constitutes an “aggravated felony,” “crime of violence,” or an other qualifying offense is the “categorical approach.” *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 818-19 (2007); *Leocal v. Ashcroft*, 125 S. Ct. 377, 381 (2004); see *Taylor v. United States*, 495 U.S. 575, 602 (1990).

The categorical approach typically entails two steps. First, the court must look strictly at the statutory definition of the crime to determine whether the offense categorically constitutes, for example, a crime of violence. See *Duenas-Alvarez*, 127 S.Ct. at 818. At this stage, the court “will not look at the underlying facts of [the defendant’s] conviction.” *United States v. Payne*, 163 F.3d 371, 374 (6th Cir. 1998); see *Leocal*, 125 S.Ct. at 381 (we “look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to the petitioner’s crime.”). Moreover, when the court considers the statutory elements of the offense, it must consider “the least objectionable conduct that would violate the statute.” *United States v. Amos*, 501 F.3d 524, 527 (6th Cir. 2007) (finding least objectionable conduct did not qualify as “violent felony”); see also *Dalton v. Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001) (“only the minimal criminal conduct necessary to sustain a conviction is relevant” (internal quotations omitted)); *Garcia-Maldonado v. Gonzales*, 491 F.3d 284, 288 (5th Cir. 2007) (“the statute must be read at the minimum criminal conduct necessary to sustain a conviction under the statute.”). When deciding what is the “least objection conduct” that would violate the statute in question, the court will consider only conduct if there is a “reasonable probability,” rather than a mere “theoretical possibility,” that authorities would base a prosecution upon it. *Duenas-Alvarez*, 127 S.Ct. at 822; see *United States v. McGrattan*, 504 F.3d 608, 614-15 (6th Cir. 2007) (finding a “realistic probability” of prosecution for minimally objectionable conduct because unpublished judicial decisions made it “clear that such a possibility is contemplated by the law,” even though no case, published or unpublished, reported any such prosecution).

If the least objectionable offense under the statutory elements satisfies the definition of the qualifying offense, then the inquiry stops at that point: a conviction under the statute is categorically, e.g., a crime of violence, and it serves as a predicate offense. If, on the contrary, the statute of conviction embraces both conduct that would — and conduct that would *not* — constitute a crime of violence, then the statute is “divisible,” see, e.g., *Dalton*, 257 F.3d at 204, and the court proceeds to the second step. See *Duenas-Alvarez*, 127 S.Ct. at 819.

At the second step of the analysis, the court can broaden the scope of its inquiry, but only to the “record of conviction.” See *Shepard v. United States*, 125 S.Ct. 1254, 1263 (2005). It looks at the record of conviction to determine which portion of the divisible statute the defendant was convicted of. Doing so, the court determines whether the defendant was *necessarily* convicted of conduct that does, or does not, meet the relevant definition. See *United States v. Arnold*, 58 F.3d 1117, 1124 (6th Cir. 1995). If the conviction was obtained through a trial, then the court can look to a record of conviction consisting of the charging document, jury instructions, and verdict. *Taylor*, 495 U.S. at 602. If the conviction was obtained through a guilty plea, then the court can look to a record of conviction consisting of the charging document, the conviction, and a record of “findings of fact adopted by the defendant upon entering the plea.” *Shepard*, 125 S.Ct. at 1260. The court cannot look at documents such as police reports that do not necessarily report the facts to which the defendant pled guilty. *Id.*; see *United States v. Armstead*, 467 F.3d 943, 947 (6th Cir. 2006) (explaining that police reports and criminal complaint applications play no role in the analysis); see *Armstead*, 467 F.3d at 949-50 (holding that, when a defendant pleads to a lesser-included offense of the offense charged in the original indictment, the court must disregard all language in the indictment that is unnecessary to support the lesser offense to which the defendant pled). The court cannot consider such documents because the crime-of-violence definition, for example, is concerned not with “prior conduct” but rather with “prior ‘convictions’ and the ‘elements’ of crimes.” *Shepard*, 125 S.Ct. at 1259; see *Arnold*, 58 F.3d at 1124 (the “definition of a ‘crime of violence’ is not intended to include behavior for which the defendant was neither charged nor convicted.”). In sum, all that is relevant is what the defendant necessarily pled guilty to (or was convicted of), not what the defendant probably did. When negotiating a plea, this doctrine can be very important because a defendant may be able to avoid the immigration consequences for his offense by simply keeping the pertinent facts out of the record of conviction.

