

QUICK REFERENCE CHART  
AND ANNOTATIONS  
FOR DETERMINING  
IMMIGRATION CONSEQUENCES OF  
SELECTED ARIZONA OFFENSES

Immigrant Legal Resource Center  
Florence Immigrant and Refugee Rights Project  
Maricopa County Office of the Public Defender

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## **Introduction**

**Note to Immigration Attorneys: Using the Chart.** This chart was written for criminal defense counsel, not immigration counsel. It represents a fairly conservative view of the law, meant to guide criminal defense counsel away from potentially dangerous options and toward safer ones. Thus immigration counsel should not rely on the chart in deciding whether to pursue defense against removal. An offense may be listed as an aggravated felony or other adverse category here even if there are strong arguments to the contrary that might prevail in immigration proceedings. For a more detailed analysis of Ninth Circuit law, see cited sections of *Defending Immigrants in the Ninth Circuit* ([www.ilrc.org](http://www.ilrc.org), 2013). The Chart can provide guidance as to the risk of filing an affirmative application for a non-citizen with a criminal record. The Notes are concise and basic summaries of several key topics.

**1. Using the Chart and Notes.** The Chart analyzes adverse immigration consequences that flow from conviction of selected Arizona offenses and suggests how to avoid the consequences. Endnote annotations discuss each offense in greater detail. The Chart appears organized numerically by code section.

Several short articles or “**Notes**” at the beginning of the chart provide more explanation of selected topics. These include Notes that explain the Chart’s immigration categories, such as aggravated felonies and crimes involving moral turpitude, as well as those that discuss certain kinds of offenses, such as domestic violence or controlled substances, and unique considerations, such as Deferred Action for Childhood Arrivals (“DACA”)

**Please note:** There are certain immigration benefits that can potentially be affected by conviction under *any* statute. Temporary Protected Status (“TPS,”) for example, may be terminated by *any* felony or *any* two misdemeanors. Deferred Action for Childhood Arrivals (“DACA”), similarly, may be unavailable to anyone with *any* felony, significant misdemeanor, or any three misdemeanors. Because these benefits are impacted by conviction under any statute, they are not specifically addressed in every section. Defense counsel should determine if their client has TPS or is DACA eligible and separately consider those consequences.

**2. Sending comments about the Chart.** Contact us if you disagree with an analysis, see a relevant new case, want to suggest other offenses to be analyzed or to propose other alternate “safer” pleas, or want to say how the chart works for you or how it could be improved. Send email to [info@azchart.org](mailto:info@azchart.org). This address will not answer legal questions. For consultations, contact Katharine Ruhl at [katharine@ruhlimmigration.com](mailto:katharine@ruhlimmigration.com), or other consultation service.

**3. Need for Individual Analysis.** This Chart and Notes are a summary of a complex body of law, to be consulted on-line or printed out and carried to courtrooms and client meetings for quick reference. However, more thorough individual analysis of a defendant’s immigration situation is needed to give competent defense advice. For example, the defense goals for representing a permanent resident are different from those for an undocumented person, and analysis also changes depending upon past convictions and what type of immigration relief is potentially available. The Chart and Notes are best used in conjunction with resource works

such as Brady, *Defending Immigrants in the Ninth Circuit*, or Tooby, *Criminal Defense of Immigrants*, and/or along with consultation with an immigration expert.

Ideally each noncitizen defendant should complete a form which captures the information needed to make an immigration analysis and is a diagnostic aid. Some offices print these forms on colored paper, so that defenders can immediately identify the file as involving a noncitizen client and have the client data needed to begin the immigration analysis.

**4. Disclaimer, Additional Resources.** While federal courts have specifically affirmed the immigration consequences listed for some of these offenses, in other cases the chart represents only the authors' opinion as to how courts are likely to rule. In addition there is the constant threat that Congress will amend the immigration laws and apply the change retroactively to past convictions. Defenders and noncitizen defendants need to be aware that the immigration consequences of crimes is a complex, unpredictable and constantly changing area of law where there are few guarantees. Defender offices should check accuracy of pleas and obtain up-to-date information. But using this guide and other works cited will help defenders to give noncitizen defendants a greater chance to preserve or obtain lawful status in the United States – for many defendants, a goal as or more important than avoiding criminal penalties.

### **Acknowledgements**

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<b>Aggravated Felony</b>	<b>Aggravated Felony</b> , defined at 8 U.S.C. § 1101(a)(43)(A)-(U). The aggravated felony definition includes twenty-one provisions that describe hundreds of offenses, which need not be aggravated or felonious. Aggravated felons under immigration law are ineligible to apply for most forms of discretionary relief from deportation including asylum, voluntary departure, and cancellation of removal. Conviction of an aggravated felony triggers mandatory detention without bond pending deportation. A conviction for illegal reentry after deportation or removal, in violation of 8 U.S.C. § 1326, will carry a significantly higher federal prison term if the defendant was previously convicted of an aggravated felony. <i>See</i> 8 U.S.C. § 1326(b)(2). <i>See</i> Note: Aggravated Felony.
<b>CMT</b>	<b>Crime Involving Moral Turpitude (CMT)</b> . A crime involves moral turpitude if it involves fraud, or it comes within a vague definition of involving evil intent or deviating from accepted rules of contemporary morality. Non-fraudulent crimes are most likely to be CMTs if they involve an intent to injure, actual injury, or a special class of victim. Here, moral turpitude is defined according to federal immigration case law, and not, e.g., state cases on witness credibility or disbarment. For CMT determinations, see comments on individual offenses in this chart. A noncitizen is <i>deportable</i> who (a) is convicted of two CMT's, which are not part of a "single scheme of criminal misconduct," at any time after being admitted to the U.S. <i>or</i> (b) is convicted of one CMT, committed within five years of admission to the U.S., that carries a potential sentence of at least one year. 8 USC § 1227(a)(2)(A)(ii) and (i). A noncitizen is <i>inadmissible</i> if convicted of one CMT, unless he or she qualifies for the petty offense or youthful offender exception. To qualify for the petty offense exception, the person must have committed only one CMT, which has a potential sentence of not more than a year, and a sentence of not more than six months must have been imposed. To qualify for the youthful offender exception, the person must have committed only one CMT. 8 USC § 1182(a)(2)(A)(ii)(II) and (I). <i>See</i> Note: CMT.
<b>DRUG</b>	<b>Controlled Substance Offenses</b> . A noncitizen is deportable and inadmissible if convicted of an offense "relating to a controlled substance (as defined in section 802 of Title 21)." There is an exception to the deportation ground, and a waiver of inadmissibility, for conviction of a single offense of possession or being under the influence of marijuana or hashish. To be deportable, the person must have been convicted after admission to the U.S. 8 USC § 1227(a)(2)(B)(i) (deportability), 8 USC § 1182(a)(2)(A)(i)(II), (h) (inadmissibility waiver). In many cases, the record of conviction must identify the specific controlled substance involved in order for the crime to have immigration consequences. <i>See</i> Note: Controlled Substances and comments on individual offenses.

**DV  
CHILDREN**

**Crimes of Domestic Violence, Stalking, Violation of Protection Order, Crime of Child Abuse, Neglect or Abandonment.** A noncitizen convicted of one of these offenses, or who is the subject of a court order finding certain types of violations of a domestic violence protective order, is deportable under 8 USC § 1227(a)(2)(E). A crime of domestic violence is defined as a “crime of violence” against a current or former spouse, cohabitant, person sharing a common child, or any other a person who is protected from the defendant’s acts under the domestic or family violence law. *See* Note: Domestic Violence and individual offenses in this chart. To be a crime of domestic violence, the offense must first be a crime of violence. While the categorical approach applies to determine whether an offense is a crime of violence, the BIA has recently held that the circumstance specific approach applies in determining whether there is a domestic relationship. *Matter of Estrada*, 26 I & N Dec. 749 (BIA 2016). This means that courts will be able to review records outside the record of conviction to determine whether there is a domestic relationship.

**FIREARMS** **Firearms offenses:** A noncitizen is deportable under 8 U.S.C. § 1227(a)(2)(C) 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 ....”

In order to qualify as a removable firearms offense under the Immigration and Nationality Act, a state firearms offense must match the federal definition of firearm at 18 USC § 921(a). *See* INA § 237(2)(C). The federal statute includes an exception for antique firearms. In *U.S. v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014), the Ninth Circuit held that “any conviction under a state firearms statute lacking an exception for antique firearms is not a categorical match for the federal firearm ground of removal.” *Id.* At 634. The Arizona State Attorney General has confirmed that offenses involving antique firearms are equally subject to prosecution. *Ariz. Op. Att’y Gen. No. I14-009* (Jan. 2, 2015).

As always, the law is subject to change. Immigration counsel have excellent arguments under current law that an Arizona conviction involving a “firearm,” without more, can never be a removable offense for lack of an antique firearms exception. However, defense counsel offers far more security in the long term by sanitizing the record of conviction and removing reference to a “firearm” all together where possible.

The safest option is to plea to possession of a “weapon,” and not specify a “firearm” if the statute includes weapons and not necessarily firearms. The Supreme Court has held that a statute is only divisible if it contains multiple, alternative elements, not multiple, alternative means. *See Descamps v. U.S.*, 133 S. Ct. (9th Cir. 2013), *see also Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016). The Court used the example of a statute which requires only “an indeterminate ‘weapon,’” which a jury would not necessarily have to find is a firearm, as an example of an indivisible statute. Under this rationale, statutes which refer to a “deadly weapon” or “dangerous instrument” are indivisible because a deadly weapon is any lethal weapon, and a firearm is a means to violate that element, not an element. The Supreme Court has accepted certification in a case which will revisit the meaning of “divisible” in *Descamps*, and which could impact this analysis. *See* Note: “Divisible Statutes: Record of Conviction,” Note: Firearms.

## **DACA**

**Deferred Action for Childhood Arrivals (“DACA”):** The past several years have seen a marked increase of the use of prosecutorial discretion within the Department of Homeland Security, particularly for those with no or minor criminal histories. One of the most significant uses of prosecutorial discretion has been the implementation of Deferred Action for Childhood Arrivals. DACA was not created by Congress, but rather was created by executive order. It is temporary in nature, but represents a significant benefit for those who entered the United States as children, are undocumented, and have no other form of relief. Defense counsel should always consider whether their client may be eligible for DACA, and how a conviction would effect that application.

DACA is essentially a commitment not to remove the non-citizen for a period of at least two years, and allows the recipient work authorization for that period. If your client was present in the United States and under 31 as of June 15, 2012, had no lawful status, and came to the United States as a minor, he or she may qualify for DACA. A non-citizen is disqualified from DACA if they have been convicted of a “felony,

significant misdemeanor, or three or more other misdemeanors.” *See* <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca>. Thus, *any* felony, and *any* three misdemeanors will generally disqualify a non-citizen no matter their nature. If a client may be eligible for DACA, defense counsel should strive to avoid any felony or any third misdemeanor. A “significant misdemeanor” is “a misdemeanor as defined by federal law (specifically, one for which the maximum term of imprisonment authorized is one year or less but greater than five days) and: (1) regardless of the sentence imposed, is an offense of domestic violence; sexual abuse or exploitation, burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or, driving under the influence; or (2) if not an offense listed above, is one for which the individual was sentenced to time in custody of more than 90 days.” *Id.* The sentence must be time actually served, and does not include a suspended sentence. *Id.* If the misdemeanor is one specifically listed, defense counsel should advise the client that it will likely disqualify him or her from DACA. Note, however, that if the equities are substantially developed to show exceptional circumstances, an applicant may be granted DACA despite the criminal offense because DACA is ultimately discretionary. For more details, *See* [http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#criminal convictions](http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#criminal%20convictions).

The Deferred Action program may soon be expanded, and a similar program implemented for parents of U.S. Citizens. Due to a federal court order and pending litigation, however, USCIS is not currently accepting applications beyond the original DACA.

Note that DACA is not addressed in every endnote section, because conviction under any statute can potentially impact eligibility. DACA is specifically referenced for statutes that have been found to be “significant misdemeanors,” but lack of a DACA analysis on any given section does not mean conviction under that statute would not be a “significant misdemeanor” or otherwise disqualify an applicant. Defense counsel should separately consider the effect of DACA in light of the information provided above. *See* Note: DACA

**DIVISIBLE  
STATUTES,  
RECORD  
OF  
CONVIC-  
TION**

One of the most important defense strategies comes from understanding and controlling the official “record of conviction” that will be considered by immigration authorities. A statute is “divisible” if it criminalizes offenses that do and do not bring immigration consequences. As discussed in annotations to this chart, many statutes are divisible in this way. In cases other than aggravated felonies for fraud or operating a prostitution business, a reviewing court or immigration judge can examine only a strictly limited set of documents, often referred to as the “record of conviction” or “judicially noticeable documents,” to determine whether the offense of conviction causes immigration consequences. This is referred to as the “modified categorical approach.” These documents include the charging document, but only where there is proof that the defendant pled to the count as charged; a written plea agreement; transcript of a plea colloquy; judgment; and any explicit factual finding by the trial judge to which the defendant assented. Presentence and police reports are not part of the reviewable record of conviction, except in some cases where counsel stipulated that they provide a factual basis for the offense. For this reason, counsel must be very careful in providing a factual basis. However, where the plea does not specify a subsection, but the factual basis indicates removable conduct, immigration counsel should argue that the court may not “work backwards” to determine which subsection was pled to. *United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1100 (9th Cir. 2015).

Previous versions of this Chart warned that, in the context of a CMT, immigration judges were authorized to look beyond the record of conviction. *Matter of Silva-Trevino*, 24 I & N. Dec. 687 (AG 2008). The Ninth Circuit ultimately rejected this approach, and the Attorney General has since vacated *Matter of Silva-Trevino* in its entirety. *Matter of Silva-Trevino*, 26 I. & N. Dec. 550, 553 (2015). Immigration Courts will now be confined to the statute and record of conviction in determining what constitutes a CMT.

Additionally, the Supreme Court has limited when a statute may be considered “divisible,” such that courts may proceed to review the record of conviction at all. *See Descamps v. U.S.*, 133 St. Ct. 2276 (2013), *see also, Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016). Where a state statute is not a categorical match to the federal offense, and the statute is not divisible, i.e., does not lay out several alternative elements, one of which meets the federal definition, an Immigration Judge may not proceed to the modified categorical approach, and the conviction is simply non-removable.

*Descamps* is an important tool for immigration counsel, and immigration counsel should be prepared to argue that a statute is not divisible under the rationale in *Descamps* and *Almanza-Arenas, supra*. The analysis in this chart, however, will conservatively assume that statutes are divisible rather than overbroad. The Ninth Circuit in *Almanza-Arenas* applies *Descamps* strictly, to the favor of the non-citizen, but other circuits have disagreed with the Ninth Circuit’s approach. The Supreme Court has accepted certification in *U.S. v. Mathis*, 786 f.3D 1068 (8th Cir. 2015), to address the circuit split on divisibility. The law in this area is therefore subject to change, and the safest practice for criminal defense attorneys is to assume that courts will be able to look to the record of conviction to determine whether the offense of conviction is a removable or inadmissible offense, and protect the record accordingly. *See Note: Divisible Statutes: Record of Conviction.*

**INCON-  
CLUSIVE  
RECORDS  
AND  
BURDEN  
OF PROOF**

**Inconclusive records and burden of proof:** What happens when a statute is divisible, but the record is not clear as to which subsection the defendant pled? Sometimes, an inconclusive record can save the day. If the question is whether the non-citizen is *deportable*, then an inconclusive record is sufficient. If the record is vague and inconclusive, the government will not be able to meet its burden of proof to establish eligibility, and the non-citizen wins, they are not removable. If, however, the non-citizen needs to apply for relief from deportation, an inconclusive record may not be enough. While the department bears the burden of proof to establish removability, the non-citizen bears the burden to establish eligibility for relief, and admissibility. As such, if the non-citizen wants to file an application to defend against removal, or ask for a benefit, she must establish eligibility, and an inconclusive record may not be enough. Case law on this point is not settled, but defense counsel should assume that an inconclusive record will be insufficient for a non-citizen to meet their burden. In that case, it will be better for the non-citizen to plead to the specific subsection or specific conduct that is *not* a removable or inadmissible offense. If pleading to a theft offense, for example, a plea to an intent to “temporarily or permanently deprive” is a good plea, but the better option would be to specify in the record that the non-citizen had the intent to *temporarily* deprive. For many undocumented persons, permanent residents who already are deportable for prior convictions, and others applying for relief, a specific plea is better than an inconclusive record. *See* Note: Inconclusive Records and Burden of Proof.

**FRAUD**

**Fraud:** As noted above in “Divisible Statutes, Record of Conviction,” there is an exception to the strict “modified categorical approach” for aggravated felonies related to fraud, defined at INA § 101(a)(43)(D). A non-citizen is removable under this section if a) the offense has as an element either fraud or deceit, and b) the loss to the victim is \$10,000 or more. While the Courts are limited to the statute of conviction to determine whether fraud or deceit is an element of the offense, the Supreme Court has held that the \$10,000 loss requirement calls for a “circumstance specific” approach. *Nijhawan v. Holder*, 557 U.S. 29 (2009). This means that Courts are *not* limited to the record of conviction, and can rely on documents such as the presentence report to determine the loss to the victim. The Ninth Circuit has recently taken an expansive view of *Nijhawan*, confirming again that a Court may look to a presentence report to determine loss. *See Fuentes v. Lynch*, 788 F.3d 1177 (9th Cir. 2015). Defense counsel therefore must exercise extreme caution when pleading to a statute involving fraud or deceit, avoiding, if possible, any indication in the presentence report, at sentencing, or elsewhere in the record that the loss to the victim may have been \$10,000 or more. Note that courts frequently look to restitution orders to determine loss.

The safest strategy is to plea to a statute that does not have as an element fraud or deceit. If that is not possible, there are still steps counsel can take to protect the record under the circumstance specific approach. The Department still must establish the \$10,000 loss by “clear and convincing evidence,” and the proceedings must be “fundamentally fair.” *Id.* at 41-42. The Supreme Court also indicated that, where there are multiple counts, some of which were dismissed, the amount of loss “must be tied to the specific counts covered by the conviction.” *Id.* at 42 (internal citations omitted). Where possible, counsel should strive to include in the plea a statement that the parties stipulate that loss or restitution is based on uncharged conduct or counts that have been

dismissed, as well as any other steps that make clear that the restitution or loss is not necessarily tied to the loss to the victim. *See* Note: Fraud.

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<b>OFFENSE</b>	<b>AGG. FELONY</b>	<b>CRIME INVOLVING MORAL TURPITUDE</b>	<b>DOMESTIC VIOLENCE, DRUGS, FIREARMS, OTHER</b>	<b>ADVICE</b>
1. § 1001 Attempt	Yes if underlying crime is AF.	Yes if underlying crime is CMT	Yes if underlying offense is. Exception: might avoid deportability for stalking and crime of child abuse, neglect or abandonment. See Note: Dom Violence	Because attempt carries a shorter maximum sentence, an attempt plea to a class 6 felony that is a CMT may give benefit. (see endnote for argument that AZ attempt does not match federal definition of attempt).
2. § 1002 Solicitation	No if drug offense, but possibly yes if crime of violence (see endnotes for strong argument to the contrary); others are uncertain. This rule only applies in 9th Cir.	Yes if underlying crime is CMT, but may be arguments in inadmissibility (see "Advice"). Solic. to Poss. for Sale is CMT	No, except offer to sell gun may be deportable firearms offense.	Good alternate plea to avoid agg felony, especially for drug offenses. Also reduces potential sentence which may aid for CMT. Some legislative threat.
3. § 1003 Conspiracy	Yes if underlying crime is AF	Yes if underlying crime is CMT	Deportable and inadmissible for controlled substance and firearms offenses; may give imm attorneys argument in DV offense	Consider solicitation instead.
4. §1004 Facilitation	Yes if underlying crime is AF	Yes if underlying crime is CMT (but see Advice)	Assume yes conservatively if underlying offense is.	Reduced sentence may help CMT.
5. § 1102 Negligent homicide	Not AF under current law because not crime of violence	No	Could be child abuse, neglect if ROC shows victim is child. Not DV because not crime of violence.	Keep victim's age (if minor) out of record of conviction.
6. § 1103 Manslaughter	Divisible. A1, A4, and arguably A5 are not	Yes, although A4 and A5 are arguably not	DV if victim had dom relationship though arguably not if plea is to A1, A4, A5 or if plea is vague as to subsection	To avoid agg fel, try for A1; to avoid CMT, try for A4
7. § 1104 Murder 2 <sup>nd</sup> Degree	Yes	Yes	DV if victim had dom relationship	See manslaughter
8. § 1105 Murder 1st Degree	Yes	Yes	DV if victim had dom relationship	See manslaughter
9. § 1201 Endangerment	No.	Yes. Felony Endangerment is a categorical CMT.	Possibly deportable for child abuse if the record shows victim was a minor	No longer a safe plea for CMT, though a misdemeanor might not be a CMT.

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10. § 1202 Threatening /Intimidating	Maybe if 1-yr sentence; no if property damage not caused by force	Not categorically: A1 and A2 probably are not CMTs. A3 should not be a CMT if underlying offense is not.	A1 and A3 may be DV offenses if ROC shows victim had domestic relationship. Could also be charged as deportable child abuse if 3601 referenced and victim was a child.	Avoid 1-yr sentence, keep ROC open to possibility of undefined violation of A2. Keep record clean of reference to a domestic relationship or child victim.
11. § 1203 (A)(1) Simple Assault	Only if a sentence of a year (see 13-1204). Plus under current law, recklessly causing injury or offensive touch is not a COV.	No, except immigration will charge as CMT if class 1 misd and there is 13-3601.	Can be deportable for DV, avoid by dropping 13-3601 tag and keeping domestic relation out of record, pleading to class 2 and/or leaving open possibility of A3, insulting but not violent touching. Could also be charged as deportable child abuse if record shows V is a minor.	To avoid COV, leave record open to reckless causation. See Note: COV. Or leave record open to A3, no more than "insulting touching." To avoid AF as a COV, get a 364 or less. To avoid CMT and DV grounds, keep domestic relation out of record of conviction, plead to class 2, and/or leave open A3 possibility.
1203(A)(2)	Yes if 1-yr sentence is imposed.	See 1203(A)(1)	Yes if dom relationship is in record. If so, leave record open to A3, A1. Could also be charged as deportable child abuse if record shows V is a minor.	See 1203(A)(1).
1203(A)(3)	Not unless Supreme Court reverses Dimaya v. Lynch. In that case, An insulting touching only an AF as COV if offense is a felony, a 1-yr sentence imposed, and situation likely to result in use of force. See 13-1204.	No, except possibly with intent to injure. Keep record vague as to insult/provoke.	Dangerous to have dom relationship on record, but may escape if record leaves open mere intent to insult/provoke. See Note: Dom Violence. Could also be charged as deportable child abuse if record shows V is a minor.	Where possible obtain 364 or less in agg offense. Leave record vague that mere offensive touching occurred.
12. § 1204 Aggravated Assault	Divisible: if 1-yr or more imposed, may be AF as COV unless record shows a mens rea of recklessness or the use of de minimus force under 1203(A)(3)	Assume yes, but imm attys at least can argue A2 and A8 are not. Also may avoid CMT if record vague as to what subsection of 1203 and what mens rea.	Assume deportable under DV grnd, if record shows intent and dom relationship; may be deportable under firearms grnd, if elements involve weapon (e.g. A2). Deportable for child abuse for A6, with possible exception if assault was 1203A3	To avoid AF, leave vague or plead specifically to recklessness and/or get 364 or less. Substitute plea simple assault. But with vague record of conviction, this may be a charge on which defendant can take 365. See Endnote.

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13. § 1205 Unlawful administer drug/ alcohol	Not as drug. Should not be COV, but obtain 364 or less to be certain.	Yes.	Drug conviction only if CS ID'd on the record. Leave record vague between drugs and alcohol.	Might avoid removal under drug ground.
14. § 1206 Assault by prisoner/ juvenile	Yes, if sentence of 365 and record shows intent	Probably.	No.	Obtain 364 or less and plead to recklessness or intent to insult/provoke
15. § 1209 Drive-by shooting	Yes as COV if 1-yr or more sentence imposed.	Yes	Assume removable as firearms - Immigration counsel may successfully argue not a match to federal statute for lack of antique firearms exception, but law may change, deportable under DV if record shows dom relationship	To avoid AF, obtain 364 or less.
16. § 1211 Discharging firearm at a structure	Yes as COV if 1-yr or more sentence imposed. May not be COV if record leaves open possibility that structure is owned by defendant and is unoccupied.	Probably a CMT, but possible B is not CMT so leave record vague.	Not currently removable under firearms ground for lack of antique firearms exception in AZ law, but counsel should proceed with caution as case law may change. A weapons possession that does not ID weapon is still a better plea.	To avoid AF, obtain 364 or less and/or show that structure not inhabited and is owned by defendant. To attempt to avoid a CMT, try to leave record vague between A (residence) and B (non-residence).
17. § 1302 Custodial Interference	Maybe as obstruction of justice if violation of court order and sentence of 365	Probably not since no intent required	Unlikely, but perhaps as "child abuse."	Avoid reference to violation of a court order and 365
18. § 1303 Unlawful Imprisonment	DHS may attempt to charge as COV if felony and 1-yr or more sentence. May not be COV if restraint by deception or intimidation. But leave record clear of details. E.g., storeowner or officer making an improper detention might use legal "intimidation" but not force.	Probably not, although some AZ judges have so held.	At risk of DV deportable if 13-3601. If 13-3601, plead to misdo with record showing possible restraint by deception or other non-violent means to give imm atty's an argument. May also be deportable as child abuse if victim was a child.	Misdo unlawful imprison effected by deceit is a relatively good alternative to a violent or sex offense.

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19. § 1304 Kidnapping	Yes if ransom involved, regardless of sentence, avoid 365 days or more to definitely avoid risk of COV.	Yes.	At risk of DV if record shows domestic relationship.	See misdo unlawful imprisonment to perhaps avoid DV. Avoid 1-yr sentence to avoid agg felony.
20. § 1305 Access Interference	Possibly with 365 as obstruction of justice	Probably	Possibly as DV child abuse	Potentially a better plea than kidnapping, depending on length of sentence. Unlawful imprisonment may be better still.
21. § 1402 Indecent Exposure	Probably not, but keep minor's age, reference to specific sexual conduct or harm to the victim out of record.	Probably not (but to be sure, try to keep minor's age and any specific sexual conduct/harm out of record)	Conceivably deportable for child abuse if V is child; attempt to keep minor's age out of record	Keep record clear of egregious details, try to plead to language of the statute. Safer plea: Disorderly Conduct.
22. § 1403 Public Sexual Indecency	Not AF as sexual abuse of a minor as long as record does not show minor was aware of conduct, or lewd intent toward minor.	No, unless victim is a minor and is aware of conduct	Possibly deportable for child abuse if record shows V is child and is aware of conduct	To avoid CMT and ag fel, do not let record establish a minor victim was aware of conduct. Keep record clear of egregious details or intent. Safer plea: Disorderly Conduct.
23. § 1404 Sexual Abuse	Possibly as COV, if 1-yr or more imposed; If less than 1-yr, and against minor, assume ag fel SAM though imm counsel have arguments against this	Yes, if without consent. Assume consensual sexual contact with minor is CMT, but imm counsel has arguments.	DV if victim has domestic relationship and force is used; may be child abuse though imm counsel have arguments against this	See endnote. Safer plea: Assault.
24. § 1405 Sexual Conduct with a Minor	Divisible, may not be if consensual and with older minor.	Possibly.	Possibly for child abuse, and DV if victim has domestic relationship	Avoid references to emotional/physical harm and nonconsensual nature. Leave age of victim out if possible.
25. § 1406 Sexual Assault	Yes, in almost all circumstances.	Yes	DV if domestic relationship; child abuse if child	

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<b>OFFENSE</b>	<b>AGG. FELONY</b>	<b>CRIME INVOLVING MORAL TURPITUDE</b>	<b>DOMESTIC VIOLENCE, DRUGS, FIREARMS, OTHER</b>	<b>ADVICE</b>
26. §1406.01 Sexual Assault Spouse (Repealed)	Yes, unless counsel obtains 364 days or less <i>and</i> record does not foreclose possibility that offense was oral sex rather than intercourse	Yes.	Deportable under DV ground	See assault, false imprisonment.
27. § 1410, 1417 Child Molestation, Continuous abuse	Yes as SAM regardless of sentence imposed	Yes	Yes as child abuse	Avoid AF by pleading to agg assault 13-1204A4; possibly avoid deportability as child abuse if linked to 13-1203A3. Specify that victim 14 or leave age out of record.
28. § 1424 Voyeurism	Possibly if victim was a minor.	Maybe.	Unlikely, but potentially as stalking or child abuse.	Good alternative to Stalking.
29. § 1502, 1503 Criminal Trespass 2 <sup>nd</sup> and 3 <sup>rd</sup> degree	No, punishable as a misdo	No because no intent to commit CMT	No	A safer plea.
30 § 1504 Criminal Trespass 1 <sup>st</sup> degree	Probably not, but, obtain 364 or less on felony convictions to be sure.	Should not be, especially if no intent to commit theft or other CMT;	Should not be DV because not COV and because DV shdn't be held to apply to property, but try to avoid DV reference	To further avoid potential problems, plead to §13-1502, 1503; but especially with the preceding conditions, this should be a safer plea.
31. § 1505 Possession of Burglary Tools	No	Possibly divisible; keep record free of "CMT burglary" – see Advice	No.	Keep record from showing intent to commit a CMT, i.e. not a burglary that involves intent to commit theft, but rather "theft or any felony."
32. § 1506 Burglary 3 <sup>rd</sup> degree	Only if 365 days. If 365 unavoidable, see Advice.	Possibly divisible. Keep record open to intent to commit <i>any felony</i> or <i>theft</i> or <i>any felony</i> "	Can't be DV even if dom relationship is in the record because it is not a COV, as long as record leaves possibility of car or commercial yard as burgled.	Burglary w/ 1-yr sentence is not an AF if (a) was of a <i>car, fenced commercial yard, and</i> (b) involved intent to commit undesignated felony or undesignated theft, or entry was lawful, or entry was "on" rather than "in." Keep record vague on these points, or where possible specify conduct that is definitively not burglary (such as a lawful entry). See endnote for additional details.
§1507 Burglary 2 <sup>nd</sup>	Yes if 365 but imm counsel may have arguments. See 13-1506.	See 13-1506.	Keep dom relationship out of record to avoid DV deportable.	To avoid AF, get 364 days or see §§ 13-1506, 1505.

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<b>OFFENSE</b>	<b>AGG. FELONY</b>	<b>CRIME INVOLVING MORAL TURPITUDE</b>	<b>DOMESTIC VIOLENCE, DRUGS, FIREARMS, OTHER</b>	<b>ADVICE</b>
§ 1508 Burglary 1 <sup>st</sup>	Only if 365 days. See 13-1506. Under Dimaya, the presence of a weapon should not transform the offense into a COV, but case law could change.	See 13-1506	Keep dom relationship out of record.	Get 364 or less to avoid AF or see § 13-1506.
33. § 1602 Criminal Damage	No.	Probably Not	No	Good plea to avoid immigration consequences, particularly if record is vague between subsections, and minimal damage is shown.
34. § 1603 Criminal Littering or Polluting	No.	No.	No.	Good alternate plea to criminal damage if you must avoid a CMT.
35. § 1604 Agg. Criminal Damage	Probably not, but try to obtain 364 days or less to avoid risk.	Possibly.	Probably not because not COV, and DV should be against people, not property, but try to keep dom relationship out of record.	Try to plead to recklessness or keep record vague between intent and reckless.
36. § 1702 Reckless burning	No because 365 not possible and reckless mens rea	Avoid since the gov't charges as CMT, but imm counsel have good defenses.	Probably not because not COV, and DV should be agst people not property, but try to keep dom relationship out of record.	
37. § 1703 Arson of Structure or Property	Yes, even with less than 365 days	Yes.	Possible not DV because likely not COV, but keep domestic relationship out of record. Possibly deportable firearms grnd if used explosive device.	Reckless burning is a safer alternative.
38. § 1704 Arson of Occupied Structure	Yes, even with less than 365 days.	Yes.	Yes DV if dom relationship. Possibly deportable firearms grnd if used explosive device.	Dangerous plea.
39. § 1705 Arson of jail or prison	Assume yes even with less than 365 days.	Yes.	Yes, if explosive used.	Dangerous plea.
40. § 1706 Burning of wildlands	Assume yes even with less than 365 days if pleads to "intentionally"	Probably, unless mens rea of recklessness or negligence.	No.	Good alternative to arson if can plead to reckless or negligence.

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<b>OFFENSE</b>	<b>AGG. FELONY</b>	<b>CRIME INVOLVING MORAL TURPITUDE</b>	<b>DOMESTIC VIOLENCE, DRUGS, FIREARMS, OTHER</b>	<b>ADVICE</b>
41. § 1802 Theft	Try to avoid 365 days, but if that is not possible, see Advice.  Avoid conviction of A3 if \$10k loss to victim – A3 w/ \$10k loss is AF even if less than 365 days.	Assume divisible. A3, A5 and A6 may be CMT. No CMT if record leaves possibility of plea to A1, A2, A4 without intent to <i>permanently</i> deprive.	No	To avoid theft AF even if sentence is 1 yr or more: Plead to A2, A3 or A6 with record vague as to theft of services, or to A2 or A4 where record does not establish intent to deprive the owner temporarily or permanently. To avoid fraud AF even with \$10k loss, plead to subsection other than A3.
42. § 1803 Joyriding	Avoid 365 days where possible, but not AF “theft” as long as record does not show intent to deprive temporarily or permanently.	No	No	Safer plea. See <i>United States v. Perez-Corona</i> , 295 F.3d 996 (9th Cir. 2002) (13-1803 not AF even with 1 yr sentence b/c no intent to deprive).
43. § 1804 Theft by Extortion	Probably if sentence of 365 though imm. counsel have arguments to contrary.	Probably, although A5, A6, and A7 leave imm. counsel arguments.	No.	To avoid ag fel, plead to obtaining “services” or leave record vague as to property or services.
44. § 1805 Shoplifting	Yes if 365 days.	Yes	No	See Theft, § 13-1802. See endnote re proof of intent by concealment.
45. § 1807 Issuing Bad Checks	Possibly if more than \$10,000 loss to victim	May be divisible: it is not known whether fraud is essential element. If record establishes fraud, CMT.	No	If \$10k loss, theft is a safer plea. If court finds this offense involves “deceit” it will be an agg felony with \$10k loss to victim.
46. § 1814 Theft of Transport	Try to avoid 365 days, but if that is not possible, see Advice.  Avoid conviction of A3 if \$10k loss to victim .	Assume divisible. A1, A3, A5 are CMT. No CMT if record leaves possibility of plea to A2, A4 without intent to <i>permanently</i> deprive.	No	To avoid theft AF even if sentence is 1 yr or more: Plead to A2 or A4 where record does not establish intent to deprive the owner temporarily or permanently. To avoid fraud AF even with \$10k loss, don’t let record establish plea to A3.
47. §§ 1902 - 1904 Robbery; Agg and Armed Robbery	Yes if 365 days or more imposed.	Yes.	DV conviction if V has domestic relationship. § 13-1904 may be deportable firearms offense if record establishes gun or explosive.	Plead to a safe Theft subsection. If weapon is involved, do not ID on the record as gun or explosive.

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<b>OFFENSE</b>	<b>AGG. FELONY</b>	<b>CRIME INVOLVING MORAL TURPITUDE</b>	<b>DOMESTIC VIOLENCE, DRUGS, FIREARMS, OTHER</b>	<b>ADVICE</b>
48. § 2002 Forgery	Probably, if 365 days or \$10k or more loss to victim/s	Yes	No	To avoid AF, try for A3 and plead to real document with false info; also consider Theft, ARS 1802; Taking Other's ID, ARS 13-2008.
49. § 2003 Possession of Forgery Device	See forgery	See forgery	No.	See forgery
50. § 2004 Criminal simulation	Yes if loss of \$10k or more to victim/s.	Yes	No.	Consider Theft, ARS 1802; Taking Other's ID, ARS 13-2008.
51. § 2006 Criminal Impersonation	Yes if loss of \$10k or more to victim/s.	A1 and A2 are CMTs, while A3 may not be; plead to A3 or leave subsection vague	No.	Consider Theft, ARS 1802; Taking Other's ID, ARS 13-2008.
52. § 2008 Taking identity of another person	365 days may be OK with vague record. Danger that \$10k loss to victim is AF deceit	Divisible. Using fictitious person's name and non-existent social for purposes of job not a CMT, whereas using a real person's number, even for employment, is a CMT.	No.	While Theft is more secure, with careful pleading this may work to prevent CMT, AF as theft. Still a danger with \$10k loss to victim.
52. §2301(D); racketeering	Divisible, subsections (D)(4)(b)(xvi) and (xxvii) are not listed in the federal racketeering statute;	Yes if the underlying offense is CMT.	Pleading to subsection (D)(4)(b)(xxvii) could run the risk of a removal charge under child abuse or sexual abuse of a minor charge.	Risky, but could be an alternative to avoid drug trafficking AF if vague record of conviction leaves open possibility of subsections held not to be AF.
53. § 2319 Smuggling	Was held unconstitutional and preempted by federal law. Old conviction may still be held AF, unless person smuggled is self, spouse, child, or parent	Was previously CMT.	Old conviction may still support a ground of deportability and inadmissibility.	If faced with old conviction, consider post-conviction relief to eliminate. See endnote for advice prior to statute being ruled unconstitutional.
54. § 2405 Compound-ing	Probably not.	No, although ICE may charge it	No.	Good alternative to drug offense and other dangerous pleas

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OFFENSE	AGG. FELONY	CRIME INVOLVING MORAL TURPITUDE	DOMESTIC VIOLENCE, DRUGS, FIREARMS, OTHER	ADVICE
55. § 2407 Tampering w/ a Public Record	Yes, if loss of \$10k or 365 days	Assume divisible, try to plead to intent to deceive, rather than defraud	No.	If possible, plead to intent to deceive, rather than defraud.
56. § 2408 Securing Proceeds	No, except possibly if record establishes a) a monetary transaction and b) involving \$10k.	Probably not, although ICE may charge it.	No.	Good alternate plea.
57. §2502-3 Escape in 2 <sup>nd</sup> and 3 <sup>rd</sup>	Maybe w/ 365, but imm counsel have strong arguments	Probably not.	No.	Plead to escape that occurred AFTER sentencing or leave record vague
§ 2504 Escape in 1 <sup>st</sup>	Yes w/ 365 days.	Yes.	Firearms offense if A2 includes firearm or explosive	Avoid if possible; try to plead to 2 <sup>nd</sup> or 3 <sup>rd</sup> degree.
58. 2506-7 FTA, 1st and 2 <sup>nd</sup> degree	§ 2506 no. Avoid §2507; see Advice re character of underlying offense. Sentence given for FTA itself is irrelevant.	Probably not.	No	FTA is AF if (a) for <u>service of sentence</u> of an offense carrying a <u>possible 5 yrs</u> or more, or (b) before a court pursuant to a court order <u>to answer to or dispose of a felony</u> carrying a <u>possible 2 yrs</u> or more. See 8 USC § 1101(a)(43)(Q), (T).
59. § 2508 Resisting Arrest	Should not be, but obtain 364 or less to be sure.	A3 should not be, A1 and A2 probably not.	No.	To avoid a CMT, also leave record open to possibility of A2 plea, or plead to A3.
60. §2510-12 Hindering	Possibly if 365 days as obstruction of justice, but not as drug or sexual abuse of a minor AF	Possibly not, if underlying offense is not CMT.	Good alternate plea for drugs, firearms, DV, sex offenses. Caution: may be inadmissible under "reason to believe" if principal is drug trafficker.	Because hindering does not take on the character of the underlying offense, this is a good alternate plea if 365 can be avoided
61. § 2602 Bribery of official	No	Yes	No.	Only bribery of a witness and commercial bribery are AF's.
62. § 2605 Commercial Bribery	Yes if 365 days or more	Yes.	No.	
63. § 2702 Perjury	Yes if 365 days or more	Divisible. A1 is a CMT, A2 may not be.	No	Plead to A2 and keep record clean of intent to defraud, induce another to his detriment, or obtain something tangible, and specify or leave open possibility that defendant believed statement to be immaterial. False Swearing safer alternative for lack of materiality.

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<b>OFFENSE</b>	<b>AGG. FELONY</b>	<b>CRIME INVOLVING MORAL TURPITUDE</b>	<b>DOMESTIC VIOLENCE, DRUGS, FIREARMS, OTHER</b>	<b>ADVICE</b>
64. § 2703 False Swearing	Try to avoid 365, but shd not be AF as perjury absent showing of materiality	Shd not be CMT, but ICE may charge it	No.	Safer plea for false statements to gov't.. See also § 13-2907.01.
65. § 2809 Tampering	Possibly as obstruction of Justice if 365 or more.	Probably.	Should not be as does not take on character of principal's offense. BUT if principal drug trafficker inadmissible under reason to believe ground.	
66. § 2810 Interfering with Judicial Proceeding	No, b/c cannot be sentenced to 365 days	Probably not.	Yes, as violation of protection order under A2	Plead to straight statutory language or avoid A2 altogether.
67. § 2904 Disorderly Conduct	No.	A6 might be charged as CMT. Others not CMT, but leave record vague as to facts	A6 could be deportable firearms offense if record ID's firearm or explosive. Keep record vague. Also A6 deportable as DV or child abuse against V where record shows dom relationship.	Specify subsection other than A6, or keep vague, and keep details vague and free of egregious or violent acts, and it is a safer plea.
68. § 2907.01 False Statement to a Police Officer	Not an agg felony	Maybe not because no requirement of materiality	No.	Good substitute plea for DV, drug, stat rape with older teen; see endnote.
69. § 2908 Criminal Nuisance	No.	No, except conceivably if unlawful conduct is CMT	No. This could be a substitute plea for charges relating to use of drugs, firearms, unlawful sex, etc.	If prosecution is willing to accept this misdemeanor, this is an excellent plea for immigration purposes.
70. § 2916 Use of Telephone to Annoy	No.	Probably.	Possibly yes, see endnote.	Less safe as an alternative than previously advised, because intent to annoy eliminated from statute.
71. § 2921A Harassment	No.	Probably not; no intent to harm	May be charged as DV "stalking" offense if 13-3601. Better than 2921.01, but still a danger.	§2921A might not cause deportability with vague, or minor, factual record.
72. §2921.01 Agg. Harrass	Should not be under current case law, but obtain 364 or less to be sure. If not possible, leave open possibility plea was to A2.	A1 is CMT but A2 may not be.	DV. Assume yes, but leave open possibility that plea was to A2, which might prevent this. A1 is DV.	To try to avoid AF even with 1-yr or more, leave open possibility plea was to A2. Keep facts vague in record.

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<b>OFFENSE</b>	<b>AGG. FELONY</b>	<b>CRIME INVOLVING MORAL TURPITUDE</b>	<b>DOMESTIC VIOLENCE, DRUGS, FIREARMS, OTHER</b>	<b>ADVICE</b>
73. § 2923 Stalking	Should not be under current case law, but obtain 364 or less to be certain.	Yes	DV: Yes	See harassment, assault.
74. § 3102 Weapons Misconduct	Divisible. Crimes of Violence with a 1-year sentence; felon in poss firearm; undocumented immigrant in poss firearm are agg felonies.	Divisible, e.g. simple poss of weapon is not a CMT.	To be sure to avoid deportable firearms offense, don't ID weapon as gun, explosive. Divisible for DV ground	See endnotes of subsections.
75. § 3107 Unlawful Discharge of a Firearm	No	No	Immigration counsel may successfully argue not removable firearm offense for lack of antique firearm exception in AZ law.	
76. § 3214 Prostitution	No	Probably. Soliciting Prostitute also CMT.	Inadmissible under prostitution ground but divisible or overbroad.	Plead to conduct other than sexual intercourse or leave vague.
77. § 3405 Marijuana Offenses	Divisible.	Divisible	Deportable and inadmissible for drug conviction (but see 30 grams exception); divisible for reason to believe trafficking	See endnote of subsections and Note: Controlled Substances.
78. §§ 3407, 3408 Dangerous & Narcotic Drug Offenses	Divisible	Divisible	See marijuana, except note exceptions for poss., use of 30 grams or less mj or hashish; see Note: Controlled Substances	See endnote of subsections and Note: Controlled Substances.
79. § 3415 Drug Paraphernalia	No	No	Controlled substance, but see endnote for arguments overbroad. DHS must prove substance, keep record clear of substance, or specify 30 grams or less of MJ for personal use if first time.	Not necessarily a safe plea; can have severe consequences and cause both deportability and inadmissibility; if possible, try to show that it related to 30 grams or less of mj, or keep substance out of record, including any string citations.
80. § 3623 Child or Vulnerable Adult Abuse	Possibly, with an intentional mens rea and a sentence of 365	Divisible.	Deportable as child abuse if record specifies child rather than vulnerable adult.	Try to avoid reference to actual harm to child.
81. § 3705 Unlawful Copying or Sale	Possibly, with a sentence of 365 days or more	Probably.	No.	To have the best chance of avoiding a CMT or agg. felony, plead to A1, A2, or A6

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OTHER OFFENSES	A.R.S. § 28-	AGGRAVATED FELONY	CRIME INVOLVING MORAL TURPITUDE	OTHER DEPORTABLE, INADMISSIBLE GROUNDS	ADVICE
82. Unlawful flight	28-622.01	No.	Possibly if docs show disregard for lives of others.	No.	Potentially a safe plea.
83. DUI	28-1381	No	No	No	Beware that a DUI is a significant misdemeanor for DACA purposes and could cause termination of TPS. Otherwise safe plea.
84. Extreme DUI	28-1382	No	No	No	See Advice under 1381 above.
85. Aggravated DUI	28-1383A1	See DUI	Arguably not as overbroad, at least divisible between Driving and Actual Physical Control and knew and should have known of license suspension	No	A plea to straight Actual Physical Control is best, but Driving/Actual Physical Control leaves arguments, plea to "should have known" license was suspended is better. See note under 1381 above re: DACA.
	28-1383A2	No	No	No	
	28-1383A3	No *	Probably Not	Potentially removable as child abuse under domestic violence ground	
	28-1383A4	No.	Maybe	No	Try for plea to A2 instead

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**1. Attempt, A.R.S. § 13-1001.**

**Summary:** Generally, a conviction for attempt carries the same immigration consequences as the principal offense. *Matter of Vo*, 25 I&N Dec. 426, 428 (BIA 2011) (“An attempt involves the specific intent to commit the substantive crime, and if commission of the substantive crime involves moral turpitude, then so does the attempt, because moral turpitude inheres in the intent”); *United States v. Taylor*, 529 F.3d 1232, 1238 (9th Cir. 2008) (Arizona's definition of “attempt” is coextensive with the federal definition); *United States v. Gomez-Hernandez*, 680 F.3d 1171, 1175 (9th Cir. 2012) (same)(*but see* argument under Aggravated Felony, below, that *U.S. v. Taylor* is no longer binding and should be reconsidered). There are two instances where conviction of attempt potentially brings an immigration advantage, however. *See* discussion of the effect of its lesser potential sentence (at CMT) and the domestic violence ground of deportability (at Otherwise Removable). Note that a plea to attempt will undermine the immigration benefit of a plea to assault by recklessness under §§ 13-1203 or 13-1204. While reckless assault has been held not to be a crime of violence, immigration courts will not recognize “attempted reckless” assault.

**Crime Involving Moral Turpitude (CMT):** Attempt to commit a CMT will be held to be a CMT. However, the fact that an attempt conviction carries a smaller maximum sentence than the principal offense may avoid immigration consequences based on a single CMT. The same is true for conviction of solicitation and facilitation. A single CMT conviction may not have immigration consequences if the potential sentence is sufficiently low and the person has no prior CMTs.

- A single CMT conviction causes *deportability* under the CMT ground only if the offense was committed within five years after admission and carries a potential sentence of *a year or more*. 8 USC § 1227(a)(2)(A)(i). Thus a potential sentence of under a year prevents deportability for a single CMT.
- A single CMT conviction will not cause *inadmissibility* if it carries a potential sentence of *a year or less*, with an actual sentence imposed of six months or less. 8 USC § 1182(a)(2)(A)(ii). Thus a potential sentence of a year or less can prevent inadmissibility for a single CMT.

*See* further discussion at “Note: Crimes Involving Moral Turpitude.” The authors conservatively assume that immigration authorities will hold a class 6 felony to have a potential sentence of more than a year due to Guidelines, so the goal is to get to a misdemeanor. A conviction for attempt will cause a class 6 felony to become a class 1 misdemeanor. A conviction for solicitation will cause a class 5 or 6 felony to become a class 1 or 2 misdemeanor. A conviction for facilitation will cause a class 4 or 5 felony to become a class 1 misdemeanor, and a class 6 felony to become a class 3 misdemeanor. (However, post-*Blakely*, immigration counsel can argue that where no aggravating factors are present, a class 6 felony carries a presumptive sentence of one year, low enough to qualify for the petty offense exception, so that is worth obtaining if it is the best available.)

**Aggravated Felony:** An attempt to commit an aggravated felony is an aggravated felony under 8 USC § 1101(a)(43)(U). *United States v. Taylor*, 529 F.3d 1232, 1238 (9th Cir. 2008) (Arizona's definition of “attempt” is coextensive with the federal definition).

*U.S. v. Taylor* is still good law and binding on the Immigration Judge. However, immigration counsel can argue that *U.S. v. Taylor* should be reconsidered in light of intervening Arizona, Supreme Court, and Ninth Circuit case law. While the Immigration Court and the Board of Immigration Appeals

will likely find they are bound by *U.S. v. Taylor*, the argument should be preserved in case the Ninth Circuit reconsiders that holding, or so that the client may present the argument in her own appeal to the Ninth Circuit. *See Alvarado v. Holder*, 759 F.3d 1121, 1129-1130 (9th Cir. 2014)(holding that the Court lacked jurisdiction to reconsider whether Arizona’s attempt statute is coextensive with the federal statute because the issue was not exhausted below). In sum, the argument is as follows: While the federal definition of attempt requires a “substantial step,” the Arizona statute requires only “any step” toward the underlying offense. In *U.S. v. Taylor*, the Court held that the statutes were coextensive despite this discrepancy, because Arizona courts interpret “any step” to essentially require a “substantial step.” The Court relied on cases from the Arizona Court of Appeals from 1985 and 2005, and held that “no case suggests that the Arizona Supreme Court would decide otherwise.” *Id.* at 1238. Since *U.S. v. Taylor* was decided, however, Arizona courts have repeatedly held that “any step” indeed contemplates preparatory acts that fall short of a “substantial step.” *See e.g. State v. Garcia*, No. 2 CA-CR2008-0020, 2009 WL 104639 at \*3 (Ariz. Ct. App. Jan. 15, 2009) (unpublished). The 10<sup>th</sup> Circuit has recognized this fact and disagreed with *U.S. v. Taylor*. *U.S. v. Martinez*, 602 F.3d 1166 (10<sup>th</sup> Cir. 2010). The Supreme Court’s decision in *Descamps v. U.S.*, 133 S.Ct. 2276 (2013) and its strict application of the categorical and modified categorical approach cast further doubt on the continuing validity of *U.S. v. Taylor*.

This argument may be equally applicable to other removal grounds, including removal based on conviction of a controlled substance offense.

**Otherwise Removable:** As discussed in the summary above, a conviction for attempt generally carries the same immigration consequences as the principal offense. However, some deportation grounds do not include attempt to commit the offense at all; there, a plea to attempt provides immigration counsel with an argument. Because part of the domestic violence deportation ground does not specifically include attempt or conspiracy, a plea to attempt might prevent deportability under the ground relating to a conviction for stalking, or a crime of child abuse, neglect or abandonment. *See* 8 USC § 1227(a)(2)(E) and Note: Domestic Violence.

Attempt is included in the definition of a conviction of a crime of domestic violence, another basis for deportation under this section, because attempt is included in the definition of ‘crime of violence’ at 18 USC § 16.

Note that a plea to “attempt” will always involve an intentional *mens rea* and thus preclude the benefits of a plea to a statute that is divisible because it includes a lower *mens rea*. *United States v. Gomez-Hernandez*, 680 F.3d 1171, 1176 (9th Cir. 2012) (“[I]t is well-settled that attempted aggravated assault under Arizona law covers only intentional conduct”) (citing *State v. Kiles*, 175 Ariz. 358, 857 P.2d 1212, 1224 (1993) (“[A]ttempt is a specific intent crime and by definition involves *intentional* conduct.”)). For instance, in order to avoid a crime of violence or a crime of domestic violence under ARS § 13-1203(A)(1) or § 13-1204, counsel would be better off pleading to a straight assault than an attempt in order to leave open the possibility of a reckless *mens rea*.

## **2. Solicitation, A.R.S. § 13-1002**

A person “commands, encourages, requests or solicits” another to commit criminal behavior.

**Summary:** This offense is a valuable alternate plea to avoid conviction of an aggravated felony (except possibly as a “crime of violence” aggravated felony) or under the substance abuse, firearms or domestic violence grounds. Solicitation to commit a drug sale is not a drug trafficking aggravated felony or a deportable controlled substance conviction in the Ninth Circuit. See also the comment at the end of this section regarding when solicitation appears in a substantive statute, such as “offering to sell

marijuana.” While solicitation of a drug sale is a CMT (see below), there usually are more immigration remedies for conviction of a CMT than for a drug offense. See discussion below.

The down-side of solicitation is that there are moves to legislatively eliminate the defense by adding “solicitation” to, e.g., the definition of aggravated felony. For this reason, while solicitation is useful, other strategies may be more secure. Also of great importance is the fact that this argument is limited to the Ninth Circuit Court of Appeals, meaning that your client could be put in removal proceedings if she intends to return to a different circuit, particularly if she completes probation outside of the Ninth Circuit. For those who will live outside the Ninth Circuit or run the risk of removal proceedings in another circuit, consider transfer of marijuana with no remuneration as an alternative. See e.g. *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).

Defense counsel should also be careful to explicitly warn the client that while they may escape removal charges with a solicitation plea (particularly for drug related offenses), they likely cannot travel outside of the United States because they may at that point become inadmissible based on another ground – such as being inadmissible for a crime involving moral turpitude, or because the government has “reason to believe” they have trafficked in drugs. That ground does not require any conviction.

**Crime Involving Moral Turpitude (CMT):** Criminal defense counsel should assume that solicitation to commit a CMT will itself be held a CMT. Immigration counsel at least can argue that this is not so, because under Arizona law solicitation is a preparatory offense and thus a separate and distinct offense from the underlying crime because it requires a different mental state and different acts. *Coronado-Durazo v. INS*, 123 F.3d 1322, 1326 (9th Cir. 1997). Unlike attempt, solicitation does not require acting with the same “kind of culpability.” However, this is a difficult argument and criminal defenders should not rely on it.

In *Barragan-Lopez v. Mukasey*, 508 F.3d 899 (9th Cir. 2007), the Ninth Circuit held that Solicitation to Possess for Sale at least four pounds of marijuana under A.R.S. § 13-1002 and § 13-3405(A)(2) and (B)(6) is a crime involving moral turpitude. The court declined to address the issue of whether solicitation to possess a small amount of marijuana for sale would constitute a CMT. Although solicitation to possess for sale is still not removable as a *controlled substance offense* per *Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999), discussed below, defense counsel should assume that Solicitation to Possess for Sale will be found to be a CMT.

Immigration counsel may also be able to argue that *Barragan-Lopez* only applies to CMTs that render an immigrant *deportable* under 8 USC § 1227, not CMTs that render an immigrant *inadmissible* under 8 USC § 1182. The BIA has stated that “the Ninth Circuit has indicated that section [1227(a)(2)(A)] is broader in its coverage of crimes involving moral turpitude than section [1182(a)(2)(A)(i)(I)], because it would include inchoate offenses, such as solicitation and facilitation, that are not specifically enumerated in the inadmissibility statute, which lists only attempts and conspiracies.” *Matter of Vo*, 25 I&N Dec. 426, 429 n. 4 (BIA 2011). Therefore, immigration counsel can argue that a conviction for Arizona solicitation to commit a CMT does not make a person inadmissible. Arizona Immigration Judges are split on this argument, some accept it in bond proceedings, some in both bond and removal proceeding, and some not at all. As such, defense counsel should conservatively advise clients that some immigration judges and officials will find to the contrary.

Because the potential sentence is less for solicitation than for the principal offense, a conviction may prevent the person from becoming deportable or inadmissible for a *single* CMT. Solicitation to commit a class 5 or 6 felony is a misdemeanor. See CMT discussion at **1. Attempt**, *supra* and Note: CMT.

**Aggravated Felony:** The Ninth Circuit held that solicitation under ARS § 13-1002 is not a drug trafficking aggravated felony, even if the principal offense is a drug trafficking offense. *Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999) (Arizona conviction for solicitation to possess marijuana for sale is not an aggravated felony because the Controlled Substances Act does not specifically criminalize solicitation or contain any broad catch-all provision).

Solicitation under ARS § 13-1002 should not be held to be an aggravated felony in non-drug cases as well, based on the fact that conspiracy and attempt are specifically included in the aggravated felony definition (*see* 8 USC § 1101(a)(43)(U)) while solicitation is not. For example, solicitation to commit a theft should be held not to constitute the aggravated felony “theft.”

Until recently, Solicitation could trigger an aggravated felony as a “crime of violence” since soliciting a violent act poses a substantial risk that physical force will be used against another even if the actual violence may occur after the solicitation itself. *Prakash v. Holder*, 579 F.3d 1033, 1036 (9th Cir. 2009); *Matter of Guerrero*, 25 I&N Dec. 631 (BIA 2011). Immigration counsel has a strong argument that these cases are no longer binding because the Ninth Circuit has held that 18 USC § 16(b) is void for vagueness. *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015)(applying the Supreme Court’s decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) to the immigration context). Thus, no offense should constitute an aggravated felony as a crime of violence unless it “has *as an element* the use, attempted use, or threatened use of physical force against the person or property of another” pursuant to 18 USC § 16(a)(emphasis added). Because it is possible that this issue could be reviewed by the Supreme Court, counsel should, as always, strive for a sentence of less than 365 days. Even if the Supreme Court were to hold that 18 USC § 16 (b) is not void for vagueness, however, it seems unlikely that the courts would continue to apply the “ordinary case” test rather than the usual minimum conduct test.

**Other grounds: Deportable and Inadmissible Drug Conviction.** Regarding controlled substance convictions, the Ninth Circuit has held that solicitation under ARS § 13-1002 does not cause deportability under the controlled substance ground because (a) it is a generic offense unrelated to controlled substances and (b) attempt and conspiracy, but not solicitation, are included in the controlled substance grounds. *Coronado-Durazo v. INS*, 123 F.3d 1322, 1326 (9th Cir. 1997) (ARS § 13-1002 is not a deportable controlled substance offense even where the offense solicited related to controlled substances, disapproving *Matter of Beltran*, 20 I&N Dec. 521, 528 (BIA 1992)). Thus a plea to solicitation to possess a controlled substance avoids deportability altogether in a drug case. It also should not cause inadmissibility as a drug conviction. However, solicitation to possess a controlled substance for sale is a CMT, and therefore might cause the person to become inadmissible or deportable under the CMT grounds. *Barragan-Lopez v. Mukasey*, 508 F.3d 899 (9th Cir. 2007). Even more damaging, if evidence shows that the solicitation related to trafficking in drugs, the conviction will cause the person to become inadmissible by giving the government “reason to believe” the person has engaged in drug trafficking. This penalty does not require a conviction. *See* 8 USC § 1182(a)(2)(C). If defense counsel pleads a client to a solicitation offense in order to avoid a controlled substance or aggravated felony drug trafficking charge, it is essential to warn the client that they should not travel abroad, as they may be inadmissible on re-entry on one of these grounds. Also beware that other circuits do not follow this rule. If the client is returning to live and complete probation in another state, they could be subject to removal in that jurisdiction, even though they would not be subject to removal in the Ninth Circuit.

**Other Grounds: In General.** A person is deportable under the firearms ground for “offering to sell” a firearm, but not for other solicitation offenses. Solicitation may prevent deportability under the domestic violence ground.

**Note: solicitation incorporated into substantive offenses, such as offering to commit a drug offense.** The Ninth Circuit has held that offering to commit a drug trafficking offense is not an aggravated felony even when the offense is included in a drug statute instead of under a separate “generic” statute such as ARS § 13-1002. *Rosas-Castaneda v. Holder*, 655 F.3d 875, 885 (9th Cir. 2011); *U.S. v Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (en banc) (California statute prohibiting offering to sell a drug is not an aggravated felony). This means that a plea to, e.g., offering to sell or offering to transport for sale under ARS §§13-3405(A)(4), 13-3407(A)(7), or 13-3408(A)(8) should avoid conviction of an aggravated felony. In practice, however, immigration judges are not consistently applying this precedent to Arizona law and will often find the offense to be an aggravated felony. For this reason, Solicitation under § 13-1002 is a much better plea. If Solicitation is not available, the plea either should be explicitly to offering to commit the offense, or it should leave the “record of conviction” vague enough so that offering to sell or transport is an option.

The Ninth Circuit has found that a conviction under a “specific” solicitation statute, such as offering to possess for sale, offering to transport for sale, or offering to sell, would render a noncitizen removable for an offense relating to a controlled substance. *Rosas-Castaneda v. Holder*, 655 F.3d 875, 881 (9th Cir. 2011); *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009). While counsel can argue that this holding conflicts with the Ninth Circuit’s en banc decision in *U.S. v. Rivera-Sanchez*, 247 F.3d 905, 909 (9th Cir. 2001) (en banc) (Cal. Health & Safety § 11360), which makes no distinction between generic solicitation and specific solicitation statutes, a conviction for “offering” to possess for sale/transport for sale/sell will likely be found removable as a controlled substance offense. Whenever, possible, counsel should attempt to plead to the generic solicitation statute under ARS § 13-1002.

### **3. Conspiracy, A.R.S. § 13-1003.**

**Summary:** Conspiracy will likely incur the same immigration consequences as the underlying crime, with the possible exception of domestic violence; *see* “other grounds.” However, immigration counsel can argue that the Arizona definition of “conspiracy” is broader than the federal definition of “conspiracy” located at 18 U.S.C. § 371 for two reasons. First, the federal definition requires that the act be committed by one of the co-conspirators, while the Arizona definition allows the act in question to be committed by a person who is not one of the co-conspirators. Second, the federal definition limits conspiracy liability to the persons with whom the defendant directly conspired, while the Arizona definition permits a conviction for working with “the conspirator of one’s conspirator.” *See* ARS § 13-1003(B). These arguments have not been recognized by any court and have been rejected in an unpublished Ninth Circuit decision. *See Banda-Montoya v. Holder*, 466 F. App’x 920, 922 (9th Cir. 2011) (finding that Arizona and federal definitions of conspiracy contain the same elements). Therefore, defense counsel should conservatively advise clients that a conviction for conspiracy will have the same consequences as a plea to the principal offense.

**Crime Involving Moral Turpitude (CMT):** Conspiracy to commit a CMT is a CMT. *See, e.g., McNaughton v INS*, 612 F.2d 457 (9th Cir. 1980); *but see* “Summary.”

**Aggravated Felony:** Conspiracy to commit an aggravated felony is an aggravated felony. 8 USC § 1101(a)(43)(U); *but see* “Summary.”

**Other Grounds: Domestic Violence:** Most grounds of inadmissibility and deportability specifically list conspiracy to commit the offense. The domestic violence deportation ground does not, however. *See* 8 USC § 1227(a)(2)(E). Therefore a plea to conspiracy to commit a “crime of domestic

violence,” stalking, or a crime of child abuse, neglect or abandonment arguably prevents deportability under that particular ground. The conviction still will likely be a crime involving moral turpitude or an aggravated felony, if the principal offense is. See “Note: Domestic Violence.”

#### 4. **Facilitation, A.R.S. §13-1004**

A person commits facilitation if, acting with knowledge that another person is committing or intends to commit an offense, the person knowingly provides the other person with means or opportunity for the commission of the offense.

**Summary:** A conviction for “facilitation” will likely subject the defendant to removability for a “theft offense,” as well as other grounds of removability. See discussion of *Duenas-Alvarez*, below. However, because it reduces the potential sentence, facilitation can help prevent a person from becoming removable for CMT.

**Crime Involving Moral Turpitude (CMT):** Criminal defense counsel should assume that facilitation will be a CMT if the principal offense is, particularly if the non-citizen has been “lawfully admitted,” such as on a visa or with lawful permanent residence. While a facilitation offense will likely be a CMT for *removal* purposes, if the underlying offense is, immigration counsel will have an argument that a non-citizen is not *inadmissible*, under INA § 212(a)(2)(A)(i)(I). See e.g. *Matter of Vo*, 25 I&N Dec. 426, FN 4 (BIA 2011). Facilitation also carries a lower potential sentence. Therefore a person with a single CMT conviction may be able to avoid deportability or inadmissibility. See CMT discussion at 1. Attempt, *supra*.

**Aggravated Felony:** Counsel should assume that conviction of facilitating an offense that is an aggravated felony will be held an aggravated felony, because aiding and abetting is. Facilitation should only be considered if solicitation is not available and the only other alternative would be to plead to a straight aggravated felony.

Facilitation is likely to have the same adverse immigration effect as does aiding and abetting. In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183(2007), the Supreme Court overturned previous Ninth Circuit precedent and held that the generic definition of theft includes the offense of aiding and abetting. This holding will be applied to aggravated felonies other than theft as well. The Ninth Circuit has also held that the federal definition of “facilitation” is equivalent to that of “aiding and abetting.” *United States v. Jimenez*, 533 F.3d 1110, 1114 (9th Cir. 2008). Under Arizona law, “facilitation” is commonly used by prosecutors to charge a person as an aider and abettor rather than as a principal. See *Arizona v. Harris*, 134 Ariz. 287, 288, 655 P.2d 1339, 1340 (App. 1982); *Arizona v. Gooch*, 139 Ariz. 365, 367, 678 P.2d 946, 948 (Ariz. 1984). While immigration attorneys can argue that, like solicitation, facilitation should be treated as a separate offense, this argument is not likely to be successful.

**Other Grounds: Drugs.** Regarding controlled substances, in *Matter of Del Risco*, 20 I&N Dec. 109, 110 (BIA 1989), the BIA held that facilitation of sale of cocaine under ARS § 13-1004 is a crime that “relates to” a controlled substance and therefore is a basis for deportation. However, *Del Risco* may have been overruled in the Ninth Circuit by *Coronado-Durazo v. INS*, 123 F.3d 1322, 1326 (9th Cir. 1997), discussed above, if the principles applied to solicitation in that case would require the same result for facilitation. In *Del Risco* the Board reasoned that although facilitation is a distinct offense from the underlying offense of sale, the nature of the offense still related to controlled substances. But in *Coronado-Durazo* the Ninth Circuit adhered to a “plain language” analysis, pointing out that solicitation (which also could be said to “relate” to controlled substances) was not listed in the drug grounds and was a generic offense, distinct from controlled substance offenses. While solicitation is by far the safer plea,

defense counsel facing a drug charge also could consider facilitation as better than a plea to a straight drug offense. *See Note: Drugs.*

**Other grounds: In general.** Counsel should assume that a conviction for facilitation does not avoid deportation grounds relating to domestic violence/stalking/child abuse, firearms, or managing a prostitution business; and inadmissibility for two or more convictions with an aggregate sentence of five or more years. As in the aggravated felony category, facilitation should be used only when there is no other alternative. However, if a plea to facilitation makes the offense a misdemeanor, it might prevent the offense from being a crime of violence (because there is a broader test for when a felony constitutes a crime of violence than when a misdemeanor does) and thereby prevent it from being a crime of domestic violence. *See discussion in 1. attempt, supra and Note: Domestic Violence.*

#### **5. Negligent Homicide, A.R.S. § 13-1102**

“A person commits negligent homicide if with criminal negligence such person causes the death of another person.” ARS § 13-105(d) states that “‘Criminal negligence’ means, with respect to a result or to a circumstance described by a statute defining an offense, that a person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.”

**Summary:** Under current law this is a good plea, because negligence should not be a crime of violence or moral turpitude offense. As always, however, counsel should make every attempt to obtain a sentence imposed of less than a year to make sure the offense is not an aggravated felony.

**Crime Involving Moral Turpitude (CMT):** Negligent homicide should not be held a CMT. *See Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992) (third degree assault with criminal negligence, in which offender failed to be aware of a substantial risk of injury flowing from his conduct, was not a CMT). Where there is “no intent required for conviction, nor any conscious disregard of a substantial and unjustifiable risk, we find no moral turpitude inherent in the statute.” *Id.* at 619.

**Aggravated Felony:** This is not an aggravated felony as a crime of violence even with a sentence imposed of a year or more. But as always, where possible counsel should obtain a sentence of less than 365 days, in case there are future legislative changes. One recent proposal in Congress was for manslaughter to be legislatively classed as a crime of violence, and thus an aggravated felony, if a year’s sentence was imposed.

An offense that involves only negligence or even negligence amounting to reckless causation of injury will not be held a crime of violence within 18 USC § 16, and thus will not be an aggravated felony under 8 USC § 1101(a)(43)(F) even if a sentence of a year or more is imposed. *Leocal v Ashcroft*, 125 S.Ct. 377 (2004) (negligent DUI is not a crime of violence because does not create risk that force will be used, just that injury will occur); *Lara-Cazares v Gonzalez*, 408 F.3d 1217 (9th Cir. 2004) (killing a person by DUI with gross negligence, amounting to recklessness, is not a crime of violence because it does not create a risk that force will be used, under *Leocal*); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc) (recklessly causing physical injury to another does not meet the federal definition of a “crime of violence” under 18 U.S.C. § 16). *See further discussion at ARS § 13-1203, assault.*

The BIA has held that a death that is caused by “extreme recklessness or a malignant heart”—such as vehicular homicide while under the influence—may meet the aggravated felony definition of

murder. *Matter of M-W*, 25 I&N Dec. 748 (BIA 2012). But because this statute requires a mens rea of negligence, rather than extreme recklessness, it should not be an aggravated felony for murder under 8 USC § 1101(A)(43)(A).

**Other Grounds:** As long as this is not a crime of violence, even if the record establishes that the defendant and victim had a domestic relationship this should not be a “crime of domestic violence” and should not cause deportability under the domestic violence ground. *See Note: Domestic Violence*. However, if the record of conviction shows that the victim was a minor, it may be charged as deportable as a crime of child abuse, neglect, or abandonment. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). Immigration counsel would have arguments against this because minority is not an element of the offense. In *Matter of Velazquez-Herrera*, the Board of Immigration Appeals recognized that the categorical approach applies in determining whether a conviction is a deportable crime of child abuse, neglect, or abandonment. *Matter of Velazquez-Herrera, supra*, at 516. Under recent Supreme Court precedent it appears that *no* conviction under an age-neutral statute can be a “crime of child abuse,” because the minimum conduct to violate an age-neutral statute includes an adult victim. The offense is not divisible under the *Descamps* standard, because an age-neutral statute does not set out conduct in the disjunctive, some of which involves child abuse and some of which does not. *See Divisible Statutes, Record of Conviction*. Until the Ninth Circuit or Board makes this holding, however, criminal defense counsel should act conservatively and make every attempt to keep the minor age of a victim out of the record of conviction of an age-neutral offense

Note that the BIA just ruled, in *Matter of Estrada*, 26 I & N Dec. 749 (BIA 2016), that the circumstance specific approach, not the categorical approach, applies to determine whether there is a domestic relationship. *See Note: Domestic Violence*. Thus, once it is determined under the categorical approach that a conviction is a crime of violence, the Judge may go outside the record of conviction to determine whether the relationship is a domestic relationship.

### **Manslaughter, A.R.S. § 13-1103**

A person commits manslaughter by:

1. Recklessly causing the death of another person; or
2. Committing second degree murder as defined in section 13-1104, subsection A upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim; or
3. Intentionally aiding another to commit suicide; or
4. Committing second degree murder as defined in section 13-1104, subsection A, paragraph 3, while being coerced to do so by the use or threatened immediate use of unlawful deadly physical force upon such person or a third person which a reasonable person in his situation would have been unable to resist; or
5. Knowingly or recklessly causing the death of an unborn child by any physical injury to the mother.

**Summary:** While a plea to Negligent Homicide A.R.S. § 13-1102 is safer, this statute contains several subsections that may not be categorically removable. Defense counsel should avoid subsection (2) and generally plead to the straight statutory language of the offense.

**Crime Involving Moral Turpitude (CMT):** Manslaughter involving recklessness has been held to be a CMT. *Franklin v. INS*, 72 F.3d 571 (8th Cir. 1995); *Matter of Wojtkow*, 18 I&N Dec. 111 (BIA 1981). Therefore, A1 is likely to be found a CMT, as is A5. Since A2 adopts the “heat of passion” element commonly used by voluntary manslaughter definitions, defense counsel should assume it will be considered a CMT. While attempted suicide has been held NOT to be a CMT, *Matter of D*, 4 I&N Dec. 149 (BIA 1950), it is unclear whether aiding another to commit suicide, as in A3, would be similarly held.

A4 arguably would not be a CMT since the act was not committed voluntarily and encompasses conduct that even a “reasonable person” could not have resisted.

**Aggravated Felony:** Since an offense with a mens rea of recklessness is not a “crime of violence,” A1 and A5 should not categorically be held to be an aggravated felony. *See Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc) (assault committed recklessly does not meet the federal definition of a “crime of violence” under 18 U.S.C. § 16); *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012); *Quijada-Aguilar v. Lynch*, 799 F.3d 1303 (9th Cir. 2015). A1 and A5 (with a reckless mens rea) should not be an aggravated felony as murder unless there is a showing of conduct that rises above ordinary recklessness. *Matter of M-W*, 25 I&N Dec. 748 (BIA 2012) (death that is caused by “extreme recklessness or a malignant heart”—such as vehicular homicide while under the influence—may meet the aggravated felony definition of murder).

Defense counsel should assume that A2 will be held an aggravated felony as either a “murder” or a “crime of violence” aggravated felony under 8 U.S.C. § 1101(a)(43)(A) or (F). *See* Second-degree Murder, Aggravated Felony. Although there are arguments against this, where possible counsel should conservatively assume that intentionally aiding another to commit suicide will meet the definition of an aggravated felony for “murder” or, if it involves force and carries a sentence of one year or more, will meet the aggravated felony definition as a “crime of violence.” Arguably, A4 is not an aggravated felony since it lacks the voluntary and intentional nature of murder or a crime of violence.

**Other Grounds:** An offense cannot satisfy the domestic violence ground of removability without first being a “crime of violence”; therefore, only subsections A2 and possibly A3 or A4 could be considered removable as a crime of domestic violence if committed against a person who meets the definition in A.R.S. § 13-3601(A)(1). If the record of conviction demonstrates that the offense is committed against a child, it may be removable as an offense of child abuse, abandonment, or neglect. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). Unless the plea is to A5, immigration counsel would have arguments against this because minority is not an element of the crime. *See* “Other Grounds” under A.R.S. § 13-1102, *supra*.

## **7. Second-degree Murder, A.R.S. 13-1104**

A person commits second degree murder if without premeditation:

1. The person intentionally causes the death of another person, including an unborn child or, as a result of intentionally causing the death of another person, causes the death of an unborn child; or
2. Knowing that the person's conduct will cause death or serious physical injury, the person causes the death of another person, including an unborn child or, as a result of knowingly causing the death of another person, causes the death of an unborn child; or
3. Under circumstances manifesting extreme indifference to human life, the person recklessly engages in conduct that creates a grave risk of death and thereby causes the death of another person, including an unborn child or, as a result of recklessly causing the death of another person, causes the death of an unborn child.

**Summary:** “Murder” is included in the definition of aggravated felony at 8 U.S.C. § 1101(a)(43)(A) and will be considered an aggravated felony regardless of the length of sentence imposed. Counsel should assume that a conviction for second-degree murder is always removable, although immigration counsel may have an argument that A3 is not.

**Crime Involving Moral Turpitude (CMT):** Counsel should assume that a conviction for second-degree murder will constitute a CMT for immigration purposes.

**Aggravated Felony:** Counsel should assume that a conviction for second-degree murder will be considered an aggravated felony as “murder” within 8 U.S.C. § 1101(a)(43)(A), regardless of the sentence imposed. This is true even for A3 since the BIA has held that a death that is caused by “extreme recklessness or a malignant heart”—such as vehicular homicide while under the influence—may meet the aggravated felony definition of murder. *Matter of M-W*, 25 I&N Dec. 748 (BIA 2012).

**Other grounds:** If the record of conviction demonstrates a domestic relationship under A.R.S. § 13-3601, a conviction for second-degree murder would likely also be removable under the ground of domestic violence unless the plea was to A3. If the victim is a minor and the age of the victim appears in the record of conviction, a conviction could be removable under the ground of child abuse, neglect, or abandonment. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). Immigration counsel should vigorously argue that *Matter of Velazquez-Herrera* was implicitly overruled by recent Ninth Circuit and Supreme Court case law. Conviction under this statute should not be removable under the child abuse ground, because minority is not an element of the offense. See “Other Grounds” under A.R.S. § 13-1102, *supra*.

#### **First-degree murder, A.R.S. § 13-1105**

A person commits first degree murder if:

1. Intending or knowing that the person's conduct will cause death, the person causes the death of another person, including an unborn child, with premeditation or, as a result of causing the death of another person with premeditation, causes the death of an unborn child.
2. Acting either alone or with one or more other persons the person commits or attempts to commit sexual conduct with a minor under section 13-1405, sexual assault under section 13-1406, molestation of a child under section 13-1410, terrorism under section 13-2308.01, marijuana offenses under section 13-3405, subsection A, paragraph 4, dangerous drug offenses under section 13-3407, subsection A, paragraphs 4 and 7, narcotics offenses under section 13-3408, subsection A, paragraph 7 that equal or exceed the statutory threshold amount for each offense or combination of offenses, involving or using minors in drug offenses under section 13-3409, kidnapping under section 13-1304, burglary under section 13-1506, 13-1507 or 13-1508, arson under section 13-1703 or 13-1704, robbery under section 13-1902, 13-1903 or 13-1904, escape under section 13-2503 or 13-2504, child abuse under section 13-3623, subsection A, paragraph 1, or unlawful flight from a pursuing law enforcement vehicle under section 28-622.01 and in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person.

**Summary:** “Murder” is included in the definition of aggravated felony at 8 U.S.C. § 1101(a)(43)(A) and will be considered an aggravated felony regardless of the length of sentence imposed. Counsel should assume that a conviction for first-degree murder is always removable.

**Crime Involving Moral Turpitude (CMT):** Counsel should assume that a conviction for first-degree murder will constitute a CMT for immigration purposes.

**Aggravated Felony:** Counsel should assume that a conviction for first-degree murder will be considered an aggravated felony as “murder” within 8 U.S.C. § 1101(a)(43)(A), regardless of the sentence imposed.

**Other grounds:** If the record of conviction demonstrates a domestic relationship under A.R.S. § 13-3601 or contains the age of the victim, a conviction for first-degree murder could also be removable under the grounds of domestic violence or child abuse, neglect, or abandonment. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). Immigration counsel should vigorously argue that *Matter of Velazquez-Herrera* was implicitly overruled by recent Ninth Circuit and Supreme Court case law. Conviction under this statute should not be removable under the child abuse ground, unless minority is an element of the offense (such as when coupled with a statute above that has minority as an element). See “Other Grounds” under A.R.S. § 13-1102, *supra*.

Note that the BIA just ruled, in *Matter of Estrada*, 26 I & N Dec. 749 (BIA 2016), that the circumstance specific approach, not the categorical approach, applies to determine whether there is a domestic relationship. See Note: Domestic Violence. Thus, once it is determined under the categorical approach that a conviction is a crime of violence, the Judge may go outside the record of conviction to determine whether the relationship is a domestic relationship.

### **9. Endangerment, A.R.S. §13-1201**

A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury. Endangerment involving a substantial risk of imminent death is a class 6 felony. In all other cases, it is a class 1 misdemeanor.

**Summary:** Under current law this is not an aggravated felony even with a 365-day sentence. Still, as always counsel should attempt to get a sentence imposed of 364 days or less to prevent this from possibly being held an aggravated felony.

**Crime Involving Moral Turpitude (CMT):** Felony endangerment under this statute is a categorical CMT. *Matter of Leal*, 26 I & N Dec. 20 (BIA 2012), upheld in *Leal v. Holder*, 771 F.3d 1140 (9th Cir. 2014)(Petition for Certiorari denied).

*Leal* focuses on *felony* endangerment, finding that reckless action which places another in substantial, actual risk of imminent death is a CMT. The rationale, however, could apply to misdemeanor endangerment as well. Even if it is a CMT, however, a *single* class 1 misdemeanor conviction would not cause deportability or inadmissibility.

**Aggravated Felony:** No, this is not an aggravated felony as a crime of violence because it does not have as an element the use, attempted use, or threatened use of force. Under Ninth Circuit law, a *mens rea* of recklessness has been insufficient to meet the definition of a “crime of violence.” *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc) (recklessly causing physical injury to another does not meet the federal definition of a “crime of violence” under 18 U.S.C. § 16); *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012) (California “general intent” crime that employs a mens rea of recklessness is not categorically a “crime of violence” under section 16(b)). Since the statute can only be violated using recklessness, it is categorically not an aggravated felony. See further discussion at ARS § 13-1203, assault.

**Other Grounds: Domestic Violence.** This is not a crime of domestic violence because it is not a crime of violence.

**Other Grounds: Crime of Child Abuse, Neglect or Abandonment:** If the record demonstrates that the person endangered was a minor, charges of removal may be brought on the basis of child abuse, neglect, or abandonment. See *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) (unreasonably placing a

child in a situation that poses a threat of injury to the child's life or health is categorically a crime of child abuse even though no proof of actual harm or injury to the child is required). However, *Matter of Soram* may be in conflict with the Ninth Circuit's decision in *Pacheco-Fregozo v. Holder*, 576 F.3d 1030 (9th Cir. 2009), which held that a statute that includes only the *possibility* of harm, with no actual physical or emotional injury, does not categorically fall within the definition of a "crime of child abuse." See *Jimenez-Juarez v. Holder*, 635 F.3d 1169, n.2 (9th Cir. 2011) (upholding *Pacheco-Fregozo* post-*Soram*). Defense counsel should plead to language that avoids any reference to actual harm or injury to the victim in order to preserve this argument for immigration counsel.

Defense counsel should attempt to cleanse the record of any mention that the victim was a minor. If the age of the victim is in the record of conviction, immigration counsel should argue that the BIA's decision permitting review of the record to ascertain age, in *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008), was an incorrect interpretation of Ninth Circuit and Supreme Court law, and implicitly overruled in *Descamps v. U.S.* 133 S.Ct. 2276 (US). Therefore an immigration judge may not consider this fact in characterizing the offense of conviction. See *Other Grounds*, ARS 13-1102, *supra*.

**Other Grounds: Firearms:** If the record demonstrates that the offense was committed with a firearm, a charge of removal may be brought on the basis of a firearms conviction. 8 USC § 1227(a)(2)(C). Defense counsel should be careful to remove any reference to a firearm from the record of conviction. If it is not possible to remove any reference, defense counsel should refer generally to a "gun" or "bb gun," which will permit immigration counsel to argue that the offense is not properly identified as a "firearm" under the federal immigration definition at 18 USC § 921(a)(3).

#### **10. Threatening or intimidating, ARS § 13-1202**

A person commits threatening or intimidating if the person threatens or intimidates by word or conduct:

1. To cause physical injury to another person or serious damage to the property of another; or
2. To cause, or in reckless disregard to causing, serious public inconvenience including, but not limited to, evacuation of a building, place of assembly or transportation facility; or
3. To cause physical injury to another person or damage to the property of another in order to promote, further or assist in the interests of or to cause, induce or solicit another person to participate in a criminal street gang, a criminal syndicate or a racketeering enterprise.

A1 or A2 is a class 1 misdemeanor, except that it is a class 6 felony if the offense is committed in retaliation for certain anti-crime activities. A3 is a class 4 felony.

**Crime Involving Moral Turpitude (CMT):** Probably not. The Ninth Circuit has held that a conviction for Criminal Threats under California law is a CMT. *Latter-Singh v. Holder*, 668 F.3d 1156, 1158 (9th Cir. 2012). However, in finding it to be categorically a CMT, the Ninth Circuit relied on three aspects of the California statute that are not necessarily present in the Arizona statute. First, the Arizona statute does not require a threat of "death or great bodily injury," since the plain language of the statute includes threats of physical injury, damage to property, or serious public inconvenience. Second, the Arizona threats statute does not require an intent that the victim believe the threat will be carried out since the legislature specifically amended the language in 1994 to delete a requirement that there be an "intent to terrify." 1994 Ariz. Sess. Laws, ch. 200, § 11. Third, the Arizona threats statute does not require intent and may be violated by a mens rea of mere negligence. *In re Kyle M.*, 200 Ariz. 447, 449 (Ariz. Ct. App. 2001); *In re Ryan A.*, 39 P.3d 543 (AZ 2002).

In *Coquico v. Lynch*, 789 F.3d 1049 (9th Cir. 2015), the Ninth Circuit noted similar disparities between California's Criminal Threats statute, and another California statute related to use of a laser. In finding the laser statute not to constitute a CMT, the Court emphasized that: (1) the laser statute did not

require that the threat be of “death or great bodily injury,” (2) did not require that the threatened person “reasonably be in sustained fear for her own safety,” and (3) required only an “intent to place the victim in ‘apprehension or fear of bodily harm,’” as opposed to an “intent to instill great fear of serious bodily injury or death.” *Coquico v. Lynch* supports an argument that conviction under 13-1202 is not categorically a CMT. To be safe, defense counsel should attempt to keep facts demonstrating a threat of “death or great bodily injury” out of the record of conviction, and should attempt to keep the possibility open that the mens rea was negligence, or at a minimum that there was no intent akin to instilling “great fear of serious bodily injury or death.”

The requirement in A3 that the threat to injure or damage property be in order to support gang or racketeering activity, should not transform an offense that otherwise does not involve moral turpitude into a CMT. The Ninth Circuit has held that “a crime that in itself does not involve moral turpitude does not become turpitudinous merely because it was committed to promote, further, or assist criminal activity by gang members.” *Hernandez-Gonzalez v. Holder*, 778 F.3d 793 (9th Cir. 2015). Thus, if defense counsel cannot avoid pleading to A3, a CMT may still be avoidable if the record demonstrates that the nature of the threat is of the type that does not itself involve moral turpitude. *See Coquico. Lynch, supra.*

**Aggravated Felony as a Crime of Violence:** Both A1 and A2 are misdemeanors that cannot sustain a sentence of a year, but will be held a class 6 felony if done in retaliation for certain activities. There counsel should obtain a sentence of 364 days or less, or keep the record vague between A1 and A2. A1 may be charged as a crime of violence, but immigration counsel will have an argument that it lacks the requisite intent since a defendant need only be criminally negligent as to the statement’s threatening nature. *In re Kyle M.*, 200 Ariz. 447, 449 (Ariz. Ct. App. 2001). A2 is not a crime of violence since it does not necessarily involve a threat to use force on people or property (e.g., it could involve threatening to pull a fire alarm).

A3 can be a felony and will likely be charged as a crime of violence. *See Rosales-Rosales v. Ashcroft*, 347 F.3d 714 (9th Cir. 2003) (Calif. P.C. § 422, which punishes “[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement ... is to be taken as a threat, even if there is no intent of actually carrying it out,” held a crime of violence).

**Other Grounds: Domestic Violence/Child Abuse, Abandonment or Neglect.** A1 will be charged as a deportable crime of domestic violence, especially if the conviction specifically cites § 13-3601 in the judgment. 8 USC §1227(a)(2)(E)(i). Immigration counsel can argue that the statute does not have the requisite mens rea to be a “crime of violence” and thus cannot be a “crime of domestic violence” but immigration judges may not agree. *See Aggravated Felony, above.* No sentence is required and a misdemeanor will suffice. Consider a plea to assault, § 13-1203(A)(3). *See Note: Domestic Violence.* If the victim is a minor and the age of the victim appears in the record of conviction, a conviction may be removable under the ground of child abuse, neglect, or abandonment. Defense counsel should attempt to cleanse the record of any mention that the victim was a minor. If the age of the victim is in the record of conviction, immigration counsel should argue that the BIA’s decision permitting review of the record to ascertain age, in *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008), was an incorrect interpretation of Ninth Circuit and Supreme Court law, and implicitly overruled in *Descamps v. U.S.* 133 S.Ct. 2276 (US). Therefore an immigration judge may not consider this fact in characterizing the offense of conviction. *See Other Grounds, ARS 13-1102, supra.*

Note that the BIA just ruled, in *Matter of Estrada*, 26 I & N Dec. 749 (BIA 2016), that the circumstance specific approach, not the categorical approach, applies to determine whether there is a domestic relationship. *See Note: Domestic Violence.* Thus, once it is determined under the categorical

approach that a conviction is a crime of violence, the Judge may go outside the record of conviction to determine whether the relationship is a domestic relationship.

### **11. Assault, ARS § 13-1203**

A. A person commits assault by:

1. Intentionally, knowingly or recklessly causing any physical injury to another person or
2. Intentionally placing another person in reasonable apprehension of imminent physical injury or
3. Knowingly touching another person with the intent to injure, insult or provoke such a person.

B. Assault committed intentionally or knowingly pursuant to subsection A, paragraph 1 is a class 1 misdemeanor. Assault committed recklessly pursuant to subsection A, paragraph 1 or assault pursuant to subsection A, paragraph 2 is a class 2 misdemeanor. Assault committed pursuant to subsection A, paragraph 3 is a class 3 misdemeanor.

**Crime Involving Moral Turpitude:** Possibly if A1 is coupled with §13-3601 and convicted as a class 1 misdemeanor. In general, simple assault is not a CMT. *Matter of re Fualaau*, 21 I&N Dec. 475 (BIA 1996) (simple assault not CMT because statute only required bodily injury rather than serious bodily injury). However, in *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1165 (9th Cir. 2006), the Ninth Circuit found that a simple assault, if committed “willfully” against a person with whom the defendant has a domestic relationship and if resulting in “serious bodily injury,” would constitute a CMT. *See also Grageda v. INS*, 12 F.3d 919, 922 (9th Cir. 1993). The Ninth Circuit has expanded this holding to find that intentional assault that wounds, maims, disfigures, or endangers the life of another is categorically a CMT. *See Uppal v. Holder*, 576 F.3d 1014 (9th Cir. 2009), *see also Mtoched v. Lynch*, 786 F.3d. 1210 (9th Cir. 2015). Since A1 as a class 1 misdemeanor carries a *mens rea* of intent pursuant to § 13-1203(B), the government may argue that it is a CMT. However, immigration counsel can counter that A1 is overbroad since it requires “any physical injury” rather than “serious bodily injury.”

If pleading to A1, the best approach is to secure a plea that combines both a reckless *mens rea* and lacks reference to a serious bodily injury. A reckless *mens rea*, standing alone, may not save an assault offense from constituting a CMT. *See e.g. Leal v. Holder*, 771 F.3d 1140, 1146-1148 (9th Cir. 2014)(finding Arizona felony endangerment a CMT despite reckless *mens rea*, due to the grave nature of the harm), but *see also Mtoched v. Lynch, supra*, at 1216-1217 (“Convictions for simple assault and battery often do not constitute convictions for CIMTs because such crimes sweep in reckless activity”). While there is some inconsistency in the law, courts have consistently recognized that the lower the level of *mens rea*, the higher the requisite harm must be before an offense can constitute a CMT.

A conviction for A2 or A3 coupled with a reference to 13-3601 could also be a CMT if the record of conviction demonstrates that there was “serious bodily injury.” Though the statutory language of A2 and A3 make it unlikely that this would be part of the factual basis, defense counsel should strike any mention of “serious bodily injury” from the record of conviction.

The Ninth Circuit has held that “a relationship of trust” must be present in order for simple assault to rise to the level of a CMT. *Morales-Garcia v. Holder*, 567 F.3d 1058, 1065 (9th Cir. 2009). Simple assault committed against persons other than a spouse (such as former cohabitants or people who are more akin to strangers or acquaintances) does not trigger a CMT. *Id.* at 1065-66. Since ARS § 13-3601 includes former cohabitants, relatives outside of the immediate family, and in-laws, mere conviction of DV assault may be insufficient to constitute a CMT. Counsel should specify the defendant’s relationship to the victim if it is outside of the immediate family and leave the relationship vague if it is a spouse or child (remember, however, that any conviction defined as domestic violence by a state statute may be removable under the DV ground of deportability).

**Aggravated Felony: Crime of Violence.** To be an aggravated felony the conviction must be a crime of violence. Neither A3, nor *recklessly* causing physical injury under A1, is categorically a crime of violence. *United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1098-1099 (9th Cir. 2015) *See also Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012) (California “general intent” crime that employs a mens rea of recklessness is not categorically a “crime of violence” under section 16(a)). However, a conviction under A2 will be a crime of violence. *United States v. Sahagun-Gallegos, supra, see also Camacho-Cruz v. Holder*, 621 F.3d 941, 943 (9th Cir. 2010) (“intentionally placing another person in reasonable apprehension of immediate bodily harm” is a crime of violence). See discussion at Other Grounds: Domestic Violence, below.

Note that a plea to *attempted* assault will always involve an intentional *mens rea* and thus preclude the benefits of a plea to recklessness. *United States v. Gomez-Hernandez*, 680 F.3d 1171, 1176 (9th Cir. 2012) (“it is well-settled that attempted aggravated assault under Arizona law covers only intentional conduct”) (citing *State v. Kiles*, 175 Ariz. 358, 857 P.2d 1212, 1224 (1993) (“[A]ttempt is a specific intent crime and by definition involves *intentional* conduct.”)). Therefore, in order to avoid a crime of violence or a crime of domestic violence, counsel would be better off pleading to a straight assault than an attempt in order to leave open the possibility of a reckless mens rea.

Regarding the year’s sentence, simple assault under Arizona law is only punishable as a misdemeanor with a maximum sentence of six months. However, if a conviction for assault under § 13-1203 serves as the basis for an aggravated assault under § 13-1204, a sentence of one year or more could result in an aggravated felony.

**Other Grounds: Domestic Violence.** To be a deportable domestic violence offense the conviction must be of (a) a crime of violence (b) committed against someone with whom the defendant had a domestic relationship. If one of these factors cannot be proved, the offense does not cause deportation under this ground. There is no requirement of a year’s sentence. *See Note: Domestic Violence.* In *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc), the Ninth Circuit found that a conviction for a class 2 misdemeanor assault under § 13-1203 did not categorically constitute a crime of violence under 18 U.S.C. § 16(a) since it involves recklessness under A1. Therefore, a domestic violence conviction for simple assault under A1 is not categorically removable as a “crime of domestic violence” unless the government can prove that the offense was committed intentionally, rather than recklessly. *However*, the government has successfully argued that, since assault committed intentionally or knowingly is punishable as a class 1 misdemeanor under § 13-1203(B), *any* conviction for A1 as a *class 1 misdemeanor* will automatically be considered a “crime of violence.”

A conviction under A2 coupled with a reference to 13-3601, or where the record demonstrates a domestic relationship, will be a crime of domestic violence. *Camacho-Cruz v. Holder*, 621 F.3d 941, 943 (9th Cir. 2010) (“intentionally placing another person in reasonable apprehension of immediate bodily harm” is a crime of violence).

In general, mere offensive touching under A3 is not a crime of violence. *See Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006) (finding California Spousal Battery which includes offensive touching not crime of violence); *Singh v. Ashcroft*, 386 F. 3d 1228 (9th Cir. 2004) (Oregon harassment statute is not necessarily a crime of violence because it can be violated by mere offensive touching); *Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010); ); *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012) (California “general intent” crime that employs offensive touching and a mens rea of recklessness is not categorically a “crime of violence.”)). Therefore, a plea to A3, even with a *mens rea* of “intentionally,” should not be held a categorical crime of violence.

*To avoid a crime of violence*, counsel should plead to A1 as a class 2 misdemeanor, A3, or leave the record vague between subsections. Counsel should avoid pleading to A1 as a class one misdemeanor, or to A2. Where possible, counsel should also attempt to keep the record clear of information that more than recklessness or mere offensive touching was involved. In best practice, this includes laying a factual basis that leaves open the possibility of recklessness or mere offensive touching. However, if the factual basis is the only place where conduct other than recklessness or mere offensive touching is indicated, and no subsection is otherwise specified, the government may not cite the factual basis to prove to what subsection a defendant purportedly pled. *United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1100 (9th Cir. 2015)

Note that a plea to *attempted* assault will always involve an intentional *mens rea* and thus preclude the benefits of a plea to recklessness. *United States v. Gomez-Hernandez*, 680 F.3d 1171, 1176 (9th Cir. 2012) (“it is well-settled that attempted aggravated assault under Arizona law covers only intentional conduct”) (citing *State v. Kiles*, 175 Ariz. 358, 857 P.2d 1212, 1224 (1993) (“[A]ttempt is a specific intent crime and by definition involves *intentional* conduct.”)). Therefore, in order to avoid a crime of violence or a crime of domestic violence, counsel would be better off pleading to a straight assault than an attempt in order to leave open the possibility of a reckless *mens rea*.

*To avoid proof of the requisite domestic relationship*, counsel should attempt to avoid the statutory reference to §13-3601, as well as any other information in the record that establishes the relationship. See *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004) (holding that immigration authorities cannot use evidence from outside the record of conviction to establish that a domestic relationship existed for the purpose of proving deportability for conviction of a crime of domestic violence), *reaffirmed in Olivas-Motta v. Holder*, 746 F.3d 907 (9th Cir. 2013), *but see Matter of Estrada*, 26 I & N Dec. 749 (BIA 2016)(holding that the circumstance specific approach applies and a Judge may go outside the record of conviction to determine whether the relationship is a domestic relationship). See Note: Record of Conviction.

**Other Grounds: Child Abuse, Abandonment, or Neglect:** Defense counsel should always attempt to leave the age of a minor victim out of the record of conviction to avoid removal under the child abuse ground. If the age of the victim is in the record of conviction, however, immigration counsel should argue that the BIA’s decision permitting review of the record to ascertain age, in *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008), was an incorrect interpretation of Ninth Circuit and Supreme Court law, and implicitly overruled in *Descamps v. U.S.* 133 S.Ct. 2276 (US). Therefore an immigration judge may not consider this fact in characterizing the offense of conviction. See Other Grounds under A.R.S. § 1102, *supra*.

## **12. Aggravated Assault, ARS § 13-1204**

A. A person commits aggravated assault if the person commits assault as defined in [section 13-1203](#) under any of the following circumstances:

1. If the person causes serious physical injury to another.
2. If the person uses a deadly weapon or dangerous instrument.
3. If the person commits the assault by any means of force that causes temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part or a fracture of any body part.
4. If the person commits the assault while the victim is bound or otherwise physically restrained or while the victim's capacity to resist is substantially impaired.
5. If the person commits the assault after entering the private home of another with the intent to commit the assault.

6. If the person is eighteen years of age or older and commits the assault on a child who is fifteen years of age or under.
7. If the person commits assault as prescribed by section 13-1203, subsection A, paragraph 1 or 3 and the person is in violation of an order of protection...
8. If the person commits the assault knowing or having reason to know the victim is [a peace officer, firefighter, EMT, teacher, school nurse, health care practitioner, or prosecutor...]
9. If the person knowingly takes or attempts to exercise control over [a peace officer's weapon]...
10. If the person [is imprisoned and attacks an employee of the jail or prison....]

**Crime Involving Moral Turpitude (CMT):** Defense counsel should conservatively assume that local Immigration Judges will find aggravated assault to be a CMT. However, the Ninth Circuit has raised doubt as to whether assault with a deadly weapon is necessarily a CMT, and case law addressing the issue may be forthcoming from the BIA. In *Ceron v. Holder*, 747 F.3d 773 (9th Cir. 2014), the Ninth Circuit considered whether California Penal Code § 245(a)(1), assault with a deadly weapon, is a CMT. The Board, noting that it had “long been settled” that assault with a deadly weapon is a CMT, found the offense a CMT. The Ninth Circuit, noting changes in California law regarding the requisite intent to violate the statute, as well as changes in federal immigration law, overturned the precedent decisions holding § 245(a)(1) to be a CMT. Noting the importance that level of intent has in the CMT analysis, the *Ceron* court was concerned that California law now made clear that assault with a deadly weapon is in fact a general intent crime. It therefore reversed the Board, and remanded for the Board to consider the issue in the first instance.

Immigration counsel also may argue that conviction under this statute, with its general reference to ARS § 13-1203, is not divisible and is never a CMT, because jury unanimity is not required as to whether the underlying assault was intentional, knowing, or reckless. *See e.g. Descamps v. U.S.* 133 S.Ct. 2276 (US); *see also Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016). The Ninth Circuit has recognized that where a jury “need not agree as to which intent predicate applies, the intent predicates are not elements, and [the statute] is therefore indivisible.” *Govindarajan v. Lynch*, 611 F. App'x 469 (9th Cir. 2015). The issue of when a statute is indivisible also remains an open question, as the Supreme Court accepted certification in the case of *U.S. v. Mathis*, 786 F.3d 1068 (8th Cir. 2015), to address a circuit split on the issue. *See Note: Record of Conviction and Divisible Statutes.*

**Aggravated Felony: Crime of Violence:** An offense is not an aggravated felony crime of violence without a sentence imposed of 365 days or more. A sentence of 364 days or less, therefore, will always avoid an aggravated felony as a crime of violence.

Immigration law uses the federal definition of a “crime of violence” found at 18 U.S.C. § 16. Section 16(a) of 18 U.S.C. requires the “use, attempted use, or threatened use of physical force,” while section 16(b) requires that the offense be a felony and involve a “substantial risk” that physical force may be used. The Ninth Circuit recently held that 18 USC § 16(b) is void for vagueness, applying the Supreme Court’s decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) to the immigration context. *See Dimaya v. Lynch*, 803 F. 3d 1110 (9th Cir. 2015). Thus, no offense should constitute an aggravated felony as a crime of violence unless it “has *as an element* the use, attempted use, or threatened use of physical force against the person or property of another” pursuant to 18 USC § 16(a)(emphasis added).

Under current case law, aggravated assault is not categorically a crime of violence. *United States v. Sahagun-Gallegos*, 782 F.3d 1094 (9th Cir. 2015). In *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc), the Ninth Circuit found that a conviction for misdemeanor assault under § 13-1203 did not categorically constitute a crime of violence under 18 U.S.C. § 16(a) since recklessness under

(A)(1) would not involve the “use, attempted use, or threatened use of physical force. Furthermore, assault under § 13-1203(A)(3) is not a crime of violence because it involves the use of *de minimus* force. *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006). Thus, a conviction under ARS § 13-1204 that involves either a reckless mens rea or de minimus force will not be an aggravated felony crime of violence, if the specified subsection does not add as an element the use of force, attempted use of force, or threatened use of force. The Ninth Circuit again confirmed this analysis in *United States v. Sahagun-Gallegos, supra*.

Defense counsel should conservatively assume that a conviction for aggravated assault with a sentence of one year or more will be held to be an aggravated felony. However, if a sentence of 364 days or less is not possible, counsel should attempt to specify a subsection that is more likely to involve a *mens rea* of recklessness, such as A1, A2, A6, A7, or A8. Since A3, A4, A5, A9, A10 are more likely by nature to involve the intentional use of force, these subsections should be avoided. Furthermore, a plea to the underlying definition of assault at § 13-1203(A)(1) or (A)(3), and use of the specific word “recklessness” in the plea agreement, will aid immigration counsel in arguing that the offense is not a crime of violence. If this is not possible, however, even pleading to § 13-1203 generally, without specifying a subsection, may avoid an aggravated felony under *United States v. Sahagun-Gallegos, supra*.

Note that a plea to *attempted* assault will always involve an intentional *mens rea* and thus preclude the benefits of a plea to recklessness. *United States v. Gomez-Hernandez*, 680 F.3d 1171, 1176 (9th Cir. 2012) (“it is well-settled that attempted aggravated assault under Arizona law covers only intentional conduct”) (citing *State v. Kiles*, 175 Ariz. 358, 857 P.2d 1212, 1224 (1993) (“[A]ttempt is a specific intent crime and by definition involves *intentional* conduct.”)). Therefore, in order to avoid a crime of violence or a crime of domestic violence, counsel would be better off pleading to a straight assault than an attempt in order to leave open the possibility of a reckless mens rea.

**Other Grounds: Domestic Violence.** See discussion of §13-1203.

**Other Grounds: Child Abuse:** A6 (person is eighteen years of age or older and commits the assault on a child who is fifteen years of age or under) will likely be charged as a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)(i). See *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) (unreasonably placing a child in a situation that poses a threat of injury to the child’s life or health is categorically a crime of child abuse even though no proof of actual harm or injury to the child is required). However, *Matter of Soram* may be in conflict with the Ninth Circuit’s decision in *Pacheco-Fregozo v. Holder*, 576 F.3d 1030 (9th Cir. 2009), which held that a statute that includes only the *possibility* of harm, with no actual physical or emotional injury, does not categorically fall within the definition of a “crime of child abuse.” See *Jimenez-Juarez v. Holder*, 635 F.3d 1169, n.2 (9th Cir. 2011) (upholding *Pacheco-Fregozo* post-*Soram*). Defense counsel should conservatively advise that any plea to A6 will be removable as a crime of child abuse but attempt to plead to language that avoids any reference to actual harm or injury to the victim.

If the plea is not to A6, but the age of the victim is in the record of conviction, ICE may still attempt to charge the offense as removable under the child abuse ground. Defense counsel should attempt to cleanse the record of any mention that the victim was a minor. If the age of the victim is in the record of conviction, immigration counsel should argue that the BIA’s decision permitting review of the record to ascertain age, in *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008), was an incorrect interpretation of Ninth Circuit and Supreme Court law, and implicitly overruled in *Descamps v. U.S.* 133 s.Ct. 2276 (US). Therefore an immigration judge may not consider this fact in characterizing the offense of conviction. See Other Grounds, ARS 13-1102, *supra*.

**Other Grounds: Firearms.** Where firearms is an element of the statute (e.g., A9(a)), the offense may cause deportability under the firearms ground. However, immigration Counsel will have a strong argument against removal under the firearms ground, because Arizona does not have an antique firearms exception. See Note: Firearms.

In light of recent Supreme Court precedent, a plea to A2 should not trigger removal under the firearms ground, even if the record of conviction identifies a firearm, because a “firearm” is an alternative means of satisfying an element of the statute, not an element of the statute itself. *See Descamps v. U.S.*, 133 S. Ct. (9th Cir. 2013), *see also Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016), *see also* Firearms Deportation Ground at ARS § 13-3102. As such, immigration counsel should argue that the statute is not divisible, and the court cannot review the record of conviction. Because the Supreme Court has accepted certification to address a circuit split on this means versus elements analysis, the safest strategy for defense counsel is to sanitize the record of conviction of any reference to a firearm. *See Note: “Divisible Statutes: Record of Conviction.”*

**Note on Deferred Action for Childhood Arrivals:** Conviction under A9 will likely bar a non-citizen from qualifying for DACA, or subject a DACA recipient (or recipient of prosecutorial discretion) to renewed removal proceedings, if the offense involves a firearm. Unlawful possession or use of a firearm is considered a serious misdemeanor for DACA purposes, meaning that the U.S. Citizenship and Immigration Services will only grant DACA if the applicant can show extraordinary circumstances. *See Note: Deferred Action for Childhood Arrivals.*

### **13. Unlawfully Administering Intoxicating Liquors, Narcotic Drugs or Dangerous Drugs, ARS § 13-1205**

A person commits unlawfully administering intoxicating liquors, a narcotic drug or dangerous drug if, for a purpose other than lawful medical or therapeutic treatment, such person knowingly introduces or causes to be introduced into the body of another person, without such person’s consent, intoxicating liquors, a narcotic drug or dangerous drug. This is a class 6 felony, except it is a class 5 felony if the victim is a minor.

This may be a useful alternate to a sexual offense or drug crime.

**Crime Involving Moral Turpitude (CMT):** Assume yes, although no case law on point.

**Aggravated Felony:** Not as a drug offense; administration of drugs does not appear as a federal controlled substance offense.

**Other Grounds: Controlled Substance:** This conviction will make a person deportable and inadmissible as a controlled substance offense only if the record of conviction specifies that the offense involved a drug, rather than alcohol. Defense counsel should plead to alcohol or at least leave the record vague between alcohol and controlled substances.

A conviction is only removable as a controlled substance offense if the drug is identified as a federally recognized controlled substance in the record of conviction. Case law is not currently clear as to whether the Arizona controlled substance schedule is coextensive with the federal schedule, though in practice Arizona Judges are finding it is not. In an unpublished decision, the BIA previously held that, even though the Arizona controlled substance schedule contains drugs that do not appear on the federal schedule, the Arizona legislature “intended to” track the federal list of illegal drugs such that the Arizona

drug conviction is removable regardless of whether a controlled substance is identified. The Ninth Circuit reversed, citing its decision in *Ragasa v. Holder*, 752 F.3d 1173, 9th Cir. 2014)(analyzing a Hawaii statute that contains the same two substances in the Arizona schedule, lacking in the federal schedule). *But see Matter of Ferreira*, 26 I & N Dec. 415 (BIA 2014)(where a drug schedule is overbroad, non-citizen must show a “realistic probability” that state prosecutes for overbroad substances). Arizona Judges are currently treating Arizona’s controlled substance schedule as overbroad, meaning that the Department must prove the substance. Defense counsel should therefore try to leave the record vague as to what controlled substance was involved, but should not assume a controlled substance conviction with an unidentified drug will be safe. Immigration Counsel may rely on *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), to argue that there must be a strict match between the state and federal list of controlled substances.

**14. Dangerous or deadly assault by prisoner or juvenile, ARS § 13-1206**

A person, while in the custody of the state department of corrections, the department of juvenile corrections, a law enforcement agency or a county or city jail, who commits an assault involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or who intentionally or knowingly inflicts serious physical injury upon another person is guilty of a class 2 felony.

**Crime Involving Moral Turpitude (CMT):** Assault in which a person intentionally or knowingly inflicts serious physical injury is likely a CMT. *Uppal v. Holder*, 576 F.3d 1014 (9th Cir. 2009). In the absence of better options, plead to language involving a deadly weapon or dangerous instrument (though not a firearm). While assault involving a deadly weapon or dangerous instrument has traditionally been held to be a CMT, the Ninth Circuit recently called such precedent into question in *Ceron v. Holder*, 747 F.3d 773 (9th Cir. 2014), en banc. See “Crime involving moral turpitude” at ARS § 13-1204, *supra*. Immigration counsel can cite the rationale in *Ceron v. Holder* to argue that conviction under this statute, involving use of a deadly weapon or dangerous instrument, is not categorically a CMT. However, until the Board comes out with a decision addressing the issue, defense counsel should conservatively assume this will be held a CMT by local immigration judges.

**Aggravated Felony: Crime of Violence.** Assuming that this statute incorporates the definition of assault found in § 13-1203, a conviction with a sentence of one year or more is not categorically an aggravated felony since it could involve a *mens rea* of recklessness. *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012) (California “general intent” crime that employs a *mens rea* of recklessness is not categorically a “crime of violence” under section 16(a)). If a sentence of one year or more cannot be avoided, defense counsel should try to incorporate language of “recklessness” in the plea agreement. See Note: Assault.

**Other Grounds: Firearms.** If the record of conviction mentions use of a “firearm,” the client may be deported under the firearms ground, though immigration counsel will have strong arguments against this under *Descamps v. U.S.*, 133 s. Ct. 2276 (U.S. 2013) and *U.S. v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014). See “Firearms Deportation Ground” under ARS § 13-3102, *infra*. Try to plead only to a non-firearm weapon or to use of a “deadly weapon or dangerous instrument.” The record includes the judgment, plea agreement or plea colloquy, or charging document to the extent there is proof that the defendant pled as charged; it may also include a police or probation report if this is stipulated as a factual basis for the plea. See *Divisible Statutes, Record of Conviction*.

Arizona law also does not include an exception for antique firearms. In order to qualify as a removable firearms offense under the Immigration and Nationality Act, a state firearms offense must match the federal definition of firearm at 18 USC § 921(a). See INA § 237(2)(C). The federal statute

includes an exception for antique firearms. In *U.S. v. Aguilera-Rios*, *supra*, the Ninth Circuit held that “any conviction under a state firearms statute lacking an exception for antique firearms is not a categorical match for the federal firearm ground of removal.” *Id.* at 634. The Arizona State Attorney General has confirmed that offenses involving antique firearms are equally subject to prosecution. Ariz. Op. Att’y Gen. No. I14-009 (Jan. 2, 2015).

**Note on Deferred Action for Childhood Arrivals:** This conviction will likely bar a non-citizen from qualifying for DACA, or subject a DACA recipient (or recipient of prosecutorial discretion) to renewed removal proceedings, if the offense involves a firearm. Unlawful possession or use of a firearm is considered a serious misdemeanor for DACA purposes, meaning that the U.S. Citizenship and Immigration Services will only grant DACA if the applicant can show extraordinary circumstances. *See Note: Deferred Action for Childhood Arrivals.*

**15. Drive-by shooting, ARS § 13-1209.**

Intentionally discharging a weapon from a motor vehicle at a person, another occupied motor vehicle or an occupied structure. Drive by shooting is a class 2 felony.

**Crime Involving Moral Turpitude (CMT):** Yes. *Matter of Muceros*, Index Decision (BIA 2000) (the willingness to risk potential serious harm regardless of whether injury is intended or actually occurs renders drive by shooting under Cal. Pen. Code § 246 a CMT) (see <http://www.usdoj.gov/eoir/vll/intdec/indexnet.html>).

**Aggravated Felony: Crime of Violence.** Probably, if a 365 day or more sentence is imposed, although immigration counsel can argue that it is not categorically a crime of violence since the weapon could be fired at one’s own house. *See U.S. v. Martinez-Martinez*, 468 F.3d 604 (9th Cir. 2006).

**Other Grounds: Firearms.** Probably not under current case law, because firearms as defined by Arizona law does not include an exception for antique firearms. In order to qualify as a removable firearms offense under the Immigration and Nationality Act, a state firearms offense must match the federal definition of firearm at 18 USC § 921(a). *See INA § 237(2)(C).* The federal statute includes an exception for antique firearms. In *U.S. v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014), the Ninth Circuit held that “any conviction under a state firearms statute lacking an exception for antique firearms is not a categorical match for the federal firearm ground of removal.” *Id.* At 634. The Arizona State Attorney General has confirmed that offenses involving antique firearms are equally subject to prosecution. Ariz. Op. Att’y Gen. No. I14-009 (Jan. 2, 2015).

**Note on Deferred Action for Childhood Arrivals:** This conviction will likely bar a non-citizen from qualifying for DACA, or subject a DACA recipient (or recipient of prosecutorial discretion) to renewed removal proceedings. Unlawful possession or use of a firearm is considered a serious misdemeanor for DACA purposes, meaning that the U.S. Citizenship and Immigration Services will only grant DACA if the applicant can show extraordinary circumstances. *See Note: Deferred Action for Childhood Arrivals.*

**16. Discharging a firearm at a structure, ARS § 13-1211.**

- A. A person who knowingly discharges a firearm at a residential structure is guilty of a class 2 felony.
- B. A person who knowingly discharges a firearm at a nonresidential structure is guilty of a class 3 felony.

**Crime Involving Moral Turpitude (CMT):** This will likely be held a CMT, although immigration counsel at least could argue that subsection B is not a CMT. Plead to B, or leave the record of conviction vague between A and B, because immigration attorneys can argue that section B does not involve moral turpitude. *Matter of Muceros*, Index Decision (BIA 2000) (willfully shooting at inhabited dwelling house, whether occupied or not, or at occupied structure under Cal. Pen. Code § 246 is a CMT).

**Aggravated Felony: Crime of Violence.** An aggravated felony crime of violence requires as an element the use, attempted use, or threatened use of physical force against *the person or property of another* 18 U.S.C. § 16(a). By careful pleading, counsel can provide immigration counsel with an argument that a particular disposition is not against the person or property of another and thus is not an aggravated felony. Counsel must not permit the record to preclude the possibility that (a) the property was unoccupied (i.e., there was not a current resident, as opposed to the current resident was not home at the time) and (b) the property was owned by the defendant. Counsel should plead to the generic language of the statute and avoid references to an inhabited residence or the property of another.

Rationale: Regarding “against a person,” shooting at an “inhabited dwelling place” under California law has been held a crime of violence since it “necessarily threatens the use of physical force against the resident.” *U.S. v. Cortez-Arias*, 403 F.3d 1111, 1116 (9th Cir. 2005). However, the Ninth Circuit in *U.S. v. Martinez-Martinez*, 468 F.3d 604 (9th Cir. 2006) distinguished the Arizona statute by finding that the definition of “residence” in ARS § 13-1211 is broader than that of a California “inhabited dwelling house,” because it includes dwellings in which no one is currently living. Therefore, the discharge of a firearm at either a residential or nonresidential structure appears to be divisible as a crime of violence against a person, since it can be committed against a structure where no one is currently living.

The government may argue that the offense is a crime of violence under 18 U.S.C. § 16(b) as a felony that involves a “substantial risk” that force will be used – an issue that *Martinez-Martinez* did not address. However, the Ninth Circuit, following Supreme Court precedent, recently held § 16(b) is void for vagueness. See “Aggravated Felony” under ARS § 13-1002, *supra*.

Regarding the use of force against “property of another,” § 13-1211 includes offenses that are committed against one’s own property. Unless the record of conviction demonstrates that the offense was committed against the property of another, the offense is not a crime of violence against property. See *Jordison v. Gonzales*, 501 F.3d 1134 (9th Cir. 2007).

**Other Grounds: Firearms.** Probably not under current case law, because firearms as defined by Arizona law does not include an exception for antique firearms. In order to qualify as a removable firearms offense under the Immigration and Nationality Act, a state firearms offense must match the federal definition of firearm at 18 USC § 921(a). See INA § 237(2)(C). The federal statute includes an exception for antique firearms. In *U.S. v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014), the Ninth Circuit held that “any conviction under a state firearms statute lacking an exception for antique firearms is not a categorical match for the federal firearm ground of removal.” *Id.* At 634. The Arizona State Attorney General has confirmed that offenses involving antique firearms are equally subject to prosecution. Ariz. Op. Att’y Gen. No. I14-009 (Jan. 2, 2015).

**Note on Deferred Action for Childhood Arrivals:** This conviction will likely bar a non-citizen from qualifying for DACA, or subject a DACA recipient (or recipient of prosecutorial discretion) to renewed removal proceedings, if the offense involves a firearm. Unlawful possession or use of a firearm is considered a serious misdemeanor for DACA purposes, meaning that the U.S. Citizenship and

Immigration Services will only grant DACA if the applicant can show extraordinary circumstances. *See* Note: Deferred Action for Childhood Arrivals.

**Other Grounds: Domestic Violence.** Arguably the domestic violence deportation ground covers only acts against persons, not property. However, to ensure that the conviction does not cause deportability under this ground, counsel should not permit the record of conviction to establish that the property was occupied, or even controlled or owned, by a person with whom the defendant had a domestic relationship.

**17. Custodial Interference, ARS § 13-1302**

A. A person commits custodial interference if, knowing or having reason to know that the person has no legal right to do so, the person does one of the following:

1. Takes, entices or keeps from lawful custody any child, or any person who is incompetent, and who is entrusted by authority of law to the custody of another person or institution.
2. Before the entry of a court order determining custodial rights, takes, entices or withholds any child from the other parent denying that parent access to any child.
3. If the person is one of two persons who have joint legal custody of a child takes, entices or withholds from physical custody the child from the other custodian.
4. At the expiration of access rights outside this state, intentionally fails or refuses to return or impedes the return of a child to the lawful custodian.

**Crime Involving Moral Turpitude (CMT):** Probably not, particularly for subsections A1, A2, and A3 since there is not necessarily an intentional or even reckless or negligent requirement. Even A4 may not be a CMT since the statute does not require cruelty, depravity, or emotional harm. *State v. Bean*, 174 Ariz. 544, 851 P.2d 843 (Ct. App. 1992).

**Aggravated Felony:** It appears not to be, although as always counsel should try to avoid a sentence of a year or more for any single count.

**Other Grounds: Domestic Violence.** Under 8 U.S.C. § 1227(a)(2)(E), a crime of child abuse, child neglect, or child abandonment is a deportable offense. The Board of Immigration Appeals has broadly defined “child abuse” as an offense involving an “intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person’s physical or mental well-being, including sexual abuse or exploitation.” *Matter of Velasquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). The government may argue that a conviction for § 13-1302 will “impair the physical or mental well-being” of a child but immigration attorneys have arguments that it does not. Immigration counsel also has a good argument that section A1 is at least divisible, if not overbroad, because the statute includes “any person who is incompetent,” in addition to “any child.” *See* “Other Grounds” under A.R.S. § 13-1102, *supra*. A plea to unlawful imprisonment with no reference to § 13-3601 or the age of the victim may be safer.

**Other Grounds: Inadmissible for Taking a Child *Outside the U.S.* in violation of a custody Decree.** Note that a noncitizen who removes a citizen child outside the U.S. in violation of a court decree, or assists in this, will be inadmissible until the child is returned to the rightful party.

**18. Unlawful Imprisonment, ARS § 13-1303**

A person commits unlawful imprisonment by knowingly restraining another person. “Restraint” is defined to mean restricting another person’s movements by “physical force, intimidation or deception” or

“any means including acquiescence of the victim if the victim is a child less than eighteen years old or an incompetent person and the victim's lawful custodian has not acquiesced in the movement or confinement.” A.R.S. §13-1301. Unlawful imprisonment is a class 6 felony unless the victim is released voluntarily by the defendant without physical injury in a safe place prior to arrest in which case it is a class 1 misdemeanor.

**Summary:** This may be a safer alternate plea, particularly under recent Ninth Circuit and Supreme Court precedent. Under recent case law, conviction under this statute should not be an aggravated felony crime of violence under any theory, but counsel can definitively avoid an aggravated felony crime of violence by obtaining a sentence of less than 365 days for any single count. Because it should not be a crime of violence, it also should not be a removable crime of domestic violence. Nor should it categorically be a crime of child abuse, because minority is not a necessary element of the statute. To be safe, avoid a § 13-3601 notation, and keep the age of a minor victim and the fact of minority out of the record of conviction.

**Crime Involving Moral Turpitude (CMT):** Probably not. Unlawful imprisonment is distinguished from kidnapping by its lack of intent to do harm. See, e.g., *State v. Larin*, 233 Ariz. 202 (Ct. App. 2013); *State v. Lucas*, 146 Ariz. 597, 604 (1985); *State v. Flores*, 140 Ariz. 469,473 (1984). A false imprisonment statute that does not require an intent to do harm should not be a CMT. The Ninth Circuit has held that California’s felony false imprisonment statute is not a CMT, because it lacks “an intent to injure someone, an actual injury, or a protected class of victims.” *Turijan v. Holder*, 744 F.3d 617, 621 (9th Cir. 2014); *See also Castrijon-Garcia v. Holder*, 704 F.3d 1205 (9th Cir. 2013)(emphasizing that California’s simple kidnapping is a general intent crime and does not require an intent to harm). In light of *Turijan v. Holder* and *Castrijon-Garcia v. Holder*, knowingly restraining another person, without more, should not amount to moral turpitude. To be sure to avoid a CMT, defense counsel should be careful to sanitize the record of conviction of any intent to injure, actual injury, or special class of victim. Since the statute can also be violated by something other than “physical force, intimidation or deception” if the victim is a child or an incompetent adult, a vague record of conviction that does not specify the means by which the “restraint” was achieved should also not be a CMT. See *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 627 (9th Cir. 2010).

If victim is a child could plead to §13-1302 Custodial Interference. Plead to section A1 and avoid identifying a minor on the record of conviction to avoid concerns about removability under the child abuse ground. *See* §13-1302, *supra*.

**Aggravated Felony: Crime of Violence:** Should not be, because use, attempted use, or threatened use of force is not a necessary element of the statute. Keep the record free of reference to violence. Counsel can be sure to avoid an aggravated felony by obtaining a sentence of 364 or less.

The Ninth Circuit has held that kidnapping is not an aggravated felony crime of violence under 18 USC § 16(a) because it may be committed without the use or threat of violence, and the same arguments would apply here. *United States v. Marquez-Lobos*, 683 F.3d 1061, 1066 (9th Cir. 2012) (citing *State v. Bible*, 175 Ariz. 549, 604, 858 P.2d 1152 (1993)). In *Marquez-Lobos*, the Ninth Circuit also noted that when the victim is a minor who is less than 18 years old or incompetent, a lack of consent may be established through non-acquiescence by the lawful custodian, which does not involve the use or threat of violence. *Id.* (citing *State v. Viramontes*, 163 Ariz. 334, 336, 788 P.2d 67 (1990)).

Under *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), conviction under this statute also should not be a crime of violence under 18 USC § 16(b), for substantial risk that force will be used, because that section is void for vagueness. *See* “Aggravated Felony” under ARS § 13-1002, *supra*. Because *Dimaya*

could be reviewed by the Supreme Court, defense counsel should, as always, strive for a sentence of 364 days or less to definitely remove any risk of a crime of violence aggravated felony.

**Other Ground: Domestic Violence and Child Abuse:** A.R.S. § 13-1303 will be a “crime of domestic violence” and cause deportability under the DV ground only where (a) the record shows that the victim has the required domestic relationship, *and* (b) the offense is a “crime of violence” as defined in 18 USC § 16. DHS may attempt to charge false imprisonment as a deportable domestic violence offense if §13-3601 is in the judgment. Note also that the BIA recently held that the circumstance specific approach applies, and a Judge may go outside the record of conviction, to determine whether there is a domestic relationship. *Matter of Estrada*, 26 I & N Dec. 749 (BIA 2016).

Counsel should attempt to avoid the § 13-3601 notation, as well as other evidence in the record of conviction showing a domestic relationship. However, if the offense is a misdemeanor and the record of conviction does not establish that force or threat of force was used (e.g., leaves open the possibility that the restraint was by deceit or other means), immigration counsel will have a strong argument that the conviction does not trigger deportation under that ground.

A noncitizen is deportable under the DV ground if convicted of a crime of **child abuse, neglect or abandonment**. Where possible, keep the victim’s age out of the record. While false imprisonment of a child does not necessarily constitute abuse – it can be accomplished simply by transporting the child without the permission of the guardian – this still carries a risk. See *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) (unreasonably placing a child in a situation that poses a threat of injury to the child’s life or health is categorically a crime of child abuse even though no proof of actual harm or injury to the child is required). Immigration counsel should argue that because minority is not an element of the statute, it cannot be a crime of child abuse. See “Other Grounds” under A.R.S. § 13-1102, *supra*.

Note that the DV ground contains no sentence requirement: obtaining a sentence imposed of less than 365 days will *not* protect the person from deportability under the DV ground, as it would against conviction of an aggravated felony. See Notes “Divisible Statute: Record of Conviction” and “Domestic Violence.”

### **19. Kidnapping, A.R.S. 13-1304**

A person commits kidnapping by knowingly restraining another person with the intent to commit certain designated crimes, including “aid in the commission of a felony.” It is punished as a class 2-4 felony depending on various factors.

**Summary.** This is a dangerous conviction for immigration purposes because it is a moral turpitude offense and is could be charged as a crime of violence. A crime of violence is an aggravated felony if a sentence of 365 days or more is imposed, and is a deportable domestic violence offense if committed against a person with a domestic relationship. For an alternate plea, see Unlawful Imprisonment or Assault.

**Crime Involving Moral Turpitude (CMT):** Kidnapping is a CMT. (If this plea is unavoidable, immigration counsel at least will have some argument if the record of conviction leaves open the possibility that the restraint was by deceit or involved a minor or incompetent adult and the intent was to “otherwise aid in the commission of a felony,” and the felony either is unidentified or is not a CMT.)

**Aggravated Felony: Crime of Violence.** This should not be a crime of violence under current case law, but defense counsel should obtain a sentence of 364 or less and protect the record of conviction

in case of a change in the law. Note that 364 days or less will not save an offense involving Ransom from being an aggravated felony. See below.

The Ninth Circuit has held that this statute is not an aggravated felony crime of violence under 18 USC § 16(a) because it may be committed without the use or threat of violence. *United States v. Marquez-Lobos*, 683 F.3d 1061, 1066 (9th Cir. 2012) (citing *State v. Bible*, 175 Ariz. 549, 604, 858 P.2d 1152 (1993)). In *Marquez-Lobos*, the Ninth Circuit also noted that when the victim is a minor who is less than 18 years old or incompetent, a lack of consent may be established through non-acquiescence by the lawful custodian, which does not involve the use or threat of violence. *Id.* (citing *State v. Viramontes*, 163 Ariz. 334, 336, 788 P.2d 67 (1990)). Because the Ninth Circuit held that use or threatened use of force is not an element of the offense, immigration counsel has a strong argument that conviction under this statute can never be a crime of violence. See *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), see also “Aggravated Felony” under ARS § 13-1002, *supra*. To be safe, defense counsel should set a record of conviction that does not indicate the use, attempted use, or threatened use of force.

**Aggravated Felony: Ransom.** An “offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom)” is an aggravated felony regardless of the sentence imposed. 8 USC § 1101(a)(43)(H). Thus, communicating interstate, mailing, transporting, receiving or possessing a ransom in connection with a kidnapping is an aggravated felony.

**Other Grounds: Domestic Violence:** As noted above, there are strong arguments, following *Dimaya v. Lynch*, that conviction under this statute is not a crime of violence. To be a crime of domestic violence, a conviction must first be a crime of violence. As such, conviction under this statute may not be a crime of domestic violence. Pre-*Dimaya*, however, this statute was a crime of domestic violence if combined with §13-3601, or if the record otherwise identified a qualifying domestic relationship (though immigration counsel would have arguments against the latter). To be safe, defense counsel should avoid a §13-3601 designation, and eliminate any reference to a domestic relationship from the record of conviction.

Note that the BIA just ruled, in *Matter of Estrada*, 26 I & N Dec. 749 (BIA 2016), that the circumstance specific approach, not the categorical approach, applies to determine whether there is a domestic relationship. See Note: Domestic Violence. See Notes “Divisible Statutes: Record of Conviction” and “Domestic Violence.”

## **20. Access Interference, ARS § 13-1305**

A person commits access interference if, knowing or having reason to know that the person has no legal right to do so, the person knowingly engages in a pattern of behavior that prevents, obstructs or frustrates the access rights of a person who is entitled to access to a child pursuant to a court order. If the child is removed from this state, access interference is a class 5 felony. Otherwise access interference is a class 2 misdemeanor.

**Crime Involving Moral Turpitude (CMT):** Probably will be held a CMT, although some case law suggests that it is not. *Matter of P*, 6 I&N Dec. 400 (BIA 1954) (criminal contempt for refusing to obey an injunction is not a CMT). Unlike § 13-1302 Custodial Interference, this statute requires “knowingly” obstructing access rights, which is more likely to be held a CMT.

**Aggravated Felony:** Possibly, as obstruction of justice, with a sentence imposed of 365 days or more. Unlikely because “ongoing proceedings” are not required under the statute, but the BIA may soon issue a decision re-defining the aggravated felony ground based on obstruction of justice. See *Valenzuela-*

*Gallardo v. Lynch*, No. 12-72326, 2016 WL 1253877, at \*8 (9th Cir. Mar. 31, 2016), *see also*, analysis under “Aggravated Felony” at ARS 13-2510-12, *infra*.

**Other Grounds: Domestic Violence.** Possibly. Under 8 U.S.C. § 1227(a)(2)(E), a crime of child abuse, child neglect, or child abandonment is deportable. The Board of Immigration Appeals has broadly defined “child abuse” as an offense involving an “intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person’s physical or mental well-being, including sexual abuse or exploitation.” *Matter of Velasquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). It can also encompass unreasonably placing a child in a situation that poses a threat of injury to the child’s life or health even though no proof of actual harm or injury to the child is required. *See Matter of Soram*, 25 I&N Dec. 378 (BIA 2010). A plea to Custodial Interference or False Imprisonment is safer.

**21. Indecent Exposure, ARS § 13-1402.**

A person commits indecent exposure if he or she exposes his or her genitals or anus or she exposes the areola or nipple of her breast or breasts and another person is present and the defendant is reckless about whether such other person as a reasonable person would be offended or alarmed by the act. Indecent exposure is a class 1 misdemeanor. Indecent exposure to a person under the age of fifteen years is a class 6 felony.

**Summary:** This is a safer alternative to sex offenses, except that if the victim was a child the offense might be charged as deportable child abuse or aggravated felony sexual abuse of a minor if the record demonstrates that the child was harmed. To avoid that, plead to disorderly conduct with no indication of sexual conduct and/or age in the record. If a disorderly conduct plea is not possible, plead to the generic language of indecent exposure and try to leave specific sexual conduct and/or age out of the record.

**Crime Involving Moral Turpitude (CMT):** Indecent exposure without a lewd intent is not a CMT. *See Matter of Medina*, 26 I & N Dec. 79, 82 (BIA 2013); *see also Matter of Mueller*, 11 I&N Dec. 268 (BIA 1965) (conviction of indecently exposing a sex organ under Wisconsin statute is not a CMT because of lack of requirement of sexual intent). Arizona indecent exposure requires mere recklessness regarding the possibility of causing offense and could be committed by topless or nude sunbathing, or an intoxicated man who needed to urinate in public.

Defense counsel should keep the language of the plea vague and avoid any references to specific sexual conduct or harm to the victim.

**Aggravated felony: Sexual Abuse of a Minor.** No, because there is no sexual intent. Compare *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999) (Texas indecent exposure is SAM because of intent to arouse). However, if the conviction includes a plea to ARS § 13-118 for sexual motivation (which states that the defendant committed the crime “for the purpose of the defendant’s sexual gratification”) there is a stronger possibility that the offense would be charged as an aggravated felony, if the offense is punished as a class 6 felony based on the victim being under 15 years of age. In that case, immigration counsel still has a strong argument that the statute is not categorically sexual abuse of a minor, and likely overbroad and indivisible.

There are two tests to determine whether an offense constitutes an aggravated felony sexual abuse of a minor. For offenses involving statutory rape, the Ninth Circuit held, en banc, that the generic definition of sexual abuse of a minor requires “four elements: (1) a mens rea level of knowingly; (2) a

sexual act; (3) with a minor between the ages of 12 and 16; and (4) an age difference of at least four years between the defendant and the minor.” *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1152 (9th Cir. 2008). A statute may also constitute sexual abuse of a minor if (1) “the conduct proscribed is... sexual;” (2), “the statute protects a minor,” and (3) “the statute requires abuse.” *United States v. Medina-Villa*, 567 F.3d 507, 513 (9th Cir. 2009), *as amended* (June 23, 2009). *See also United States v. Gomez*, 757 F.3d 885, 904 (9th Cir. 2014). Abuse is defined as “physical or psychological harm in light of the age of the victim in question.” *Id.*

The statute is not categorically sexual abuse of a minor, and likely overbroad and indivisible, because several of these elements are missing from the statute, including the requisite four year age difference. *See e.g. Estrada-Espinoza v. Mukasey, supra, see also Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016). The statute also lacks the element of abuse as defined in *Medina-Villa*. In *U.S. v. Gomez, supra*, the Ninth Circuit held that ARS § 13–1405 overbroad and indivisible, including the under fifteen version, because “the statute continues to lack the element of ‘abuse’ because the statute may apply to victims who are not ‘younger than fourteen years.’” *Id.* at 904. *See also Rebilas v. Keisler*, 506 F.3d 1161 (9th Cir. 2007).

Note that the Supreme Court has accepted certification in *U.S. v. Mathis*, 786 f.3d 1068 (8th Cir. 2015), to address a circuit split on the divisibility. The law in this area is therefore subject to change, and the safest practice for criminal defense attorneys is to assume that courts will be able to look to the record of conviction to determine whether the offense of conviction is a removable or inadmissible offense, and protect the record accordingly. *See Note: “Divisible Statutes: Record of Conviction.”* Defense counsel should therefore strive to keep age of the victim out of the record of conviction, or specify age if victim is an adult. Since sexual abuse of a minor requires both “sexual conduct” and “physical or psychological harm” to the victim, *United States v. Medina-Villa, supra*, defense counsel should also avoid any references to specific sexual conduct or harm to the victim.

**Other: Child Abuse.** In the past DHS has charged indecent exposure to a child/minor as a crime of “child abuse,” which is not an aggravated felony but a ground of removal. In *Rebilas v. Keisler*, 506 F.3d 1161 (9th Cir. 2007), the Ninth Circuit suggested in the context of a charge of sexual abuse of a minor that “abuse” would not necessarily occur in a context where the minor was not aware of the offensive conduct. However, “child abuse” can also encompass unreasonably placing a child in a situation that poses a threat of injury to the child’s life or health even though no proof of actual harm or injury to the child is required. *See Matter of Soram*, 25 I&N Dec. 378 (BIA 2010). Immigration attorneys can also argue that there are minor ways to violate the statute (nude sunbathing, public urination) that do not constitute child abuse, and that it may not constitute child abuse if the conviction was for the general offense, rather than the section requiring that the victim was under the age of 15. *See Note: Child Abuse.* Still, where possible bargain to keep age and, certainly, egregious behavior out of the record of conviction, or better yet plead to disorderly conduct.

## **22. Public Sexual Indecency, A.R.S. §13-1403**

### **Public Sexual Indecency, Public Sexual Indecency To A Minor, ARS § 13-1403**

A. A person commits public sexual indecency by intentionally or knowingly engaging in any of the following acts, if another person is present, and the defendant is reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act: 1. An act of sexual contact. 2. An act of oral sexual contact. 3. An act of sexual intercourse. 4. An act of bestiality. (Class 1 misdemeanor)

B. A person commits public sexual indecency to a minor if he intentionally or knowingly engages in any of the acts listed in subsection A and such person is reckless whether a minor under the age of fifteen

years is present. (Class 5 felony)

**Summary:** A plea to 13-1403B may be a dangerous plea if the record establishes an age younger than 14 and awareness of the victim. Plead to disturbing the peace, or if needed to indecent exposure. Immigration counsel will have strong arguments against this having consequences even where the victim was a minor, but they may not prevail and the person will be detained during the fight.

**Crime Involving Moral Turpitude (CMT):** Maybe. This offense committed in front of an adult ought not to be held a CMT, because recklessness about the possibility of offending a person should not be a CMT. *Matter of Medina*, 26 I & N Dec. 79,8 (BIA 2013)(indecent exposure is not CMT without lewd intent). While the government might charge this as a CMT where the victim was a minor, immigration counsel have strong arguments against it. The only intent requirement is that the defendant was reckless as to whether a minor is present in the sense of being within viewing range, not whether it would alarm or offend the minor. Defense counsel should keep the language of the plea vague and avoid any references to the victim's awareness of the offense or harm to the victim.

**Aggravated felony: Sexual Abuse of a Minor.** Not categorically an aggravated felony. Arguably not divisible, but an Immigration Judge may find it divisible. In *Rebilas v. Mukasey*, 527 F.3d 783 (9th Cir. 2008), the Ninth Circuit found that a conviction for § 13-1403(B) was not categorically sexual abuse of a minor since the minor need not be aware of the conduct. The court noted that “[w]hen the minor is unaware of the offender's conduct, the minor has not been ‘abused’ as that term is commonly or generically defined, because the minor has not been physically or psychologically harmed.” *Id.* at 786. Defense counsel should conservatively assume that the statute will be found divisible, and the court may examine the record of conviction to determine whether the minor was aware of the conduct and therefore “abused.” Plead to the generic statutory language of the offense with no mention of the minor's awareness of the conduct. If the record refers to the minor's awareness, it may be better to plead to Indecent Exposure. Try to keep the age of the victim out of the factual basis and avoid a plea to (B). Immigration counsel has a good argument that the statute is not divisible under *Descamps*, because a minor's awareness of the conduct is not an element of the statute. See Note: “Divisible Statutes, Record of Conviction.”

The statute may also be overbroad because it lacks either the element of a four year age difference, or a victim under the age of 14. See “Aggravated Felony: Sexual Abuse of a Minor” at ARS 13-1402, *supra*.

**Other Grounds: DV/Child Abuse:** The Board of Immigration Appeals has defined “child abuse” as an offense involving an “intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person's physical or mental well-being, including sexual abuse or exploitation.” *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). To prevent (A) from being a deportable crime of child abuse, do not let the record establish that the victim was under age 18.

For (B) or for (A) when the record establishes minor age, under *Rebilas*, *supra*, immigration counsel can argue that “child abuse” was not committed if the minor was unaware of the offender's conduct. However, “child abuse” can also encompass unreasonably placing a child in a situation that poses a threat of injury to the child's life or health even though no proof of actual harm or injury to the child is required. See *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010). A plea to Indecent Exposure may be safer, but if this is not possible, try to avoid a plea to (B) and keep the victim's age and the minor's awareness of the conduct out of the record of conviction. See Note: Domestic Violence.

**23. Sexual Abuse, ARS § 13-1404**

“A person commits sexual abuse by intentionally or knowingly engaging in sexual contact with any person fifteen or more years of age without consent of that person or with any person who is under fifteen years of age if the sexual contact involves only the female breast.” “Without consent” may involve force or threat of force, the victim’s incapacity by drugs, etc. or inability to understand the nature of the act, or deceit. *See* discussion of ARS §13-1406, *infra*. The mere fact of minority does not establish lack of consent. *State v. Getz*, 189 Ariz. 561, 564 (Ariz., 1997). “Sexual contact” means “any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact.”

B. Sexual abuse is a class 5 felony unless the victim is under fifteen years of age in which case sexual abuse is a class 3 felony punishable pursuant to section 13-604.1

**Crime Involving Moral Turpitude (CMT):** Sexual touching without the consent of a victim of any age will be held a CMT if an intent to harm or actual harm is required. *Gonzalez-Cervantes v. Holder*, 709 F.3d 1265, 1269 (9th Cir. 2013). The psychological harm experienced by non-consensual touching of private parts is sufficient harm. *Id.* Sexual abuse under ARS § 13-1404 has been held a CMT where the record of conviction established either an intent to harm or actual harm. *U.S. v. Acosta-Salinas*, 584 F. App’x 490, 491 (9th Cir. 2014). In practicality, actual harm will almost always be found since the Ninth Circuit has held that the psychological harm experienced in the act of non-consensual touching constitutes sufficient harm. *Gonzalez-Cervantes* at 1269 (“sexually abusive battery necessarily inflicts actual harm on the victim.”)

Consensual sexual contact with a minor under the age of 15 may be a CMT, but Immigration Counsel will have arguments that it is not. In *Matter of Silva Trevino*, 24 I & N Dec. 687 (A.G. 2008), the AG held that consensual sexual conduct with a minor is a CMT if the defendant knew or should have known that the victim was under 18. *Matter of Silva Trevino* has been vacated, albeit on other grounds. Earlier the Ninth Circuit had held that even consensual sexual *intercourse* with a person under the age of 16 is not necessarily moral turpitude. *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007) (Calif. Penal Code § 261.5(d), which prohibits consensual intercourse between a person under the age of 16 and a person at least 21 years of age, is not categorically a crime involving moral turpitude). The sexual contact in § 13-1404 is arguably less morally offensive, as it is limited to contact with the female breast, as opposed to intercourse. Furthermore, the Arizona Supreme Court has specifically held that ARS § 13-1404 applies to “consensual sexual activity between consenting minors.” *Matter of Pima Cnty. Juvenile Appeal No. 74802-2*, 164 Ariz. 25, 33-34, (1990) (abrogated on other grounds).

While *Matter of Silva Trevino* has since been vacated, the rationale regarding sexual conduct with a minor has not been specifically overturned. *Matter of Guevara Alfaro*, 25 I & n Dec. 417 (BIA 2011), in which the Board addressed the discord between *Quintero-Salazar* and *Silva Trevino*, and reaffirmed *Silva Trevino*, also remains good law. As such, an Immigration Judge may still apply *Silva Trevino* and *Guevara Alfaro*. Where possible, counsel should include in the record a statement that the defendant reasonably believed the victim was age 18 (or older).

**Aggravated Felony: Sexual abuse of a minor.**

There are two tests to determine whether an offense constitutes an aggravated felony sexual abuse of a minor. For offenses involving statutory rape, the Ninth Circuit held, en banc, that the generic definition of sexual abuse of a minor requires “four elements: (1) a mens rea level of knowingly; (2) a sexual act; (3) with a minor between the ages of 12 and 16; and (4) an age difference of at least four years between the defendant and the minor.” *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1152 (9th Cir.

2008). A statute may also constitute sexual abuse of a minor if (1) “the conduct proscribed is... sexual;” (2), “the statute protects a minor,” and (3) “the statute requires abuse.” *United States v. Medina-Villa*, 567 F.3d 507, 513 (9th Cir. 2009), *as amended* (June 23, 2009). *See also United States v. Gomez*, 757 F.3d 885, 904 (9th Cir. 2014). Abuse is defined as “physical or psychological harm in light of the age of the victim in question.” *Id.*

*Non-consensual sexual contact with a person over the age of 15.* Non-consensual sex meets the test for “sexual abuse” because it is likely to be considered to cause emotional or physical harm to the victim. *See* discussion of “harm” test in *United States v. Medina-Villa*, 567 F.3d 507 (9th Cir. 2009). (Further, *see* discussion below of this offense as a crime of violence, deportable crime of child abuse and crime of domestic violence, and crime involving moral turpitude.)

Regarding proof that the victim was a minor, it is possible that Arizona immigration judges will find that a record of conviction that specifies that the victim was under 18 will prove the victim was a minor. The Ninth Circuit has held that if an offense requires only that the victim be over age 15, evidence in the record that the victim was some other specific age could not be considered. *See, e.g., Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc), *Rivera-Cuartas v. Holder*, 605 F.3d 699 (9th Cir. 2010). The Ninth Circuit overruled these holdings, but that case, in turn, was overruled by *Descamps v. U.S.*, 133 S. Ct. 2276 (2013). Post *Descamps*, immigration counsel has strong arguments that the statute is not divisible, and the IJ should not be able to look to the record of conviction to determine the age of the victim. In *U.S. v. Gomez*, 757 F.3d 885, 903-04 (9th Cir. 2014), the Ninth Circuit recognized that ARS § 13–1405 is missing the element of abuse *See* “Other Grounds” under A.R.S. § 13-1102, *supra*. To be safe, defense counsel should still attempt to eliminate any reference to a victim under the age of 16.

*Consensual sexual conduct with a person under the age of 15, if the contact involves only the female breast.* Criminal defense counsel should assume conservatively that this will be held to be sexual abuse of a minor, or at least that DHS will attempt to charge the offense as sexual abuse of a minor. Immigration counsel, however, has strong arguments under current case law that the statute is not categorically sexual abuse of a minor, and that the statute is overbroad and not divisible. To preserve all arguments in immigration proceedings, criminal defense counsel should have the record of conviction indicate that the victim was age 14, or at least not indicate that the victim was age 13 or younger.

Immigration counsel has a strong argument that the statute, even that part that involves a victim under the age of fifteen, is overbroad and not divisible under *Descamps*. In *U.S. v. Gomez*, 757 F.3d 885 (9th Cir. 2014), the Ninth Circuit held that ARS § 13–1405 is overbroad and indivisible, including the under fifteen language. The Ninth Circuit held that “the statute continues to lack the element of ‘abuse’ because the statute may apply to victims who are not ‘younger than fourteen years.’” *Id.* at 904-909. Because § 13-1404 also refers to victims “under fifteen years of age,” the same rationale applies and the statute should not be divisible. Thus, immigration counsel may argue that the Court may not proceed to review the record of conviction. *See also Rivera-Cuartas v. Holder*, 605 F.3d 699 (9th Cir. 2010)

Furthermore, ARS § 13-1404 requires only the touching of breasts, as opposed to sexual intercourse or contact contemplated by ARS § 13–1405, and does not require that the act be committed for sexual gratification or with lewd intent. Given the mild nature of the sexual contact (the touching of breasts), the relatively older age (age 14, not 13) of the victim, and the lack of requirement of intent for sexual gratification, there is a strong argument that the offense is not sexual abuse of a minor.

Immigration counsel can also point out that, while sexual contact with a person under the age of 14 has been held to constitute sexual abuse of a minor on the grounds that using young children for sexual

gratification is inherently abusive and harmful, numerous cases support the position that sexual contact with a fourteen year old is not sexual abuse. *Compare United States v. Baron-Medina*, 187 F.3d 1144, 1147 (9th Cir. 1999) with *U.S. v. Castro*, 607 F.3d 566, 567-58 (9th Cir. 2010) (lewd act with a 14- or 15-year old victim is not categorically SAM), *Pelayo-Garcia v. Holder*, 589 F.3d 1010 (9th Cir. 2009) (sexual conduct with a person just under sixteen is not *per se* abusive). The Ninth Circuit has recognized that the older the teenager, the less likely it is that some form of consensual contact will cause psychological harm. *See United States v. Baza-Martinez*, 464 F.3d at 1015 (9th Cir. 2006) (noting that, under *Baron-Medina*, section 288(a) punishes "abuse" "because it requires use of young children, implying harmful or injurious conduct" (internal quotation marks omitted)); *United States v. Lopez-Solis*, 447 F.3d 1201, 1206 (9th Cir. 2006) ("The age affects whether the conduct the statutory rape law covers constitutes 'abuse.'").

**Aggravated Felony: Crime of Violence.** *Nonconsensual sexual contact with a person at least 15 years old.* A crime of violence is an aggravated felony if the sentence to imprisonment is 365 days or more. 8 USC § 1101(a)(43)(F).

The Ninth Circuit had previously held similar statutes to be crimes of violence under § 16(b), finding a substantial risk that force would be used in committing the offense. *See Rodriguez-Castellon v. Holder*, 733 F.3d 847 (9th Cir. 2013). However, immigration counsel should argue that this case law was implicitly overruled by *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015) (holding that § 16(b) is void for vagueness in the immigration context). Under *Dimaya v. Lynch*, no offense should constitute an aggravated felony as a crime of violence unless it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" pursuant to 18 USC § 16(a) (emphasis added). An offense should no longer be removable as a crime of violence aggravated felony based on there being a "substantial risk" that force will be used. *See* "Aggravated Felony" under ARS § 13-1002, *supra*. Because the Supreme Court may review *Dimaya*, defense counsel should attempt to secure a sentence of less than 365 to be sure to avoid an aggravated felony.

This statute is arguably divisible, meaning that the court may look to the record of conviction, because "without consent" may involve force or threat of use of force. To be safe, defense counsel should specify that no force or threat of force was used, or leave open that possibility.

*Consensual sexual contact with a person under age 15, if the contact is limited to the female breast.* While ICE may charge this as a crime of violence if there is a sentence of 365 days, immigration counsel have strong arguments that it should not be a crime of violence, as noted above.

**Other Grounds: Crime of Child abuse.** *Nonconsensual sexual contact with a person at least 15.* Criminal defense counsel should make every effort to keep the victim's age from the record of conviction, if the victim is under the age of 18. If the reviewable record shows that the victim was under 18, the offense will likely be held a deportable crime of child abuse; if it does not, the offense should not be held a deportable crime of child abuse. The Board of Immigration Appeals has defined "child abuse" as an offense involving an "intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person's physical or mental well-being, including sexual abuse or exploitation." *Matter of Velasquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). The Board held that even if being a minor is not an element of the offense, if minor age is conclusively established by the record of conviction, the conviction can be held a crime of child abuse. In light of recent Supreme Court and Ninth Circuit case law, immigration counsel has strong arguments that the Board's ruling on this point is in error and should be reconsidered. *See* "Other Grounds" under A.R.S. § 13-1102, *supra*.

*Consensual sexual contact with a person under the age of 15.* In this case, the age of the victim is proved, but immigration counsel can argue that mild sexual contact with a 14-year-old is not per se harmful and does not “unreasonably place a child in a situation that poses a threat of injury to the child’s life or health” as is required under *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010).

**Other Grounds: Crime of DV:** If the victim is 18 years or older and the 13-3601 notation attaches, it may be removable as a crime of domestic violence. As noted under “Aggravated Felony: Crime of Violence,” above, this offense is not a crime of violence unless the use, attempted use, or threatened use of force is an element of the offense. See *Dimaya v. Lynch*, *supra*. Because “without consent” includes the use or threatened use of force, the statute is arguably divisible and the court may proceed to the record of conviction. If a 13-3601 notation is not avoidable, counsel should be careful to avoid any reference to the use or threatened use of force in the record of conviction.

#### **24. Sexual Conduct with a Minor, ARS § 13-1405**

“A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.” The offense is a class 2 felony if the child is under 15, or if the child is at least 15 years old but the perpetrator is in a parental or guardianship relationship. Probation or parole is not allowed. Otherwise it is a class 6 felony.

**Summary:** The statute describes three offenses, none of which require threat, duress or deceit. In order of the potential severity of immigration consequences, the offenses are sexual intercourse or oral sex with (1) a victim who is 15 – 18 years of age; (2) a victim under the age of 15; or (3) a victim who is 15 – 18 years of age where the perpetrator is a parent or guardian. Each offense must be considered separately. In some circumstances the first offense might have no immigration consequences; the second offense will have some immigration consequences but might escape an aggravated felony; and the third offense will have all possible immigration consequences.

If the record establishes that the offense is a class 2 felony because the perpetrator is in a parental or guardianship relationship, it is likely that the offense will be held sexual abuse of a minor

**Crime Involving Moral Turpitude (CMT):** Sexual conduct between a parent or guardian and a child always will be considered a CIMT. Safest practice is for defense counsel to plead to a class 6 felony and keep the age of the victim out of the record of conviction.

Consensual sexual conduct with a person under the age of 15 or 18 may or may not be a CIMT. In *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007) the court found that Calif. Penal Code § 261.5(d), which prohibits consensual intercourse between a person under the age of 16 and a person at least 21 years of age, is not categorically a crime involving moral turpitude because it defines conduct that is malum prohibitum, and because it is a strict liability offense that does not require any showing of “the requisite elements of willfulness or evil intent.” However, in *Matter of Silva-Trevino*, 24 I&N Dec. 687, 705 (A.G. 2008), the Attorney General found that any offense in which an adult engages in intentional sexual contact with a person who the defendant knew or should have known was a minor will constitute a crime involving moral turpitude. The Board addressed the discord between *Quintero-Salazar* and *Silva-Trevino* in *Matter of Guevara Alfaro*, 25 I & n Dec. 417 (BIA 2011), and affirmed the rationale in *Silva-Trevino*. *Silva-Trevino* has, however, been vacated in its entirety, though the rationale in *Silva-Trevino* and *Matter of Guevara Alfaro* may still control unless and until there is case law specifically overturning *Matter of Guevara Alfaro*.

In a recent, unpublished decision, the Ninth Circuit cited affirmatively to *Quintero-Salazar* and found a California statute overbroad and indivisible as a CMT where the statute “lacks a scienter requirement as to the age of the victim and requires no minimum age gap between the perpetrator and the victim.” *Gomez-Ponce v. Holder*, 571 F. App’x 528, 530 (9th Cir. 2014).

**Aggravated Felony: Sexual Abuse of a Minor.**

*Victim 15-18 years of age:* The Ninth Circuit held in *Rivera-Cuartas v. Holder*, 605 F.3d 699 (9th Cir. 2010) that a conviction for sexual conduct with a minor under § 13-1405 is not categorically an aggravated felony since it does not match the generic definition of “sexual abuse of a minor” found at 18 U.S.C. § 2243 and it includes conduct that would not qualify as “physical or psychological abuse,” particularly against an older adolescent. The Ninth Circuit recently reaffirmed *Rivera-Cuartas* in *United States v. Gomez*, 757 F.3d 885 (9th Cir. 2014), which held that even the under 15 portion of the statute is missing the essential element of abuse. The generic definition of “sexual abuse of a minor” is set out in 18 U.S.C. § 2243, which requires that the victim be between the ages of 12 and 16 and at least four years younger than the defendant. See “Aggravated Felony: Sexual Abuse of a Minor” at ARS 13-1402, *supra*. Since the Arizona statute is lacking these elements, a conviction under § 13-1405 is not categorically an aggravated felony as “sexual abuse of a minor.” Because the statute is lacking an element of the generic offense all together, Immigration Counsel may argue that a Judge may not proceed to the modified categorical approach, and that no conviction under this statute constitutes an aggravated felony as sexual abuse of a minor. *Id.* at 909. Defense counsel should conservatively assume that a Court could review the record of conviction, and try to cleanse the record of any mention of the age of the victim or defendant at the time of the offense. See Note: “Divisible Statutes and Record of Conviction.”

*Victim under 15:* Immigration counsel may argue that the statute is overbroad and not divisible, because it is missing the element of abuse. *United States v. Gomez*, 757 F.3d 885, 909 (9th Cir. 2014). Because the Supreme Court is set to address the definition of “divisibility,” this may change. See “Divisible Statutes: Record of Conviction,” *supra*. The safest approach if pleading to this subsection, is to either specify that the victim was fourteen, or keep the record vague as to the victim’s age.

*Victim is 15-18 and defendant is a parent/guardian:* Assume that this will always be considered sexual abuse of a minor. Better to keep the record vague between this and a victim under 15 to leave at least some argument that it’s not sexual abuse of a minor.

**Aggravated Felony: Crime of Violence:** Under recent Supreme Court and Ninth Circuit case law, this should not be a crime of violence, but counsel should still be careful to protect the record of conviction. A crime of violence is an aggravated felony if the sentence to imprisonment is 365 days or more. 8 USC § 1101(a)(43)(F). To be a crime of violence within 18 U.S.C § 16, the offense must have use, attempted use, or threat of use of physical force as an element. 18 U.S.C § 16 (a). Force is not an element of the statute. See *e.g. Taylor v. State*, 55 Ariz. 29, 35-36 (1940). The Ninth Circuit has held that CPC § 288(c)(1), lewd and lascivious acts on a child 14 or 15 years old by a defendant ten years older, is a crime of violence under § 16(b). See *Rodriguez-Castellon v. Holder*, 733 F.3d 847 (9th Cir. 2013). Immigration counsel has a very strong argument that *Rodriguez-Castellon* was implicitly overruled by *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), which held that 18 USC § 16(b) is void for vagueness in the immigration context. See “Aggravated Felony” under ARS § 13-1002, *supra*. Immigration counsel can also argue that ARS § 13-1405 is distinguishable from CPC § 288(c)(1), because a four year age difference is not required, much less a ten year age difference. See *Id.* At 858-859. Defense counsel should be careful to exclude any use or threat of use of force from the record of conviction and factual basis.

**Other Grounds: Child Abuse.** Possibly. See Note: Domestic Violence. The BIA has held that “child abuse” includes an intentional or negligent act or omission that “constitutes maltreatment of a child or that impairs a child’s physical or mental well-being, including sexual abuse or exploitation. At a minimum, this definition encompasses convictions for offenses involving the infliction on a child of physical harm, even if slight; mental or emotional harm, including acts injurious to morals; sexual abuse, including direct acts of sexual contact, but also including acts that induce (or omissions that permit) a child to engage in prostitution, pornography, or other sexually explicit conduct; as well as any act that involves the use or exploitation of a child as an object of sexual gratification or as a tool in the commission of serious crimes, such as drug trafficking.” Moreover, as in the “sexual abuse of a minor” context, the term “crime of child abuse” refers to an offense committed against an individual who is under 18 years of age. Child abuse need not be committed by the child’s parent or by someone acting in loco parentis.

Immigration counsel can argue that consensual sexual intercourse or oral sexual contact with an older adolescent does not necessarily cause harm or injury, and is not use or exploitation. Defense counsel should avoid any references to nonconsensual or violent conduct and should attempt to exclude the age of a young minor from the record of conviction. Sexual conduct with a child 15 or under will likely be found an offense involving “child abuse.” *Jimenez-Juarez v. Holder*, 635 F.3d 1169, 1171 (9th Cir. 2011) (the act of touching the sexual or other intimate parts of the victim when the victim is either 14 or 15 years old is categorically a crime of child abuse).

**25. Sexual Assault (including rape), A.R.S. §13-1406**

“A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person.” “Without consent” includes any of the following: (a) coercion by the immediate use or threatened use of force against a person or property; (b) victim’s incapacity or lack of comprehension caused by mental disorder, alcohol, sleep etc., where the defendant knew or should have known this; (c) victim was intentionally deceived as to the nature of the act; (d) victim was intentionally deceived to believe that the perpetrator was the victim's spouse. Class 5 felony, but additional penalties apply if the victim was under 15 or “date-rape” drugs were applied.

**Crime Involving Moral Turpitude (CMT):** Yes.

**Aggravated Felony:** Yes, unless the following three conditions are met: the record does not establish that the victim was under 18 years of age; the record does not establish that the offense involved penetration; *and* a sentence of less than a year was imposed. Also the record must not establish that the offense involved the date-rape drug flunitrazepam.

The reasoning is as follows. If the record establishes that the victim was under the age of 18, it will likely be an aggravated felony regardless of sentence as “sexual abuse of a minor” under 8 USC §1101(a)(43)(A). Regardless of the age of the victim, this felony is likely a “crime of violence,” which is an aggravated felony if a sentence of a year or more is imposed. 8 USC §1101(a)(43)(F). Regardless of sentence or age of victim, rape, including rape by intoxication, is an aggravated felony within 8 USC § 1101(a)(43)(A). *Castro-Baez v. INS*, 217 F.3d 1057 (9th Cir. 2000). Oral sexual contact likely will not be considered rape, however. Possession of flunitrazepam (a date-rape drug) is an aggravated felony as a drug trafficking offense. 8 USC §1101(a)(43)(B).

While defense counsel should conservatively assume that conviction under ARS § 13-1406 with a year or more imposed will be a crime of violence, immigration counsel may argue that it is not categorically a crime of violence under 18 USC § 16(a), and possibly not even divisible, because use or

threatened use of force is not an essential element of the offense. *See* Note: Divisible Statutes, Record of Conviction. As noted above, “without consent” includes the use or threatened use of force, but also lack of capacity and deceit. In addition to keeping the record clean of reference to an underage victim, penetration, and striving for a sentence under a year, defense counsel should attempt to keep any reference to the use or threatened use of force out of the record of conviction, or make clear that one of the other means of “without consent” is implicated.

Immigration counsel should also argue that under *Dimaya v. Lynch*, 803 F.3d 1110 (9<sup>th</sup> Cir. 2015), conviction under this statute is not a crime of violence under 18 USC § 16(b), for substantial risk that force will be used, because that section is void for vagueness. *See* “Aggravated Felony” under ARS § 13-1002, *supra*.

**Otherwise Removable:** If the record of conviction reveals that the victim had a domestic relationship with the perpetrator as set forth in 8 USC § 1227(a)(2)(E), or the victim was a child, then the conviction may be a deportable offense under the domestic violence and child abuse grounds. Note that the BIA just ruled, in *Matter of Estrada*, 26 I & N Dec. 749 (BIA 2016), that the circumstance specific approach, not the categorical approach, applies to determine whether there is a domestic relationship. *See* Note: Domestic Violence.

Immigration counsel may be able to argue that the offense is not a crime of violence, and therefore not a crime of domestic violence. *See* “Aggravated Felony,” above. Furthermore, immigration counsel should argue that even if the record of conviction shows the victim to be a minor, minority is not an element of the statute and therefore the Judge should not consult the record of conviction to determine the age. *See* “Other Grounds” under A.R.S. § 13-1102, *supra*.

## **26. Sexual Assault of Spouse, ARS §1406.01 (Repealed)**

This section was repealed, but we preserve the analysis for counsel to evaluate past convictions. The offense involved intentionally or knowingly engaging in sexual intercourse or oral sexual contact with a spouse by force or threat of force. A first offense was a class 6 felony, and the judge had discretion to make it a class 1 misdemeanor with mandatory counseling. A subsequent offense was a class 2 felony with no suspension of sentence, probation, pardon or release except under § 31-233, subsection A or B until the sentence imposed by the court has been served or commuted.

**Crime Involving Moral Turpitude (CMT):** Yes.

**Aggravated Felony:** To have avoided an aggravated felony, counsel must have created a record of conviction that leaves open the possibility that the offense did not involve penetration, *and* obtained a sentence imposed of 364 days or less. *See* discussion of sexual assault, *supra*.

**Other Grounds: Domestic Violence.** Conviction will cause deportability as a “crime of domestic violence.” 8 USC § 1227(a)(2)(E).

## **27. Molestation of a Child, ARS §13-1410**

A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child under fifteen years of age. Molestation is a class 2 felony.

**Crime Involving Moral Turpitude (CMT):** Yes.

**Aggravated Felony:** Molestation of a child under the age of 14 is an aggravated felony as sexual abuse of a minor under 8 USC § 1101(a)(43)(A), regardless of sentence imposed. See e.g., *United States v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999) (conviction of California Pen. Code § 288(a) for lewd conduct with a child under the age of 14 is an aggravated felony for sentencing enhancement purposes). Immigration counsel can argue that this would not be the case for a victim between 14 and 15 years of age, although there is no guarantee of this and this is not a safe plea. See *United States v. Gomez*, 757 F.3d 885, 904-909 (9th Cir. 2014), see also discussion at ARS 13-1404, *supra*.

**Other Grounds: Child Abuse.** Conviction will cause deportability as an act of child abuse under the domestic violence ground at 8 USC §1227(a)(2)(E)(i).

**28. Voyeurism, ARS § 13-1424**

A. It is unlawful to knowingly invade the privacy of another person without the knowledge of the other person for the purpose of sexual stimulation.

B. It is unlawful for a person to disclose, display, distribute or publish a photograph, videotape, film or digital recording that is made in violation of subsection A of this section without the consent or knowledge of the person depicted.

C. For the purposes of this section, a person's privacy is invaded if both of the following apply:

1. The person has a reasonable expectation that the person will not be photographed, videotaped, filmed, digitally recorded or otherwise viewed or recorded.

2. The person is photographed, videotaped, filmed, digitally recorded or otherwise viewed, with or without a device, either:

(a) While the person is in a state of undress or partial dress.

(b) While the person is engaged in sexual intercourse or sexual contact.

(c) While the person is urinating or defecating.

(d) In a manner that directly or indirectly captures or allows the viewing of the person's genitalia, buttock or female breast, whether clothed or unclothed, that is not otherwise visible to the public.

**Crime Involving Moral Turpitude (CMT):** Maybe. Many offenses with the element of lewdness or sexual gratification are held to be a crime involving moral turpitude. *Matter of Alfonso-Bermudez*, 12 I&N Dec. 225 (BIA 1967). Since Voyeurism requires that the offense be committed “for the purpose of sexual stimulation,” criminal defense counsel should assume that it will be found to involve moral turpitude.

**Aggravated Felony:** If the record of conviction establishes that the victim was a minor, the government could attempt to charge the offense as an aggravated felony for sexual abuse of a minor under 8 U.S.C. § 1101(a)(43)(A). As always, if a minor is involved, defense counsel should attempt to keep the age of the victim out of the record of conviction.

Even if a minor victim is apparent in the record of conviction, immigration counsel has strong arguments that the statute is overbroad and not divisible under *Descamps* and *Almanza-Arena*, as the statute is missing multiple elements of the generic definition of sexual abuse of a minor.

There are two tests to determine whether an offense constitutes an aggravated felony sexual abuse of a minor. For offenses involving statutory rape, the Ninth Circuit held, en banc, that the generic definition of sexual abuse of a minor requires “four elements: (1) a mens rea level of knowingly; (2) a sexual act; (3) with a minor between the ages of 12 and 16; and (4) an age difference of at least four years

between the defendant and the minor.” *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1152 (9th Cir. 2008). A statute may also constitute sexual abuse of a minor if (1) “the conduct proscribed is... sexual;” (2), “the statute protects a minor,” and (3) “the statute requires abuse.” *United States v. Medina-Villa*, 567 F.3d 507, 513 (9th Cir. 2009), *as amended* (June 23, 2009). *See also United States v. Gomez*, 757 F.3d 885, 904 (9th Cir. 2014). Abuse is defined as “physical or psychological harm in light of the age of the victim in question.” *Id.*

Minority is not an element of ARS § 13-1424 at all. The statute is therefore missing the elements of minority and age different to constitute a sexual abuse of a minor under *Estrada-Espinoza*. It also is missing the element that “the statute protects a minor,” as required under *Medina-Villa*. Because minority is not required, the statute also lacks the element of abuse as defined in *Medina-Villa*. The statute also arguably lacks the element of a “sexual act,” despite requiring the offender to act with the purpose of sexual stimulation. Because multiple of the elements under either definition are missing, immigration counsel has a strong argument that the statute is overbroad and not divisible. *See Note: “Divisible Statutes: Record of Conviction.”*

**Domestic Violence/Child abuse:** Though unlikely, this offense could potentially be charged as stalking under the domestic violence ground of removal. It could also be charged as a deportable crime of child abuse, if the record shows that the victim is a minor. If the age of the victim is in the record of conviction, immigration counsel should argue that the BIA’s decision permitting review of the record to ascertain age, in *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008), was an incorrect interpretation of Ninth Circuit and Supreme Court law, and implicitly overruled in *Descamps v. U.S.* 133 S.Ct. 2276 (US). Therefore an immigration judge may not consider this fact in characterizing the offense of conviction. *See Other Grounds, ARS 13-1102, supra*

Even assuming the government proved minor age of the victim, immigration counsel will argue that since the victim is not required to be aware of the conduct, the offense is not *per se* harmful to a minor victim.

## **29. Criminal Trespass, ARS §§ 13-1502-3**

### **Criminal Trespass in the Third Degree, ARS § 13-1502**

A person commits criminal trespass in the third degree by:

1. Knowingly entering or remaining unlawfully on any real property after a reasonable request to leave by the owner or any other person having lawful control over such property, or reasonable notice prohibiting entry.
2. Knowingly entering or remaining unlawfully on the right-of-way for tracks, or the storage or switching yards or rolling stock of a railroad company. Criminal trespass in the third degree is a class 3 misdemeanor.

**Crime Involving Moral Turpitude (CMT):** This should not be a CMT. Simple trespass is not a CMT because there is no intent to commit CMT in commission of trespassing. *Matter of Esfandiary*, 16 I&N Dec. 659, 661 (BIA 1979) (conviction for malicious trespass required finding of an intent to commit petty larceny).

**Aggravated Felony:** No, punishable only as misdemeanor.

**Criminal Trespass in the Second Degree, ARS § 13-1503**

A person commits criminal trespass in the second degree by knowingly entering or remaining unlawfully in or on any nonresidential structure or in any fenced commercial yard. Criminal trespass in the second degree is a class 2 misdemeanor.

**Crime Involving Moral Turpitude (CMT):** This should not be a CMT. *See, supra*, Criminal Trespass in the Third Degree.

**Aggravated Felony:** No, only punishable as misdemeanor.

**30. Criminal Trespass in the First Degree, ARS § 13-1504**

A. A person commits criminal trespass in the first degree by knowingly:

1. Entering or remaining unlawfully in or on a residential structure.
2. Entering or remaining unlawfully in a fenced residential yard.
3. Entering any residential yard and, without lawful authority, looking into the residential structure thereon in reckless disregard of infringing on the inhabitant's right of privacy.
4. Entering unlawfully on real property that is subject to a valid mineral claim or lease with the intent to hold, work, take or explore for minerals on the claim or lease.
5. Entering or remaining unlawfully on the property of another and burning, defacing, mutilating or otherwise desecrating a religious symbol or other religious property of another without the express permission of the owner of the property.
6. Entering or remaining unlawfully in or on a critical public service facility.

B. Subsection A, paragraph 1, 5 or 6 is a class 6 felony. Subsection A, paragraph 2, 3 or 4 is a class 1 misdemeanor.

**Aggravated Felony:** This should not be an aggravated felony. Until recently, there was a risk that ICE would charge A1, A5, or A6 as an aggravated felony crime of violence under 18 USC § 16(b) if the sentence was 365 days or more. However, the Ninth Circuit recently held that 18 USC § 16(b) is void for vagueness, applying the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See Dimaya v. Lynch*, 803 F.3d 1110 (9<sup>th</sup> Cir. 2015). *See* "Aggravated Felony" under ARS § 13-1002, *supra*. To be safe, defense counsel should attempt to obtain a sentence of 364 or less.

**Crime Involving Moral Turpitude (CMT):** This should not be a CMT. The BIA has held that entry of an occupied dwelling with intent to commit any offense is a CMT. *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009). However, while section (A)(1) involves a residential structure, intent to commit any offense is not an element. Under *Decamps v. U.S.*, 133 S. Ct. 2276, 2283 (2013), a court may not proceed to the record at all if an element of the generic offense is missing all together. Thus, conviction under subsections (A)(1), A(2), and (A)(6) should never be a CMT. (A)(2) and (A)(6) also do not involve a residential structure. A(3) should not be a CMT for the same reason. Note that the Supreme Court has accepted certification in *U.S. v. Mathis*, 786 f.3d 1068 (8<sup>th</sup> Cir. 2015), to address the circuit split on divisibility. The law in this area is therefore subject to change. *See* Note: "Divisible Statutes: Record of Conviction."

**31. Possession of Burglary Tools, ARS § 13-1505**

A. A person commits possession of burglary tools by:

1. Possessing any explosive, tool, instrument or other article adapted or commonly used for committing any form of burglary as defined in sections 13-1506, 13-1507 and 13-1508 and intending to use or permit the use of such an item in the commission of a burglary.

2. Buying, selling, transferring, possessing or using a motor vehicle manipulation key or master key....
- C. Possession of burglary tools is a class 6 felony.

**Crime Involving Moral Turpitude (CMT):** Counsel should keep the record of conviction clear of evidence of defendant's intent to use the tools to commit a particular kind of burglary: one where the offense to be committed upon entry involves moral turpitude, such as theft. In other words, counsel either should not permit the record of conviction to describe the intended burglary, or should phrase the intent in a vague manner such as "theft *or* any felony" or "a felony."

A1. The issue is the intent within the burglary the person intends to commit. Burglary under 13-1506, 13-1507, and 13-1508 may not be a CMT if the record of conviction establishes that the client is guilty of "theft or any felony" or "a felony." *Matter of S-*, 6 I&N Dec. 769 (BIA 1955) (possession of burglary tools with intent to commit any offense is not a CMT unless accompanied by an intent to use the tools to commit a specific crime which is itself a CMT). It may be a CMT if the record of conviction establishes that the intent is to commit theft or another CMT. This may also be found a CMT if the burglary was of an occupied dwelling, regardless of whether the underlying intent involved theft. *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009).

Immigration counsel will have a good argument that this subsection is overbroad and indivisible pursuant to *Descamps v. U.S.* 133 s.Ct. 2276 (US) and *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016). This argument is particularly strong because of the multiple layers of reference within the statutes. First, a jury would likely not be required to determine what type of burglary a defendant intended to commit. Second, the jury would not be required to determine what subsection of theft was involved, even if a jury was required to find that the underlying burglary involved an intent to commit theft as opposed to any felony. See discussion under "crime involving moral turpitude" at sections 13-1506, 13-1507, and 13-1508 and 13-1802. Immigration counsel can therefore argue that the court may not review the record of conviction. Because case law may change, however, defense counsel should protect the record of conviction by specifying "theft or any felony" or "any felony" and avoid pleading to burglary of an occupied dwelling. See Note: "Divisible Statutes: Record of Conviction."

A2. This should not be a CMT since there is no element in this section requiring an intent to commit a CMT. See *Matter of S-*, *id.* However, in practice, some immigration judges may find it to be a CMT.

**Aggravated Felony:** No. This does not equal burglary or a crime of violence. However, as with all offenses, for further protection counsel should attempt to obtain a sentence of 364 days or less, which ought to be possible for this class 6 felony.

## 32. Burglary Offenses

### **Burglary in the Third Degree, ARS §13-1506**

A. A person commits burglary in the third degree by:

1. Entering or remaining unlawfully in or on a nonresidential structure or in a fenced commercial or residential yard with the intent to commit any theft or any felony therein.
2. Making entry into any part of a motor vehicle by means of a manipulation key or master key, with the intent to commit any theft or felony in the motor vehicle.

B. Burglary in the third degree is a class 4 felony.

**Summary:** Obtaining a sentence imposed of 364 days or less will definitively avoid aggravated felony classification. If a sentence of a year or more is imposed, however, immigration counsel still has strong arguments against AF classification. In sum, if a sentence of a year or more will be imposed, to avoid both a CMT and aggravated felony conviction the client should plead to A1 with record of conviction stating “nonresidential structure *or* in a fenced commercial or residential yard” or any wording that includes “a fenced commercial yard,” and “theft *or* any felony” or “a felony;” or plead to A2 with a record of conviction stating “theft or any felony” or “a felony.” If possible, it is better to leave the record vague between conviction under A1 or A2. Burglary is potentially a CMT, but careful creation of the record of conviction may avoid this as well.

**Crime Involving Moral Turpitude:** Not categorically a CMT. Arguably overbroad and not divisible under *Descamps*, though defense counsel should conservatively assume it will be found divisible and protect the record accordingly. The key is to avoid a record or any evidence demonstrating that the client pleaded to an offense with an intent to commit a CMT after entry.

A1, A2. Unlawful entry or remaining unlawfully are not themselves CMTs. *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005); *Matter of G*, 1 I. & N. Dec. 403 (BIA 1943); *Matter of M*, 9 I. & N. Dec. 132 (BIA 1960). Burglary becomes a CMT only if the intended offense involves moral turpitude. Entry with intent to commit larceny is a CMT, while entry with intent to commit an undesignated offense (“a felony”) or an offense that does not involve moral turpitude is not. *Matter of M*, 2 I&N Dec. 721 (BIA 1946). Defense counsel should create a record of conviction where the client is guilty only of “theft or any felony” or “a felony.”

Because Arizona theft statutes include subsections that do not require intent to permanently deprive the owner of benefits, and since traditionally an intent to permanently deprive is required for moral turpitude, even a plea to intent to commit an undesignated theft may avoid CMT. The disadvantage of “any theft” is that immigration judges are trained to think that any theft is a CMT, while they recognize that “any felony” may not be.

Immigration counsel may also argue that the intent to commit “theft” vs. “a felony” are alternative means to satisfying the same element, and therefore conviction under the statute can never be a CMT, but defense counsel should not rely on this argument. See “Explanation: Aggravated Felony as Attempted Theft,” below.

The Ninth Circuit has also held that *attempted* commercial burglary in which the defendant entered a store lawfully, with the intent to shoplift, is not a CMT. *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1109 (9th Cir. 2011). Counsel can avoid a CMT by creating a factual basis that the defendant merely entered the store lawfully with intent to commit a theft. This is a good alternative to theft or shoplifting since even police reports or other documents showing that defendant actually committed theft should not convert this into a CMT. *Hernandez-Cruz v. Holder*, 651 F.3d 1110-1111 (police reports showing that defendant actually took merchandise cannot deprive defendant of the benefit of his plea bargain).

**Aggravated Felony, Bottom-Line:** With a sentence imposed of a year or more, this could be held an AF as either burglary or attempted theft. The very best course is to obtain a sentence imposed of 364 days or less. However, even with a sentence of a year or more imposed, counsel can guard against AF status by working with the record of conviction.

**Explanation: AF as Burglary.** Burglary is an aggravated felony with a one year sentence or more imposed. 8 USC §1101(a)(43)(G). The generic definition of burglary applicable to this aggravated

felony ground is “an unlawful or unprivileged entry into, or remaining in, a *building or other structure*, with intent to commit a crime.” *Taylor v. United States*, 494 U.S. 575 (1990) (emphasis added). However, the Arizona burglary statutes are broader than the generic definition of burglary for at least four reasons:

- 1) ***Unlawful entry.*** Although Arizona burglary appears to require that the defendant “enter or remain unlawfully,” the definition of this phrase includes a lawful entry of a business with an intent to steal merchandise. ARS § 13-1501(2). Therefore, immigration counsel can argue that a conviction under any of the three burglary statutes cannot be held an aggravated felony as “burglary” unless the record of conviction shows an unlawful entry. *Descamps v. United States*, 133 S. Ct. 2276, 2283, (2013)
- 2) ***“Structure.”*** The Arizona definition of “structure” includes vending machines and vehicles, which do not fit the generic burglary definition. *See* ARS § 13-1501(12); *U.S. v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (en banc), *State v. Bon*, 236 Ariz. 249, 252, 338 P.3d 989, 992 (Ct. App. 2014), review denied (July 10, 2015)(open bed of a truck is a structure), *State v. Gill*, 235 Ariz. 418, 419, 333 P.3d 36, 37 (Ct. App. 2014)(mailbox is structure). Also, the Arizona definition of “residential structure” includes both movable and unmovable structures, the latter of which does not fit the generic definition of “burglary.” *See United States v. Terrell*, 593 F.3d 1084, 1092-93 (9th Cir. 2010) 131 S. Ct. 2094, 179 L. Ed. 2d 895 (U.S. 2011).
- 3) ***“In or on.”*** While the generic definition of “burglary” requires an entry “into” a structure, Arizona burglary includes entries both “in and on” a structure. Thus, a person could be convicted of burglary for walking on the roof of a structure or for sitting on the seat of a motorcycle that was subsequently stolen. *State v. Ortiz*, No. 2 CA-CR 2008-0372, 2009 WL 1863883, at \*3 (Ariz. Ct. App. Jun. 29, 2009) (affirming § 13-1506(A)(1) conviction for defendant who “remained unlawfully on a motorcycle with the intent to commit theft of that motorcycle”).
- 4) ***“Yard.”*** Since generic burglary requires entry into a structure, an entry into a fenced residential or commercial yard is not an aggravated felony as burglary. *U.S. v Wenner*, 351 F.3d 969 (9th Cir. 2003) (Wash. burglary).

Based on these distinctions, counsel can structure pleas in the following ways:

A1. Counsel can: 1) plead to lawful entry of a business or leave the record vague as to whether the entry was unlawful; 2) plead to entry of a vehicle or an unknown nonresidential structure; 3) plead to entry “on” the structure or include both the “in or on” language in the plea; and 4) plead to entry of a “fenced commercial yard” or “fenced commercial or residential yard.”

A2. Auto burglary in general is not AF burglary because it does not involve wrongful entry of a structure. *Ye v INS*, 214 F.3d 1128 (9th Cir. 2000). Therefore this section is not an aggravated felony as burglary. If the entry was of a locked vehicle with an underlying intent to commit theft, however, it may be removable as an aggravated felony for attempted theft with a sentence of 365 days or more. *Ngaeth v. Mukasey*, 545 F.3d 796, 802 (9th Cir. 2008). Counsel should avoid references in the plea to a locked vehicle and an intent to commit theft.

***Explanation; AF as Attempted Theft.*** Conviction of an attempt to commit an offense involving theft is an aggravated felony if a sentence of one year or more is imposed. The Ninth Circuit has held that

a conviction for entering a locked vehicle with the intent to commit theft constitutes an aggravated felony if the sentence is 365 days or more. *Ngaeth v. Mukasey*, 545 F.3d 796, 802 (9th Cir. 2008). Therefore, a plea to A2 in which the underlying intent involved theft may be an aggravated felony. Defense counsel should keep the record of conviction clear of what the intended crime was, i.e., plead to “theft or any felony” in the disjunctive, or to “any felony.”

Immigration counsel can point to Ninth Circuit decisions holding that Arizona theft is broader than the generic definition of theft, and even if the record of conviction reveals that defendant intended to commit “any theft” it is unclear whether it was theft of services or theft of property, or whether any intent to deprive the owner was involved.

Immigration counsel can also argue that the statute is not divisible and that the court may not review the record of conviction. See Note: Divisible Statutes, Record of Conviction. In *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014), the Ninth Circuit considered the same statute address in *Ngaeth, supra.*, California Penal Code § 459, 2<sup>nd</sup> degree burglary. The Court noted, citing *Ngaeth*, that the statute is overbroad because “section 459 may be violated by an attempt to commit a crime other than theft.” *Id.* at 1084. Following *Descamps v. US*, 133 S. Ct. 2276 (2013), the court held that it could no longer continue to the modified categorical approach to review the record of conviction, as it had in *Ngaeth*. Even though the statute is written in the disjunctive, separating “theft” and “any felony” with an “or,” the court held that the statute is not divisible as defined in *Descamps*, because a California jury need not be unanimous regarding the particular offense that the defended intended to commit. *Id.* at 1087-1089. Similarly, Arizona courts have repeatedly cited burglary as having two elements: (1) entry and (2) the intent to commit theft or any felony. See e.g. *In re Appeal in Maricopa Cty.*, Juvenile Action No. J-75755, 111 Ariz. 103, 105, 523 P.2d 1304, 1306 (1974). The Arizona Pattern Jury Instructions also break the offense down into these two elements, with theft or felony being alternative means of satisfying the second element. RAJI (Criminal) STCI 15.06 (3<sup>rd</sup> ed). Immigration Counsel can therefore argue that, under *Rendon*, this statute is never divisible and simply is not an aggravated felony as attempted theft. Defense counsel should proceed with caution, however, because the Supreme Court has accepted cert in a case that will address a circuit split on the means vs. elements analysis in *Rendon*. See “Divisible Statutes: Record of Conviction.”

#### ***AF as a Crime of Violence:***

A1. The Ninth Circuit has consistently held that felony burglary of a residence is a crime of violence under 18 USC § 16(b), because of the inherent risk that the burglar will encounter one of its lawful occupants and force will be used. *United States v. Becker*, 919 F.2d 568 (9th Cir. 1990); *Lopez-Cardona v. Holder*, 662 F.3d 1110 (9th Cir. 2011); *United States v. Ramos-Medina*, 682 F.3d 852, 855 (9th Cir. 2012). The same arguably applied to a residential yard. *James v. United States*, 127 S/ Ct/ 1586, 1589 (2007). However, the Ninth Circuit recently held that a California residential burglary statute is not a crime of violence because 18 USC § 16(b) is void for vagueness. *Dimaya v. Lynch*, 803 F.3d 1110 (9<sup>th</sup> Cir. 2015 See “Aggravated Felony” under ARS § 13-1002, *supra*. Because this issue could go to the Supreme Court, defense counsel should still make efforts to safeguard the record by pleading to either burglary of a “nonresidential structure or a fenced commercial or residential yard” or “a fenced commercial yard.” Even if the Ninth Circuit ultimately holds that 18 USC § 16(b) is not void for vagueness, it is unlikely that the court would continue to apply the “ordinary case” test rather than the usual minimum conduct test. There are strong arguments that the minimum conduct to violate A1 does not carry the inherent risk that force will be used, as noted above. See Divisible Statutes, Record of Conviction. As always, defense counsel should attempt to secure a sentence of 364 or less to definitively avoid an aggravated felony as a crime of violence.

A2. Auto burglary is not a crime of violence as long as the record of conviction does not establish that actual violence was used, e.g. does not establish that the car window was smashed, as opposed to found open. *Ye v. INS, supra*.

**Domestic Violence:** As noted above, felony burglary likely is not a crime of violence, following *Dimaya v. Lynch*. If it is not a crime of violence, it cannot be a crime of domestic violence. Immigration counsel also have an argument that only crimes against persons, not property, qualify as deportable domestic violence offenses. If felony burglary is held to be a crime of violence, and there is a DV type victim, it is possible that it will be held a domestic violence offense triggering deportation. To be safe, Defense counsel should avoid a reference to § 13-3601 and keep the record of conviction from identifying the domestic relationship.

Note that the BIA just ruled, in *Matter of Estrada*, 26 I & N Dec. 749 (BIA 2016), that the circumstance specific approach, not the categorical approach, applies to determine whether there is a domestic relationship. *See Note: Domestic Violence*.

**Deferred Action for Childhood Arrivals:** This conviction will likely bar a non-citizen from qualifying for DACA, or subject a DACA recipient (or recipient of prosecutorial discretion) to renewed removal proceedings. Burglary is considered a serious misdemeanor for DACA purposes, meaning that the U.S. Citizenship and Immigration Services will only grant DACA if the applicant can show extraordinary circumstances. *See Note: Deferred Action for Childhood Arrivals*.

#### **Burglary in the Second Degree, ARS §13-1507**

A. A person commits burglary in the second degree by entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein.

B. Burglary in the second degree is a class 3 felony.

**Summary:** To avoid an aggravated felony, obtain a sentence of less than a year. To avoid a CMT, plead to intent to commit “theft or any felony.” To avoid possible exposure to the domestic violence ground, avoid identification of the domestic relationship.

**Crime Involving Moral Turpitude:** See discussion at ARS §13-1506, *supra*. To avoid a CMT, defense counsel should create a record of conviction where the client is guilty only of “theft or any felony” or “a felony.” The BIA has also found that burglary of an occupied dwelling is a CMT regardless of the underlying crime. *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009). However, the definition of a “residential structure” under Arizona law includes dwellings that are not occupied. ARS § 13-1501(11). Counsel should attempt to plead to burglary of an unoccupied dwelling or leave the record vague as to whether the residence was occupied at the time of the burglary.

**Aggravated Felony as Burglary:** *See* ARS §13-1506.

**Aggravated Felony as a Crime of Violence:** Probably not. Previously, felony burglary of a dwelling was a “crime of violence” under 18 USC § 16(b), because of the inherent risk that the burglar will encounter the resident and violence will ensue. Under *Dimaya v. Lynch*, however, immigration counsel has a strong argument that no conviction is a crime of violence under USC § 16(b), because that section is void for vagueness. *See* ARS § 13-1506, *supra*. The issue could go to the Supreme Court, however, so defense counsel should proceed with caution. To be sure to avoid a crime of violence, counsel should make every attempt to obtain a sentence of 364 days or less for each individual count.

Defense counsel can provide immigration attorneys with an additional argument that the offense is not a crime of violence if the record leaves open the possibility (a) that no force was used against the property (e.g., a window was not broken to gain entrance) and (b) the dwelling was not occupied at the time (meaning that it was not currently rented or lived in, as opposed to that the occupant was not at home). Regarding the latter point, the Arizona definition of dwelling includes an unoccupied dwelling. See *U.S. v. Martinez-Martinez*, 468 F.3d 604 (9th Cir. 2006). Immigration counsel have a good argument that there is no inherent risk that a confrontation will ensue and force will be used in the burglary of a residential structure that is not inhabited.

Where a sentence of a year or more is imposed, counsel also must ensure that the record does not establish that the offense is an aggravated felony as “burglary”; see above section.

**Aggravated Felony as Attempted Theft.** Conviction of an attempt to commit an offense involving theft may be an aggravated felony if a sentence of one year or more is imposed. The Ninth Circuit has held that a conviction for entering a locked vehicle with the intent to commit theft constitutes an aggravated felony if the sentence is 365 days or more. *Ngaeth v. Mukasey*, 545 F.3d 796, 802 (9th Cir. 2008). Therefore, any plea in which a “substantial step” is taken in order to commit theft may be an aggravated felony. Defense counsel should avoid reference to entry of any “locked” structure and keep the record of conviction clear of what the intended crime was, i.e., plead to “theft or any felony” in the disjunctive, or to “any felony.” Immigration counsel can point to Ninth Circuit decisions holding that Arizona theft is broader than the generic definition of theft, and even if the record of conviction reveals that defendant intended to commit “any theft” it is unclear whether it was theft of services or theft of property, or whether any intent to deprive the owner was involved. Immigration counsel may also argue that “theft” or “any felony” are alternative means of the satisfying the same element, and thus the statute is not divisible. See ARS §13-1506, *supra*

**Domestic Violence:** As noted above, felony burglary should no longer be a crime of violence after *Dimaya v. Lynch*, see “Aggravated Felony: Crime of Violence,” *supra*. To be safe, defense counsel should keep the record of conviction from identifying a domestic relationship. Even if *Dimaya v. Lynch* were overruled, immigration counsel will argue that only crimes against persons, not property, qualify as crimes of violence.

Note that the BIA just ruled, in *Matter of Estrada*, 26 I & N Dec. 749 (BIA 2016), that the circumstance specific approach, not the categorical approach, applies to determine whether there is a domestic relationship. See Note: Domestic Violence.

**Deferred Action for Childhood Arrivals:** This conviction will likely bar a non-citizen from qualifying for DACA, or subject a DACA recipient (or recipient of prosecutorial discretion) to renewed removal proceedings. Burglary is considered a serious misdemeanor for DACA purposes, meaning that the U.S. Citizenship and Immigration Services will only grant DACA if the applicant can show extraordinary circumstances. See Note: Deferred Action for Childhood Arrivals.  
deportable domestic violence offenses.

### **Burglary in the First Degree, ARS §13-1508**

A. A person commits burglary in the first degree if such person or an accomplice violates the provisions of either section 13-1506 or 13-1507 and knowingly possesses explosives, a deadly weapon or a dangerous instrument in the course of committing any theft or any felony.

B. Burglary of a nonresidential structure or a fenced commercial or residential yard is a class 3 felony. It is a class 2 felony if committed in a residential structure.

**Crime Involving Moral Turpitude:** With the correct record of conviction, this might escape classification as a CMT since all of the component offenses may be non-CMTs. Entry with intent to commit an undesignated offense (“a felony”) or an offense that does not involve moral turpitude is not a CMT. *Matter of M*, 2 I&N Dec. 721 (BIA 1946). However, a class 2 for residential structure will likely be found a CMT regardless of the underlying crime. *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009) (burglary of an occupied dwelling is categorically a CMT). The additional element of a weapon might not transform the conviction into a CMT. See, e.g., *Matter of Montenegro*, 20 I&N Dec. 603 (1992) (“The moral condemnation comes from the act of burglary or rape, not the fact that the criminal had a gun in his pocket”). The fact that possession of a weapon is an element of the offense may lead some immigration judges to analogize it to residential burglary in that is more likely to invite a violent defensive response from the resident. *Matter of Louissaint*, 24 I&N Dec. 754, 758 (BIA 2009).

**Aggravated Felony:** See § 13-1506. Simple possession of a weapon is not a crime of violence, *Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992). Following recent Supreme Court and Ninth Circuit case law, including *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), which held that 18 USC § 16(b) is void for vagueness in the immigration context, it is unlikely that possession of a weapon will transform burglary into a crime of violence. See “Aggravated Felony” under ARS § 13-1002, *supra*. However, the safest strategy is to avoid a sentence of a year or more.

**Firearms Deportation Ground:** A noncitizen is deportable if he is convicted of possessing a firearm or destructive device in violation of the law. 8 USC § 1227(a)(2)(C). A destructive device includes explosives. To avoid this ground, counsel should keep the record of conviction vague as to the weapon of possession and plead defendant to the statutory language in the disjunctive “explosives, a deadly weapon or a dangerous instrument,” or “deadly weapon,” or “dangerous instrument.” Examples of non-firearm dangerous weapons are: knives, sticks, clubs, rods, etc.

Under current case law, immigration counsel will have strong arguments that a non-citizen is not deportable under the firearms ground for conviction under this statute, because the statute is overbroad and not divisible. First, use of a firearm is an alternative means of satisfying an element of the statute, not an element itself. See *Descamps v. U.S.*, 133 S. Ct. (9th Cir. 2013), see also *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016). Second, Arizona law does not have an antique firearms exception. See *U.S. v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014). See also Note: Firearms The Supreme Court has accepted certification in a case that will address a circuit split on this means vs. elements analysis, and the case law on this issue is therefore subject to change. Defense counsel should conservatively assume that a court will be able to review the record of conviction, and protect the record accordingly. See also “Firearms Deportation Ground” at ARS § 13-3102.

**Domestic Violence:** Where felony burglary is a crime of violence and there is a DV type victim, it is conceivable that it will be held a domestic violence offense triggering deportation. Counsel should avoid a reference to § 13-3601 and keep the record of conviction from identifying the domestic relationship. Immigration counsel will argue that only crimes against persons, not property, qualify as deportable domestic violence offenses.

**Deferred Action for Childhood Arrivals:** This conviction will likely bar a non-citizen from qualifying for DACA, or subject a DACA recipient (or recipient of prosecutorial discretion) to renewed removal proceedings. Burglary is considered a serious misdemeanor for DACA purposes, meaning that the U.S. Citizenship and Immigration Services will only grant DACA if the applicant can show extraordinary circumstances. See Note: Deferred Action for Childhood Arrivals.

### **33. Criminal Damage, ARS § 13-1602**

A. A person commits criminal damage by recklessly:

1. Defacing or damaging property of another person; or
2. Tampering with property of another person so as substantially to impair its function or value; or
3. Tampering with the property of a utility.
4. Parking any vehicle in such a manner as to deprive livestock of access to the only reasonably available water.
5. Drawing or inscribing a message, slogan, sign or symbol that is made on any public or private building, structure or surface, except the ground, and that is made without permission of the owner.

B. Criminal damage is punished as follows:

1. Criminal damage is a class 4 felony if the person recklessly damages property of another in an amount of ten thousand dollars or more, or if the person intentionally tampers with utility property and the damage causes an imminent safety hazard to any person.
2. Criminal damage is a class 5 felony if the person recklessly damages property of another in an amount of two thousand dollars or more but less than ten thousand dollars.
3. Criminal damage is a class 6 felony if the person recklessly damages property of another in an amount of one thousand dollars or more but less than two thousand dollars..
4. Criminal damage is a class 1 misdemeanor if the person recklessly damages property of another in an amount of more than two hundred fifty dollars but less than one thousand dollars.
5. In all other cases criminal damage is a class 2 misdemeanor.

**Aggravated Felony:** Probably not, although to be safe counsel should attempt to obtain a sentence of less than a year and/or keep the record clear of evidence that actual force was used, and should avoid a class 4 felony which specifies intentional tampering with a utility causing an imminent safety hazard. Under Supreme Court and Ninth Circuit precedent, a reckless causation of serious injury is not an aggravated felony. See *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc) (Arizona assault is not categorically a “crime of violence” since it encompasses a *mens rea* of recklessness); *Leocal v Ashcroft*, 125 S.Ct. 377 (2004) (negligent DUI is not a crime of violence because does not create risk that force will be used, just that injury will occur); *Lara-Cazares v Gonzalez*, 408 F.3d 1217 (9th Cir. 2004) (killing a person by DUI with gross negligence, amounting to recklessness, is not an aggravated felony because it does not create a risk that force will be used, under *Leocal*). In addition, the statute includes elements that do not require force, e.g., parking, drawing. Offenses that do not have as an element the use or threatened use of force do not constitute a crime of violence. See *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), see also “Aggravated Felony” under ARS 13-1002, *supra*.

**Crime Involving Moral Turpitude (CMT):** Possibly if the damage is extensive enough. See *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995) (second degree malicious mischief, Wash. Rev. Code § 9A.48.080(1)(a), is a relatively minor offense that can be violated by causing \$250 damage, and not a crime necessarily involving moral turpitude). Even damage far greater than \$250 might escape CMT classification, however, since it can be the work of “pranksters with poor judgment. Consequently, unlike the crimes of spousal abuse, child abuse, first-degree incest, and carnal knowledge of a fifteen year old, malicious mischief does not necessarily involve an “act of baseness or depravity contrary to accepted moral standards.” *Id.* at 240. Intentionally tampering with a utility property, causing an imminent safety hazard, under subsection (B)(2), is more likely to be held a CMT in light of *Matter of Leal*, 26 I & N Dec. 20 (BIA 2012), upheld in *Leal v. Holder*, 771 F.3d 1140 (9th Cir. 2014).

**Other Grounds: DV.** Probably not. Immigration counsel have a strong argument that force must be against person, not property, to constitute a crime of domestic violence. 8 USC 1227(a)(2)(E)(i).

Where possible, however, counsel should keep record of conviction clear of use of force, and/or of a domestic relationship with the owner of the property. Also, reckless mens rea should be held insufficient to meet the definition of a “crime of domestic violence.” See *supra*, section discussing aggravated felony. Conviction where victim was a child and referenced as a §13-3601 domestic violence conviction may render one removable as a crime of child abuse. Defense counsel should attempt to cleanse the record of any mention that the victim was a minor. If the age of the victim is in the record of conviction, immigration counsel should argue that the BIA’s decision permitting review of the record to ascertain age, in *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008), was an incorrect interpretation of Ninth Circuit and Supreme Court law, and implicitly overruled in *Descamps v. U.S.* 133 s.Ct. 2276 (US). Therefore an immigration judge may not consider this fact in characterizing the offense of conviction. See Other Grounds, ARS 13-1102, *supra*.

**34. Criminal littering or polluting, ARS § 13-1603**

A. A person commits criminal littering or polluting if such person without lawful authority does any of the following:

1. Throws, places, drops or permits to be dropped on public property or property of another which is not a lawful dump any litter, destructive or injurious material which he does not immediately remove.
2. Discharges or permits to be discharged any sewage, oil products or other harmful substances into any waters or onto any shorelines within the state.
3. Dumps any earth, soil, stones, ores or minerals on any land.

B. Criminal littering or polluting is punished as follows:

1. A class 6 felony if a knowing violation of subsection A in which the amount of litter or other prohibited material or substance exceeds three hundred pounds in weight or one hundred cubic feet in volume or is done in any quantity for a commercial purpose.
2. A class 1 misdemeanor if the act is a knowing violation of subsection A, paragraph 1 in which the amount of litter or prohibited material or substance is more than one hundred pounds in weight but less than three hundred pounds in weight or more than thirty-five cubic feet in volume but less than one hundred cubic feet in volume and is not done for commercial purposes.
3. A class 1 misdemeanor if the act is not punishable under paragraph 1 of this subsection and involves placing any destructive or injurious material on or within fifty feet of a highway, beach or shoreline of any body of water used by the public.
4. A class 2 misdemeanor if not punishable under paragraph 1 or 2 of this subsection.

**Crime Involving Moral Turpitude (CMT):** No, because no *mens rea* requirement. This is a good alternative to Criminal Damage § 13-1602 if counsel wants to ensure that offense is not a CMT. Also may be a good alternative to offenses involving hazardous materials from meth labs.

**Aggravated Felony:** No.

**Other:** No.

**35. Aggravated criminal damage, ARS § 13-1604**

A. A person commits aggravated criminal damage by intentionally or recklessly without the express permission of the owner:

1. Defacing, damaging or in any way changing the appearance of any building, structure, personal property or place used for worship or any religious purpose.
2. Defacing or damaging any building, structure or place used as a school or as an educational facility.

3. Defacing, damaging or tampering with any cemetery, mortuary or personal property of the cemetery or mortuary or other facility used for the purpose of burial or memorializing the dead.
4. Defacing, damaging or tampering with any utility or agricultural infrastructure or property, construction site or existing structure for the purpose of obtaining nonferrous metals as defined in section 44-1641.

**Crime Involving Moral Turpitude (CMT):** This is a more dangerous plea than Criminal Damage. Counsel should plead to a *mens rea* of recklessness or plead to both “intentionally and recklessly” to have the best chance of avoiding a CMT. See *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996) (where reckless conduct is an element, a crime of assault can be but is not automatically a CMT). In general, there are strong arguments that mere vandalism is not a CMT, especially if there is not a great deal of damage. See *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995) (second degree malicious mischief, Wash. Rev. Code § 9A.48.080(1)(a), is a relatively minor offense that can be violated by causing \$250 damage, and not a crime necessarily involving moral turpitude). Because it is not clear how courts will react to the added element of a place of worship, school, etc., counsel should attempt to plead to regular criminal damage. Counsel should keep the record clear of onerous facts and where possible plead to the language of the statute.

**Aggravated Felony:** This should not be an aggravated felony as a crime of violence, because use of force is not an element of the statute. The Ninth Circuit has held that 18 USC § 16(b) is void for vagueness. *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015). Thus, no offense should constitute an aggravated felony as a crime of violence unless it “has as an element the use, attempted use, or threatened use of physical force against the person or property of another” pursuant to 18 USC § 16(a)(emphasis added). Because it is possible that this issue could be reviewed by the Supreme Court, counsel should, as always, strive for a sentence of less than 365 days. See “Aggravated Felony” at ARS § 13-1002, *supra*.

Even if *Dimaya v. Lynch* were overruled, this should not be an aggravated felony if the record indicates or leaves open the possibility of reckless as opposed to intentional action, or indicates or leaves open the possibility of nonviolent acts, e.g. spray-painting as opposed to smashing property. Defense counsel should strive to protect the record of conviction and specify or leave open the possibility of recklessness. Immigration counsel may argue that the statute is not divisible at all, such that the court may not consult the record of conviction, because the culpable mental states of reckless or intentional are alternative means, not alternative elements, of violating the statute. See e.g. *Descamps v. U.S.*, 133 St. Ct. 2276 (2013), see also, *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016), see also ““Divisible Statutes: Record of Conviction,” *supra*.

**Other – Domestic Violence:** To be a crime of domestic violence, a conviction must first be a crime of violence. As noted above, there are strong arguments that conviction under this statute is not a crime of violence. Immigration counsel also have strong arguments that the use of force against property is not a crime of domestic violence. To be safe, defense counsel should try to exclude the § 13-3601 label from the record of conviction and eliminate reference to a domestic relationship in the record of conviction.

Note that the BIA just ruled, in *Matter of Estrada*, 26 I & N Dec. 749 (BIA 2016), that the circumstance specific approach, not the categorical approach, applies to determine whether there is a domestic relationship. See Note: Domestic Violence.

### **36. Reckless burning, ARS § 13-1702.**

A person commits reckless burning by recklessly causing a fire or explosion which results in damage to an occupied structure, a structure, wildland or property. Class 1 misdemeanor.

**Crime Involving Moral Turpitude (CMT):** The government often charges this as a CMT, but immigration counsel would have a good argument that it is not if there is a vague record of conviction. Criminally reckless behavior may be a basis for a finding of moral turpitude (see e.g. *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976), *aff'd sub nom. Medina-Luna v. INS*, 547 F.2d 1171 (7th Cir. 1977)), but only if there is another aggravating factor present for an offense to constitute a CMT (*Matter of Fualaau*, 21 I&N 475 (BIA 1996), *but see Matter of Leal*, 26 I & N Dec. 20 (BIA 2012), upheld in *Leal v. Holder*, 771 F.3d 1140 (9<sup>th</sup> Cir. 2014)(finding that reckless endangerment is a CMT). In this case, reckless burning is a relatively minor offense and does not necessarily involve an “act of baseness or depravity.” See *Rodriguez-Herrera v. INS*, 52 F.3d 238, 240 (9<sup>th</sup> Cir. 1995) (Wash. second-degree malicious mischief statute does not rise to the level of either depravity or fraud that would qualify it as necessarily involving moral turpitude because is a relatively minor offense and did not necessarily involve a base act contrary to moral standards). The BIA recently held, in an unpublished opinion, that a New York arson statute with a reckless mens rea is not categorically a CMT. See *Jorge Hernandez-Hernandez*, A045-582-968 (BIA May 20, 2014).

**Aggravated Felony:** Reckless burning cannot be an aggravated felony as a crime of violence because as a Class 1 misdemeanor it carries a maximum sentence of less than 365 days. Even with a sentence of 365 days, it would still not likely be held as an aggravated felony due to the *mens rea* of recklessness, see *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9<sup>th</sup> Cir. 2006) (en banc), and because use of force is not an element of the offense. See *Dimaya v. Lynch* 803 F.3d 1110 (9<sup>th</sup> Cir. 2015)(finding that 18 USC § 16(b) is void for vagueness). It should also not be found an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i) as an offense “described in” the federal criminal statute since the federal statute requires “maliciously” damaging or destroying property, which is not equivalent to recklessness. See *Flores-Lopez v. Holder*, 685 F.3d 857 (9<sup>th</sup> Cir. 2012).

**37. Arson of a structure or property, ARS § 13-1703.**

Knowingly and unlawfully damaging a structure or property by knowingly causing a fire or explosion. Arson of a structure is a class 4 felony. Arson of property is a class 4 felony if the property had a value of more than one thousand dollars. Arson of property is a class 5 felony if the property had a value of more than one hundred dollars but not more than one thousand dollars. Arson of property is a class 1 misdemeanor if the property had a value of one hundred dollars or less.

**Summary:** This can be a dangerous offense. Consider a plea to §§ 13-1602 or 1702.

**Crime Involving Moral Turpitude (CMT):** Arson has traditionally been held to be a CMT. *Borromeo v. INS*, 213 F.3d 641 (9<sup>th</sup> Cir. 2000)(arson constitutes a CMT); *Matter of T*, 6 I&N Dec. 835 (BIA 1955).

**Aggravated Felony:** Yes. This will be held an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i) *regardless of the length of sentence*. Under 8 USC § 1101(a)(43)(E), an offense “described in” certain federal statutes is an aggravated felony. One of the federal statutes is 18 USC § 844(i), malicious destruction of property by fire or explosive, used in interstate or foreign commerce. Except for lacking the federal jurisdictional element, the conduct in ARS § 13-1703 appears to be described in § 844(i). The Supreme Court recently held that, where a state statute matches the federal statute, but for the federal jurisdictional element, it constitutes an aggravated felony offense “described in” the federal statute despite the lack of the federal jurisdictional element. *Torres v. Lynch*, No. 14-1096, 2016 WL 2903424 (U.S. May 19, 2016).

Until recently, Arson under this section would be charged as an aggravated felony crime of violence pursuant to 18 USC 16(b), if the sentence imposed was a year or more, because of the substantial risk that force would be used in the commission of the offense. *See Matter of Palacios Pinder*, 22 I & N Dec. 434 (BIA 1998). Immigration counsel has a strong argument this case law is no longer binding because the Ninth Circuit has held that 18 USC § 16(b) is void for vagueness. *Dimaya v. Lynch*, 803 F.3d 1110 (9<sup>th</sup> Cir. 2015). Even though a court should no longer hold this to be a crime of violence, defense counsel should be careful to protect against any risk by avoiding a sentence of a year or more or, if that is not possible, leaving the record vague as to the owner of the structure or property. *See Jordison v. Gonzales*, 501 F.3d 1134 (9<sup>th</sup> Cir. 2007) (Cal. Penal Code § 452(c) not categorically a crime of violence because it can include the burning of one's own property).

Alternate plea: Reckless Burning §13-1702.

**38. Arson of an occupied structure, ARS § 13-1704.**

- A. A person commits arson of an occupied structure by knowingly and unlawfully damaging an occupied structure by knowingly causing a fire or explosion.
- B. Arson of an occupied structure is a class 2 felony.

**Crime Involving Moral Turpitude (CMT):** Yes. See ARS § 13-1703.

**Aggravated Felony:** Yes, this will be held an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i) *regardless of the length of sentence*. Under 8 USC §1101(a)(43)(E), an offense “described in” certain federal statutes is an aggravated felony. One of the federal statutes is 18 USC § 844(i), malicious destruction of property by fire or explosive, used in interstate or foreign commerce. Except for lacking the federal jurisdictional element, the conduct in ARS § 13-1703 appears to be described in § 844(i). The Supreme Court recently held that, where a state statute matches the federal statute, but for the federal jurisdictional element, it constitutes an aggravated felony offense “described in” the federal statute despite the lack of the federal jurisdictional element. *Torres v. Lynch*, No. 14-1096, 2016 WL 2903424 (U.S. May 19, 2016).

If a conviction under this statute cannot be avoided, defense counsel should obtain a sentence of 364 days or less to avoid a potential alternative charge that the conviction is an aggravated felony as a crime of violence. Until recently, Arson under this section would be charged as an aggravated felony crime of violence pursuant to 18 USC § 16(b), if the sentence imposed was a year or more, because of the substantial risk that force would be used in the commission of the offense. *See Matter of Palacios Pinder*, 22 I & N Dec. 434 (BIA 1998). Immigration counsel has a strong argument this case law is no longer binding because the Ninth Circuit has held that 18 USC § 16(b) is void for vagueness. *Dimaya v. Lynch*, 803 F.3d 1110 (9<sup>th</sup> Cir. 2015). Even though a court should no longer hold this to be a crime of violence, defense counsel should be careful to protect against any risk by avoiding a sentence of a year or more or, if that is not possible, leaving the record vague as to the owner of the structure or property. *See Jordison v. Gonzales*, 501 F.3d 1134 (9<sup>th</sup> Cir. 2007) (Cal. Penal Code § 452(c) not categorically a crime of violence because it can include the burning of one's own property). Alternate plea: Reckless Burning §13-1702.

**39. Arson of an occupied jail or prison facility, ARS § 13-1705**

- A. A person commits arson of an occupied jail or prison facility by knowingly causing a fire or explosion which results in physical damage to the jail or prison facility.
- B. Arson of an occupied jail or prison facility is a class 4 felony

See ARS § 13-1704.

**40. Burning of wildlands, ARS § 13-1706**

A. It is unlawful for any person, without lawful authority, to intentionally, knowingly, recklessly or with criminal negligence to set or cause to be set on fire any wildland other than the person's own or to permit a fire that was set or caused to be set by the person to pass from the person's own grounds to the grounds of another person....

C. A person who violates this section is guilty of an offense as follows:

1. If done with criminal negligence, the offense is a class 2 misdemeanor.
2. If done recklessly, the offense is a class 1 misdemeanor.
3. If done intentionally or knowingly and the person knows or reasonably should know that the person's conduct violates any order or rule that is issued by a governmental entity and that prohibits, bans, restricts or otherwise regulates fires during periods of extreme fire hazard, the offense is a class 6 felony.
4. If done intentionally and the person's conduct places another person in danger of death or serious bodily injury or places any building or occupied structure of another person in danger of damage, the offense is a class 3 felony.

**Summary:** This is a good alternative to arson under §§ 13-1703, 13-1704, and 13-1705 if counsel can plead to a reckless or negligent *mens rea*. Otherwise, client may be better off with § 13-1703.

**Crime Involving Moral Turpitude (CMT):** The government will likely charge this as a CMT, saying it matches the definition of “arson.” See § 13-1703, CMT. However, immigration counsel has a good argument if the *mens rea* is recklessness or negligence. See *Matter of Fualaau*, 21 I&N 475 (BIA 1996); *Matter of Sweetster*, 22 I&N Dec. 709 (BIA 1999).

**Aggravated Felony:** If counsel pleads to a *mens rea* of negligence or recklessness under C1 or C2, this should not be considered an aggravated felony as a “crime of violence.” See *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc); *Leocal v. Ashcroft*, 125 S.Ct. 377 (2004). A plea to C3 will likely be found an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i) *regardless of the length of sentence*. Under 8 USC § 1101(a)(43)(E), an offense “described in” 18 USC § 844(i) (malicious destruction of property by fire or explosive, used in interstate or foreign commerce), is an aggravated felony. Since § 1101(a)(43)(E)(i) does not require a sentence of 365 days, *any* conviction under C3 could be an aggravated felony even with a sentence of less than one year. While this statute lacks the element of interstate or foreign commerce, the Supreme Court recently held that, where a state statute matches the federal statute, but for the federal jurisdictional element, it constitutes an aggravated felony offense “described in” the federal statute despite the lack of the federal jurisdictional element. *Torres v. Lynch*, No. 14-1096, 2016 WL 2903424 (U.S. May 19, 2016).

Subsequent to the Ninth Circuit’s decision in *Dimaya v. Lynch*, 803 F.3d 1110 (9<sup>th</sup> Cir. 2015), conviction under this statute should not be a crime of violence because it does not have as an element the use or threat of use of force. To definitively avoid this risk, however, defense counsel should obtain a sentence of less than 364 days, and, where possible, specify reckless or negligent conduct. See § 13-1704.

**41. Theft, ARS §13-1802**

A. A person commits theft if, without lawful authority, the person knowingly:

1. Controls property of another with the intent to deprive the other person of such property;

2. Converts for an unauthorized term or use services or property of another entrusted to the defendant or placed in the defendant's possession for a limited, authorized term or use; or

3. Obtains services or property of another by means of any material misrepresentation with intent to deprive the other person of such property or services; or

4. Comes into control of lost, mislaid or misdelivered property of another under circumstances providing means of inquiry as to the true owner and appropriates such property to the person's own or another's use without reasonable efforts to notify the true owner; or

5. Controls property of another knowing or having reason to know that the property was stolen; or

6. Obtains services known to the defendant to be available only for compensation without paying or an agreement to pay the compensation or diverts another's services to the person's own or another's benefit without authority to do so, or

7. Controls the ferrous metal or nonferrous metal of another with the intent to deprive the other person of the metal; or

8. Controls the ferrous metal or nonferrous metal of another knowing or having reason to know that the metal was stolen; or;

9. Purchases within the scope of the ordinary course of business the ferrous metal or nonferrous metal of another person knowing that the metal was stolen.

B. A person commits theft if, without lawful authority, the person knowingly takes control, title, use or management of a vulnerable adult's property while acting in a position of trust and confidence and with the intent to deprive the vulnerable adult of the property. Proof that a person took control, title, use or management of a vulnerable adult's property without adequate consideration to the vulnerable adult may give rise to an inference that the person intended to deprive the vulnerable adult of the property.

C. It is an affirmative defense to prosecution under subsection B that....

D. The inferences set forth in 13-2305 apply to any prosecution under subsection A, paragraph 5 of this section.

G. Theft of property or services with a value of twenty-five thousand dollars or more is a class 2 felony. Theft of property or services with a value of three thousand dollars or more but less than twenty-five thousand dollars is a class 3 felony. Theft of property or services with a value of three thousand dollars or more but less than four thousand dollars is a class 4 felony, except that theft of any vehicle engine or transmission is a class 4 felony regardless of value. Theft of property or services with a value of two thousand dollars or more but less than three thousand dollars is a class 5 felony. Theft of property or services with a value of one thousand dollars or more but less than two thousand dollars is a class 6 felony. Theft of any property or services valued at less than one thousand dollars is a class 1 misdemeanor, unless the property is taken from the person of another, is a firearm or is an animal taken for the purpose of animal fighting in violation of section 13-2910.01, in which case the theft is a class 6 felony.

H. A person who is convicted of a violation of subsection A, paragraph 1 or 3 of this section that involved property with a value of one hundred thousand dollars or more is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except pursuant to section 31-233, subsection A or B until the sentence imposed by the court has been served, the person is eligible for release pursuant to section 41-1604.07 or the sentence is commuted.

I.

J.

K.

**Note:** If the theft involves a car, besides the other options below consider pleading to joyriding, see ARS § 13-1803.

**Aggravated Felony.** Not categorically an aggravated felony as theft. Good arguments that the statute is overbroad and not divisible, but an Immigration Judge may find it divisible. A3 with a \$10,000 or more loss to the victim will likely be an aggravated felony as a crime of fraud.

Under immigration laws, an aggravated felony includes a theft offense (including receipt of stolen property) where a sentence of a year or more has been imposed. 8 USC § 1101(a)(43)(G). Avoid an aggravated felony by obtaining a sentence of 364 days or less.

If it is not possible to avoid a sentence of a year or more, however, an aggravated felony still can be avoided with careful control of the record of conviction. Counsel should create a record that leaves open the possibility that the offense was A2, A3 or A6 and involved theft of services, or was A2 or A4 and did not involve an intent to deprive the owner either temporarily or permanently.

Theft by material misrepresentation, section A3, is analyzed separately. This conviction will not be an aggravated felony under the theft category if a sentence of a year or more is imposed, but will be an aggravated felony as a crime of fraud or deceit if the loss to the victim/s exceeded \$10,000, regardless of whether the amount appears in the record of conviction. See *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), See also *Fuentes v. Lynch*, 788 f.3d 1177 (9<sup>th</sup> Cir. 2015). Regarding proof of \$10,000 loss, see Note: Fraud.

*Explanation.* Theft for immigration purposes is defined as “a taking of *property* or an exercise of control over *property* without consent with the *criminal intent to deprive* the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent.” *U.S. v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9<sup>th</sup> Cir. 2002) (emphasis added).

In *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9<sup>th</sup> Cir. 2003), the Ninth Circuit held a conviction under A.R.S. § 13-1802 was divisible for this purpose in at least two ways. First, some subparts include the theft of services as opposed to property (see A2, A3 and A6). Second, some subparts do not require an intent to deprive the owner, either temporarily or permanently (see A2, A4 and A5). The Ninth Circuit also found that identically worded subparts of §13-1814, theft of means of transportation, do not constitute theft for this purpose. *Nevarez-Martinez v. INS*, 326 F.3d 1053, 1055 (9<sup>th</sup> Cir. 2003).

Counsel should not plead to A5, as receiving stolen property under a similar California statute has been held to be an aggravated felony under 8 U.S.C. § 1101(a)(43)(G). *Matter of Cardiel*, 25 I&N Dec. 12 (BIA 2009); *Verdugo-Gonzalez v. Holder*, 581 F.3d 1059, 1060 (9<sup>th</sup> Cir. 2009). However, immigration counsel may have an argument that A5 is broader than the California statute since A5 includes not only “knowing” but “having reason to know” that the property was stolen. Defense counsel should avoid any reference to the client “knowing” that the property was stolen or else leave the language of the plea vague.

Until the tension in the Ninth Circuit is resolved as to whether one may infer a criminal intent where the statute requires only “knowing,” the safest plea for theft would leave open the possibility that defendant stole services (i.e. judgment / indictment recite boilerplate statutory language thus leaving open possibility that defendant stole services or merely refers to 13-1802 without mentioning a specific subsection). Also, counsel should avoid a plea to A1, which the Ninth Circuit found to constitute a theft offense. *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1170 (9<sup>th</sup> Cir. 2006).

Under recent case law, Immigration Counsel has a very strong argument that ARS § 13-1802 is not divisible under *Descamps v. U.S.*, 133 S. Ct. 2276 (2013), and *Almanza-Arenas v. Holder*, 785 F.3d

366 (9<sup>th</sup> Cir. 2015)(en banc), meaning that no conviction under the statute would be a removable offense. The Arizona Jury Instructions note that under *State v. Dixon*, 127 Ariz. 554, 662 P.2d 501 (App. 1981), a jury need not be unanimous as to which subsection of theft was violated, so long as they are unanimous on the question of whether the defendant's conduct constituted theft. *See* Revised Arizona Jury Instructions 18.02.01; *See also State v. Hickman*, No. 1 CA-CR 09-0950, at \*3-4 (Ariz. Ct. App. Apr. 19, 2011). In addressing California's theft statute, the Ninth Circuit has held it to be indivisible precisely because a jury need not unanimously agree on how the defendant committed theft. *Lopez-Valencia v. Lynch*, 798 F.3d 863, 869 (9th Cir. 2015). Because juror unanimity is also not required under Arizona law, the rationale of *Lopez-Valencia v. Lynch* should apply equally to ARS § 13-1802. In practicality, some local IJs may still find § ARS 13-1802 to be divisible, and therefore may review the whole record of conviction. Furthermore, other circuits have disagreed with the Ninth Circuit's application of *Descamps*. The Supreme Court has accepted certification in *U.S. v. Mathis*, 786 f.3D 1068 (8th Cir. 2015), to address the circuit split on divisibility. *See* Note: "Divisible Statutes: Record of Conviction." Thus it remains extremely important for defense counsel to craft a plea and create a record of conviction that will avoid immigration consequences, assuming the statute will be found divisible.

*Theft by material misrepresentation.* The BIA recognizes the essential difference between theft (by stealth) and fraud or deceit (by trickery). *Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008). Section A3 is by trickery, not stealth, and therefore it is likely that it will not be considered theft and a sentence of a year or more will not make it an aggravated felony. Where a sentence of a year or more cannot be avoided, attempt to leave the record of conviction vague between A3 and other sections, or designate A3, as long as there is not a loss to the victim of \$10,000 or more. As always, in case this argument does not prevail it is far better to obtain 364 days on any single count.

Note that a crime involving fraud or deceit is an aggravated felony under 8 USC § 1101(a)(43)(M)(i) if the victim/s loss exceeds \$10,000, regardless of whether the amount appears in the record of conviction. *See Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), *See also Fuentes v. Lynch*, 788 f.3d 1177 (9<sup>th</sup> Cir. 2015). Regarding proof of \$10,000 loss, see Note: Fraud. If the \$10,000 loss will be established, but a sentence of a year or more will not be imposed, leave the record of conviction vague between A3 and the other theft sections, or designate some section other than A3.

**Crime Involving Moral Turpitude:** Intent to permanently deprive is required for a CMT. Theft offenses that do not involve intent to permanently deprive the owner of the property are not classified as theft crimes involving moral turpitude. *See e.g. Matter of P*, 2 I&N Dec. 887 (BIA 1947); *Matter of M*, 2 I&N Dec. 686 (BIA 1946) (conviction for joyriding does not involve moral turpitude because defendant did not intend to effect a permanent taking). Theft offenses that require as an essential element the intent to permanently deprive the owner of his or her property have consistently been held to involve moral turpitude. *Gutierrez-Chavez v. INS*, 8 F.3d 26 (9th Cir. 1993).

Where a theft statute prohibits both temporary and permanent taking, the statute is not categorically a CMT. ARS § 13-1802 is not categorically a CMT, and arguably is overbroad and not divisible. Subsections A1 and A3 contain an element to deprive the owner of property but not permanent deprivation. *In re Juvenile Action No. J-98065*, 141 Ariz. 404, 687 P.2d 412 (Ct. App. 1984) (theft does not require permanent deprivation; the statute requires control with the intent to deprive). Subsections A2, A4, A5 and A6 do not have an element to deprive; however, an intent to permanently deprive could be inferred from the record of conviction or other documents. A5 could be analogized to receiving stolen property, which is not a CMT unless it involved a permanent taking. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). A6 could be a CMT because an intent to permanently deprive may be inferred.

Under recent case law, Immigration Counsel has a very strong argument that ARS § 13-1802 is not divisible under *Descamps v. U.S.*, 133 S. Ct. 2276 (2013), and *Almanza-Arenas v. Holder*, 785 F.3d 366 (9<sup>th</sup> Cir. 2015)(en banc), meaning that no conviction under the statute would be a removable offense. See analysis under “Aggravated Felony,” above.

**Compare Theft Aggravated Felony and CMT:** The aggravated felony definition of theft excludes theft of services, but includes theft with less than permanent intent to deprive. To be a crime involving moral turpitude, there must be intent to permanently deprive, but whether the theft is of services or property is irrelevant.

#### **42. Unlawful use of means of transportation (joyriding), ARS §13-1803**

A. A person commits unlawful use of means of transportation if, without intent permanently to deprive, the person either:

1. Knowingly takes unauthorized control over another person's means of transportation (class 5 felony).
2. Knowingly is transported or physically located in a vehicle that the person knows or has reason to know is in the unlawful possession of another person pursuant to paragraph 1 or section 13-1814. (class 6 felony)

**Aggravated Felony.** A conviction for unlawful use of means of transportation is not categorically an aggravated felony theft offense, as the intent to deprive the owner of use or possession is not an element of the offense. *United States v. Perez-Corona*, 295 F.3d 996 (9<sup>th</sup> Cir. 2002). Counsel should keep the record of conviction clear of evidence of an intent to deprive; if not, and if a sentence of a year or more is imposed, DHS will attempt to argue that the offense will meet the definition of an aggravated felony. Immigration counsel has a good argument that the statute is not divisible at all, and that the Court may not review the record of conviction, because intent to deprive is not an element of the statute. See *Descamps v. U.S.*, 133 S. Ct. 2276 (2013), See also *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9<sup>th</sup> Cir. 2016) (en banc), See also “Divisible Statutes: Record of Conviction,” *supra*.

**Crimes Involving Moral Turpitude (CMT).** No. Theft offenses that do not involve intent to permanently deprive the owner of the property are NOT classified as theft crimes involving moral turpitude. See e.g. *Matter of P*, 2 I&N Dec. 887 (BIA 1947); *Matter of M*, 2 I&N Dec. 686 (BIA 1946) (conviction for joyriding does not involve moral turpitude because defendant did not intend to effect a permanent taking).

#### **43. Theft by Extortion, ARS § 13-1804**

A. A person commits theft by extortion by knowingly obtaining or seeking to obtain property or services by means of a threat to do in the future any of the following:

1. Cause physical injury to anyone by means of a deadly weapon or dangerous instrument or cause death or serious physical injury to anyone
2. Cause physical injury to anyone except as provided in paragraph 1 of this subsection.
3. Cause damage to property.
4. Engage in other conduct constituting an offense.
5. Accuse anyone of a crime or bring criminal charges against anyone.
6. Expose a secret or an asserted fact, whether true or false, tending to subject anyone to hatred, contempt or ridicule or to impair the person's credit or business.
7. Take or withhold action as a public servant or cause a public servant to take or withhold action.
8. Cause anyone to part with any property...

C. Theft by extortion as defined in subsection A, paragraph 1 is a class 2 felony. Otherwise, theft by extortion is a class 4 felony.

**Crime Involving Moral Turpitude (CMT):** Counsel should assume that immigration judges will hold that a conviction under § 13-1804 constitutes a crime involving moral turpitude. *See, e.g., Matter of GT*, 4 I&N Dec. 446 (BIA 1951) (sending threatening letters with intention to extort is a CMT). However, immigration attorneys at least may have good arguments that some subsections are not CMTs. Extortion is defined in Black's Law Dictionary, as "the act or practice of obtaining something or compelling some action by *illegal* means, as by force or coercion" (7th Ed) (emphasis added). Sections A5, A6, and A7 do not necessarily involve "illegal means"; however, an immigration judge may still conclude that such conduct is a CMT as "inherently base, vile, or depraved." *Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988).

**Aggravated Felony: Theft.** Counsel should assume conservatively that theft by extortion will be held to constitute a taking without consent, and therefore may be an aggravated felony as theft if a sentence of a year or more is imposed. See discussion of Theft, above. To prevent this, counsel should leave the record of conviction vague between theft of property and services, or designate services. Theft is defined as "a taking of *property* or an exercise of control over property *without consent* with the criminal intent to deprive the owner or rights and benefits of ownership, even if such deprivation is less than total or permanent." *U.S. v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002) (emphasis added).

**Crime of violence.** The offense also may be an aggravated felony as a crime of violence if a sentence of at least a year is imposed. A "crime of violence" involves the use, attempted use, or threatened use of physical force against the person or property of another. 18 U.S.C. § 16(a). Counsel should assume that a conviction under A1, A2, or perhaps A3, or where the record shows use or threat of force, is likely to be an aggravated felony if a sentence of a year or more is imposed

#### **44. Shoplifting, ARS § 13-1805**

A. A person commits shoplifting if, while in an establishment in which merchandise is displayed for sale, the person knowingly obtains such goods of another with the intent to deprive that person of such goods by:

1. Removing any of the goods from the immediate display or from any other place within the establishment without paying the purchase price; or
2. Charging the purchase price of the goods to a fictitious person or any person without that person's authority; or
3. Paying less than the purchase price of the goods by some trick or artifice such as altering, removing, substituting or otherwise disfiguring any label, price tag or marking; or
4. Transferring the goods from one container to another; or
5. Concealment.

B. A person is presumed to have the necessary culpable mental state pursuant to subsection A of this section if the person does either of the following:

1. Knowingly conceals on himself or another person unpurchased merchandise of any mercantile establishment while within the mercantile establishment.
2. Uses an artifice, instrument, container, device or other article to facilitate the shoplifting.

Shoplifting is a class 5 felony if the value was \$2,000 or more, if undertaken during a "continuing criminal episode," or if done to assist a criminal street gang or syndicate. Shoplifting is a class 6 felony if the value was \$1000 or more but less than \$2000, and a class 1 misdemeanor if property is less than

\$1000, except for a firearm. Certain priors can make it a class 4 felony.

**Summary:** Theft is a better means of avoiding an aggravated felony with a year's sentence.

**Crime Involving Moral Turpitude (CMT):** Shoplifting is a CMT when it includes as an element intent to steal or deprive *permanently*. An IJ will likely find that result here. A plea to theft under ARS 13-1802 is a safer plea. See discussion above.

If an alternative plea is not available, Immigration counsel should argue that the statute is divisible because it does not require intent to permanently as opposed to temporarily deprive. The Board of Immigration Appeals has held in an unpublished decision that shoplifting under ARS 13-1805 is categorically a CMT. Javier O. Dominguez-Parra, A090-109-290 (BIA Jan. 15, 2015). The Board looked to the definition of "deprive" and found that the alternative to a permanent deprivation, an erosion of value, ultimately constitutes a permanent loss. The Board held that "erosion in and of itself results in a permanent loss to the victim of the crime, irrespective of how the state may couch the distinction between "temporary" and "permanent," and the erosion of the substantial value indicates that the unlawful taking or attempted taking presumptively included an intent to permanently deprive."

This unpublished decision is subject to challenge as the full language of the definition of deprive also includes loss of use or enjoyment, which was not addressed by the BIA in that case. The Board in *Dominguez-Parra* also cites to *Matter of Jurado*, 24 I & N Dec. 29, (BIA 2006), which held that a court may presume an intent to permanently deprive by the nature of the offense. Arizona Judges continue to rely on *Matter of Jurado* to presume an intent to permanently deprive, and therefore hold a conviction under ARS §13-1805 a CMT. Immigration counsel should vigorously argue that *Matter of Jurado* was wrongly decided and is incompatible with recent Supreme Court jurisprudence, including *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). While Immigration Judges regularly hold that shoplifting is a CMT, some have recently held it is not. The issue is also before the Board of Immigration Appeals and the Ninth Circuit. Immigration counsel will therefore want to be careful to preserve and litigate the issue, as case law may soon change.

Immigration counsel can also make the difficult argument that the statute is not categorically a CMT, because a person might have had a momentary intent to deprive but then change his or her mind, which would not be a CMT. In *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1103 (9th Cir. 2011), the Ninth Circuit held that a person who enters a store with an intent to commit theft and then changes his mind and leaves has not committed a CMT. *Id.* at 1109 ("To harbor an inchoate intent to commit a crime, never acted upon, simply does not 'shock society's conscience'"). Both A4 and A5 involve situations in which a person may initially manifest an intent to shoplift by transferring merchandise from one container to another or concealing merchandise before abandoning the plan and leaving the store without committing the necessary "taking" for a CMT. See *Sulavka v. State*, 223 Ariz. 208, 212, 221 P.3d 1022, 1026 (Ct. App. 2009) (the act of removing an item from the shelf and concealing it, without more, is sufficient for a shoplifting conviction). While Arizona shoplifting requires a more substantial step towards theft than the statute in *Hernandez-Cruz*, defense counsel should leave open the option of a plea to A4 or A5 in order to allow immigration counsel to argue that the offense is not a CMT.

Note that a *first* moral turpitude offense that is a misdemeanor cannot cause deportability or inadmissibility because it has a maximum sentence of only six months and therefore fits the petty offense exception. See Note: Crimes Involving Moral Turpitude.

**Aggravated Felony:** Shoplifting will likely be considered an aggravated felony if a sentence to imprisonment of 365 days or more is imposed. 8 USC § 1101(a)(43)(G). Counsel should avoid a

sentence of 365 days or more. Time imposed under §13-1805(I) as a recidivist sentence enhancement will be included in this calculation. *U.S. v. Rodriguez*, 128 S.Ct. 1783 (2008) (overruling *U.S. v. Corona-Sanchez*, 291 F.3d 1201, 1210 (9th Cir. 2002) (en banc) to find that recidivist sentence enhancements are given effect). Shoplifting is an aggravated felony “theft” offense because it involves “a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent.” *Corona-Sanchez* at 1205.

Immigration counsel can argue that a shoplifting conviction does not necessarily involve a “taking” for aggravated felony purposes since transferring merchandise from one container to another or concealing merchandise would not require the defendant to actually leave the store with the merchandise. See CMT; *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1103 (9th Cir. 2011). However, the argument that shoplifting is not an aggravated felony may not be as strong as for CMTs since a conviction under A4 or A5 could constitute a “substantial step” such that the offense could be charged as “attempted theft” under 8 USC § 1101(a)(43)(U); *Ngaeth v. Mukasey*, 545 F.3d 796, 802 (9th Cir. 2008) (entry of a locked vehicle with an underlying intent to commit theft constitutes a “substantial step” for purposes of an aggravated felony for attempted theft).

#### **45. Issuing a Bad Check, ARS § 13-1807**

A. A person commits issuing a bad check if the person issues or passes a check knowing that the person does not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check as well as all other checks outstanding at the time of issuance.

B. Any of the following is a defense to prosecution under this section: 1. The payee or holder knows or has been expressly notified before the drawing of the check or has reason to believe that the drawer did not have on deposit or to the drawer's credit with the drawee sufficient funds to ensure payment on its presentation. 2. The check is postdated and sufficient funds are on deposit with the drawee on such later date for the payment in full of the check. 3. Insufficiency of funds results from an adjustment to the person's account by the credit institution without notice to the person...

D. Except as provided in subsection E of this section, issuing a bad check is a class 1 misdemeanor.

E. Issuing a bad check in an amount of five thousand dollars or more is a class 6 felony if the person fails to pay the full amount of the check, including accrued interest at the rate of twelve per cent per year and any other applicable fees pursuant to this chapter, within sixty days after receiving notice pursuant to section 13-1808.

**Summary.** While the law is not clear, this is a possibly safe plea to avoid moral turpitude and the aggravated felony fraud.

**Crime Involving Moral Turpitude:** Possibly divisible; counsel should control record of conviction. Issuing bad checks is a CMT if intent to defraud is an essential element of the crime, either by specific language or cases interpreting it. *See, e.g., Planes v. Holder*, 652 F.3d 991, 998 (9th Cir. 2011); *Burr v. INS*, 350 F.2d 87 (9th Cir. 1965). It is not a CMT if such intent is lacking. *See, e.g., Matter of Balao*, 20 I&N Dec. 440 (BIA 1992). ARS § 13-1807 requires merely that the person act “knowing that the person does not have sufficient funds.” While Arizona courts have not spoken on the issue of whether proof of fraudulent intent is necessary to sustain a conviction, it appears that it is not. For example, a person could be found guilty who wrote a non-postdated bad check but intended to place sufficient money in the account by the time the check cleared. However, if the record of conviction established fraudulent intent, it is possible that a court would consider that as an element of the offense, so counsel should keep the record clear of this. While defense counsel should be careful to protect the record, immigration counsel may argue that the statute is not divisible under *Descamps v. U.S.*, 133 S. Ct.

(9th Cir. 2013), such that the court may not consider the record of conviction. *See also Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016), *See* “Divisible Statutes: Record of Conviction,” *supra*.

**Aggravated Felony as Fraud or Deceit:** Possibly divisible. If §13-1807 is considered to have fraud *or* deceit as an element, it will be an aggravated felony regardless of the sentence imposed if the “loss to the victim or victims exceeds \$10,000.” 8 USC § 1101(a)(43)(M) and (U). This is true regardless of whether the amount of loss appears in the record of conviction. *See Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), *see also Fuentes v. Lynch*, 788 f.3d 1177 (9th Cir. 2015). ARS § 13-1807 requires that the defendant pass a check “knowing” that he lacks sufficient funds. Again, immigration counsel will point out that intent to deceive is not an element, and the statute could be violated by a person who intended to place funds in the account immediately. However, a more secure plea can be obtained based on the difference between a crime of deceit and the crime of theft, which is a taking without consent. *See Matter of Garcia-Madruga*, 24I&N Dec. 436 (BIA 2008). As long as a sentence of a year or more will not be imposed, where there is a loss exceeding \$10,000 a more secure plea would be to a straight theft offense. (While a sentence of a year or more will make a conviction of theft an aggravated felony, the fact that the loss to the victim/s exceeded \$10,000 will not.) A plea to ARS § 13-1802 should avoid an aggravated felony even with a showing of a loss to the victim/s of over \$10,000, as long as the record does not describe fraud or deceit and section A3 (theft by material misrepresentation) is not specifically designated. Regarding proof of \$10,000 loss, see Note: Fraud.

#### **46 Theft of means of transportation, ARS §13-1814**

A. A person commits theft of means of transportation if, without lawful authority, the person knowingly does one of the following:

1. Controls another person's means of transportation with the intent to permanently deprive the person of the means of transportation.
2. Converts for an unauthorized term or use another person's means of transportation that is entrusted to or placed in the defendant's possession for a limited, authorized term or use.
3. Obtains another person's means of transportation by means of any material misrepresentation with intent to permanently deprive the person of the means of transportation.
4. Comes into control of another person's means of transportation that is lost or misdelivered under circumstances providing means of inquiry as to the true owner and appropriates the means of transportation to the person's own or another's use without reasonable efforts to notify the true owner.
5. Controls another person's means of transportation knowing or having reason to know that the property is stolen.

**Summary:** The statute is not categorically removable, and may be divisible; plead to the statute as a whole or to A2 or A4.

**Aggravated Felony.** Maybe. Avoid an aggravated felony by avoiding a sentence imposed of a year or more. Even if a sentence of a year or more is imposed, a conviction under ARS §13-1804 does not constitute an aggravated felony if the record of conviction does not eliminate the possibility that the conviction was for A2 or A4, with no indication of an intent to deprive the owner. In *Nevarez-Martinez v. INS*, 326 F.3d 1053 (9th Cir. 2003), the Court found that § 13-1814 is divisible because sections A2, A4 and A5 contain no element of deprivation and, thus, do not meet the generic definition of theft. Sections A1 and A3 contain an element of intent to deprive and as such are aggravated felonies. If faced with a record of conviction that specified A1 or A3, immigration counsel may consider making an argument that the subsections list alternative means, not alternative elements. *See e.g. Descamps v. U.S.*, 133 S. Ct. (9th Cir. 2013), *See also Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016). *See* “Divisible Statutes: Record of Conviction.”

Counsel should avoid a plea to A5, as receiving stolen property under the California statute has been held to be an aggravated felony under 8 U.S.C. § 1101(a)(43)(G). *Matter of Cardiel*, 25 I&N Dec. 12 (BIA 2009); *Verdugo-Gonzalez v. Holder*, 581 F.3d 1059, 1062 (9th Cir 2009). However, immigration counsel may have an argument that A5 is broader than the California statute since A5 includes not only “knowing” but “having reason to know” that the property was stolen. Defense counsel should avoid any reference to the client “knowing” that the property was stolen or else leave the language of the plea vague.

**CMT.** A2 and A4 should not categorically be held to be CMT’s because they do not involve intent to permanently deprive the owner of the property. *See e.g. Matter of D*, 1 I&N Dec. 143 (BIA 1941) (driving an automobile without the consent of the owner is not a crime involving moral turpitude); *Matter of P*, 2 I&N Dec. 887 (BIA 1947); *Matter of M*, 2 I&N Dec. 686 (BIA 1946) (conviction for joyriding does not involve moral turpitude because defendant did not intend to effect a permanent taking). In practice, however, many immigration judges may find these to be CMTs.

A1 and A3 are CMTs because each contains the element of intent to permanently deprive. A5 may be held a CMT as akin to receipt of stolen property. *Wadman v. INS*, 329 F.2d 812 (9th Cir. 1964). However, receipt of stolen property is not a CMT unless it involved a permanent taking. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). Defense counsel should strive to indicate on the record that there was no intent to deprive, or that the taking was only temporary. If faced with a record of conviction that specified A1 or A3, immigration counsel may consider making an argument that the subsections list alternative means, not alternative elements. *See e.g. Descamps v. U.S.*, 133 S. Ct. (9th Cir. 2013), *See also Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016). *See* “Divisible Statutes: Record of Conviction.”

## **47 Robbery Offenses**

### **Robbery, ARS § 13-1902.**

A. A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.

**Crime Involving Moral Turpitude (CMT):** Yes.

**Aggravated Felony:** If a sentence of a year or more is imposed, robbery will be an aggravated felony as a theft crime or as a crime of violence. *State v. Hudson*, 152 Ariz.121, 730 P2d 830 (1986) (finding that robbery is, by definition, a crime involving violence).

### **Aggravated robbery, ARS § 13-1903.**

See Robbery, § 13-1902.

### **Armed robbery, ARS § 13-1904.**

A. A person commits armed robbery if, in the course of committing robbery as defined in section 13-1902, such person or an accomplice:

1. Is armed with a deadly weapon or a simulated deadly weapon; or
2. Uses or threatens to use a deadly weapon or dangerous instrument or a simulated deadly weapon.

**Crime Involving Moral Turpitude (CMT):** Yes.

**Aggravated Felony:** If sentenced to a year or more, aggravated robbery will be an aggravated felony as a crime of violence or a theft crime. See Robbery, § 13-1902. *United States v. Taylor*, 529 F.3d 1232, 1237 (9th Cir. 2008) (armed robbery under Arizona law involves the threat or use of force and is therefore a crime of violence).

**Firearms Ground:** Under current case law, armed robbery should not be a deportable offense under 8 U.S.C. 1227(a)(2)(C) as a firearms offense, but defense counsel should eliminate reference to a firearm in the record of conviction to be safe. Immigration counsel will argue that use of a firearm is alternative means of violating the statute, not an element, and as such the statute is not divisible under *Descamps v. U.S.*, 133 S. Ct. 2276 (U.S. 2013). See “Aggravated Felony” under ARS § 13-1002, *supra*. Even if the statute were found divisible, despite a firearm being an alternative means of satisfying the deadly weapon element, the statute is overbroad because it lacks an antique firearms exception. In *U.S. v. Aguilar-Rios*, 769 F.3d 626 (9th Cir. 2014), the Ninth Circuit held that “any conviction under a state firearms statute lacking an exception for antique firearms is not a categorical match for the federal firearm ground of removal.” *Id.* At 634. The Arizona State Attorney General has confirmed that offenses involving antique firearms are equally subject to prosecution. Ariz. Op. Att’y Gen. No. I14-009 (Jan. 2, 2015). In case there is a change in law, however, defense counsel should strive to eliminate a “firearm” from the record of conviction.

#### **48. Forgery, A.R.S. § 13-2002**

With intent to defraud, the person:

1. Falsely makes, completes or alters a written instrument; or
2. Knowingly possesses a forged instrument; or
3. Offers or presents, whether accepted or not, a forged instrument or one that contains false information.

**Crime Involving Moral Turpitude:** Yes. *Espino-Castillo v. Holder*, 770 F.3d 861 (9th Cir. 2014).

While it is unlikely to succeed before the Immigration Judge or the BIA, immigration counsel can make an argument that the statute is not categorically a CMT, because Arizona’s definition of “intent to defraud” does not match the generic definition of “intent to defraud” as defined by the Ninth Circuit Court of Appeals. For statutes where “intent to defraud” is not an element, the Ninth Circuit has found fraud inherent in the offense where there is 1) deceit, 2) to obtain something of value, and 3) detriment or injury to another. See *e.g. Blanco v. Mukasey*, 518 F.3d 714, 718 (9th Cir. 2008); *Tijani v. Holder*, 628 F.3d 1071, 1083 (9th Cir. 2010). It is not clear that Arizona’s definition of “intent to defraud” requires obtaining something of value or causing detriment or injury to another. Where facts support such an argument, immigration counsel can attempt to establish a “realistic probability” that the statute would be applied to non-turpitudinous conduct by pointing to the case at issue. See *Duenas-Alvarez v. Holder*, 127 S. Ct. 815, 822 (2007) (“To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case.”) *but see Espino-Castillo v. Holder, supra*, at 864-865 (declining to look to the circumstances of the petitioner’s conviction to determine if the statute is applied to non-turpitudinous conduct, because the element of an “intent to defraud” rendered the statute a categorical CMT).

**Aggravated felony as Forgery:** Counsel should conservatively assume that the offense will be held to constitute forgery, and therefore be an aggravated felony if a sentence of at least a year is imposed. 8 USC §1101(a)(43)(R). However, immigration counsel have strong arguments that the statute is divisible since a conviction can involve a real document that contains false information, such as a validly-issued driver’s license with a false name or date of birth. See *Vizcarra-Ayala v. Mukasey*, 514

F.3d 870 (9th Cir. 2008) (Cal. Penal Code § 475(c) encompasses conduct involving real, unaltered documents and thus is not categorically an offense "relating to forgery" under 8 U.S.C. § 1101(a)(43)(R)); *State of Arizona v. Thompson*, 194 Ariz. 295 (1999) (MVD employee was convicted for including false information on an otherwise genuine document).

**Aggravated Felony as Fraud or Deceit:** Yes, if it involved a loss to the victim or victims of more than \$10,000, regardless of whether the amount of loss appears in the record of conviction. *See* 8 USC §1101(a)(43)(M); *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), *see also Fuentes v. Lynch*, 788 f.3d 1177 (9th Cir. 2015). Regarding proof of \$10,000 loss, see Note: Fraud.

**49. Possession of forgery device, A.R.S. § 13-2003A.**

A. A person commits criminal possession of a forgery device if the person either:

1. Makes or possesses with knowledge of its character and with intent to commit fraud any plate, die, or other device.... specifically designed or adapted for use in forging written instruments, or
2. Makes or possesses any device, apparatus ... adaptable for use in forging written instruments with intent to use it or to aid or permit another to use it for purposes of forgery.

**Crime Involving Moral Turpitude (CMT):** Both sections will be found to be CMTs because both involve fraud. *See Espino-Castillo v. Holder*, 770 F.3d 861 (9th Cir. 2014).

While it is unlikely to succeed before the Immigration Judge, immigration counsel can make the argument that the statute is not categorically a CMT, because Arizona's definition of "intent to defraud" does not match the generic definition of "intent to defraud" as defined by the Ninth Circuit Court of Appeals. *See* discussion under "crime involving moral turpitude" at A.R.S. § 13-2002, *supra*.

**Aggravated Felony as Forgery.** To avoid an aggravated felony, avoid a sentence imposed of a year or more. Assume both will be deemed "an offense relating to forgery" and be an aggravated felony if a sentence of a year or more is imposed. *See* 8 USC §1101(a)(43)(R). However, immigration counsel can argue that this is not categorically an aggravated felony since the device can be used to create documents that do not fall within the generic definition of a "forged document." *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870 (9th Cir. 2008).

**Aggravated Felony as Fraud.** Yes, if the loss to the victim or victims exceeds \$10,000 , regardless of whether the amount of loss appears in the record of conviction. *See* 8 USC §1101(a)(43)(M); *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), *see also Fuentes v. Lynch*, 788 f.3d 1177 (9th Cir. 2015). Regarding proving a loss exceeding \$10,000, see Note: Fraud.

**50. Criminal simulation, ARS § 13-2004.**

A. A person commits criminal simulation if, with intent to defraud, such person makes, alters, or presents or offers, whether accepted or not, any object so that it appears to have an antiquity, rarity, source, authorship or value that it does not in fact possess.

B. Criminal simulation is a class 6 felony.

**Crime Involving Moral Turpitude (CMT):** Yes, because it requires an intent to defraud. *See Espino-Castillo v. Holder*, 770 F.3d 861 (9th Cir. 2014). Immigration counsel can make the difficult argument that Arizona's definition of "intent to defraud" does not match the federal definition of "intent to defraud." *See* discussion under "crime involving moral turpitude" at A.R.S. § 13-2002, *supra*.

**Aggravated Felony as Fraud or Deceit.** Yes, if the loss to the victim or victims exceeds \$10,000, regardless of whether the amount of loss appears in the record of conviction. *See* 8 USC §1101(a)(43)(M); *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), *see also Fuentes v. Lynch*, 788 f.3d 1177 (9th Cir. 2015). Regarding proving a loss exceeding \$10,000, see Note: Fraud.

**51. Criminal impersonation, ARS § 13-2006**

A. A person commits criminal impersonation by:

1. Assuming a false identity with the intent to defraud another; or
2. Pretending to be a representative of some person or organization with the intent to defraud; or
3. Pretending to be, or assuming a false identity of, an employee or a representative of some person or organization with the intent to induce another person to provide or allow access to property. This paragraph does not apply to peace officers in the performance of their duties.

B. Criminal impersonation is a class 6 felony.

**Crime Involving Moral Turpitude (CMT):** May be divisible. A1 and A2 are CMTs due to the fraud element. *See e.g. De Martinez v. Holder*, 770 F.3d 823 (9th Cir. 2014). A3 ought not to be held a CMT because falsely identifying oneself with no intent to obtain something of value has been held not to constitute a CMT by the Ninth Circuit. *See Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2008). Since providing or allowing access to property is not necessarily something of monetary value or otherwise “tangible,” a conviction under A3 should not be considered a CMT. However, in practice, many immigration judges will still find this to be a CMT.

**Aggravated Felony:** Yes, if the loss to the victim or victims exceeds \$10,000, regardless of whether the amount of loss appears in the record of conviction. *See* 8 USC §1101(a)(43)(M); *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), *see also Fuentes v. Lynch*, 788 f.3d 1177 (9th Cir. 2015). Regarding proving a loss exceeding \$10,000, see Note: Fraud.

**52. Taking Identity of Another Person or Entity, ARS 13-2008**

A. A person commits taking the identity of another person or entity if the person knowingly takes, purchases, manufactures, records, possesses or uses any personal identifying information or entity identifying information of another person or entity, including a real or fictitious person or entity, without the consent of that other person or entity, with the intent to obtain or use the other person's or entity's identity for any unlawful purpose or to cause loss to a person or entity whether or not the person or entity actually suffers any economic loss as a result of the offense...

E. Taking the identity of another person or entity is a class 4 felony.

**Summary.** In terms of aggravated felony designations, the statute is not categorically removable because it covers an extremely broad range of conduct. It doesn't necessarily involve writing (required for the aggravated felony forgery), property (required for theft), or money (required for fraud). It seems to include offenses such as giving a false name to the police to avoid a warrant; using someone else's social security number to get a job; person using a fake ID to prove he's 25 to rent a car. (Use of fake ID for access to alcohol is specifically excluded by recent amendment; ARS § 13-2008(D)). If a person pleads to the language of the statute, the government will not be able to establish sufficient facts for an aggravated felony.

**Crime Involving Moral Turpitude (CMT):** Divisible. Using a *fictitious* person's name and a non-existent social security number solely for the purpose of getting a job is not a CMT. *Ibarra-*

*Hernandez v. Holder*, 770 F.3d 1280, 1282 (9th Cir. 2014), *see also Linares-Gonzalez v. Lynch*, No. 12-71142, 2016 WL 1084735, at \*8, FN 10 (9th Cir. Mar. 21, 2016)

Using a *real* person's social security number without their knowledge or consent, however, is a CMT even if for the sole purpose of securing employment. *Id.* Plead to taking the ID of a fictitious person or, if not possible, leave the record of conviction vague and open to the possibility of a fictitious person.

**Aggravated Felony:** To prevent an aggravated felony conviction as theft, obtain a sentence imposed of less than a year. If there was a loss to the victim or victims of \$10,000 or more, this will likely be removable as an aggravated felony for fraud, regardless of whether the amount of loss appears in the record of conviction. *See* 8 USC §1101(a)(43)(M); *Nijhawan v. Holder*, 129 S. [Ct. 2294 (2009), *see also Fuentes v. Lynch*, 788 f.3d 1177 (9th Cir. 2015). Regarding proving a loss exceeding \$10,000, *see* Note: Fraud. However, the Ninth Circuit's holding that using a fictitious person's name and social security number, solely for the purpose of employment and without the intent to cause loss to anyone, does not involve moral turpitude, implies that such conduct does not constitute a fraud offense. *Ibarra-Hernandez v. Holder*, 770 F.3d 1280, 1282 (9th Cir. 2014). As such, leaving the record of conviction vague or specifying a fictitious person may give immigration counsel an argument that the offense does not involve fraud.

*Theft:* A theft offense is an aggravated felony if a one-year sentence is imposed. 8 USC §1101(a)(43)(G). A sufficiently vague record of conviction can prevent a finding that the offense of conviction constituted "theft" for this purpose. The information itself need not be stolen, and the unlawful purpose of the crime could be a non-theft offense. *See* discussion in "crimes involving moral turpitude" above. For example, a person might use identifying information to which he had lawful access, but without the person's consent, in order to wrongly obtain someone else's services (theft of services is not "theft" as an aggravated felony; *see* discussion at ARS §13-1802) or for some other criminal purpose not involving theft. In that case even a sentence imposed of a year or more would not make the conviction an aggravated felony.

*Fraud or Deceit if the Loss to the Victim Exceeds \$10,000:* An offense involving fraud or deceit is an aggravated felony if there is a loss to the victim of more than \$10,000, regardless of whether the amount of loss appears in the record of conviction. *See* 8 USC §1101(a)(43)(M); *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), *see also Fuentes v. Lynch*, 788 f.3d 1177 (9th Cir. 2015). Regarding proof of \$10,000 loss to the victim, *see* Note; Fraud. Where loss to the victim/s exceeds \$10,000, counsel could attempt to avoid a plea to this offense from being found a crime of "deceit" by keeping the record of conviction clear of evidence that the "criminal purpose" for which the information was to be used involved fraud or deceit. However, DHS still might charge that deceit is inherent in the commission of the offense. *See e.g. Tijani v. Holder*, 628 F.3d 1071, 1075 (9th Cir. 2010) (even though statute does not have an element of an intent to defraud, fraud is implicit in the nature of the offense). A safer plea would be to theft, without designating section A3, and with a sentence of less than a year.

## **52. Racketeering & Illegal control of an enterprise, ARS §§ 13-2301(D)(4), 2312.**

ARS § 13-2312A: A person commits illegal control of an enterprise if such person, through racketeering or its proceeds, acquires or maintains, by investment or otherwise, control of any enterprise.

Racketeering is defined under ARS § 2301(D)(4) as "any act, including any preparatory or completed offense, that is chargeable or indictable under the laws of the state or county in which the act occurred and, if the act occurred in a state or country other than this state, that would be chargeable or indictable under the laws of this state if the act had occurred in this state, and that would be punishable by imprisonment for more than one year under the laws of this state and, if the act occurred in a state or

country other than this state, under the laws of the state or country in which the act occurred, regardless of whether the act is charged or indicted, and the act involves: (a) terrorism...that results or is intended to result in a risk of serious physical injury or death;  
(b) [list of thirty acts “if committed for financial gain.”]

**Summary:** Divisible as an aggravated felony. With careful control of the record of conviction, it is possible to avoid an aggravated felony. Note that it may be an aggravated felony even without a sentence imposed of a year.

**CIMT:** A conviction for racketeering will likely be a CMT if the underlying conduct of the racketeering enterprise is a CMT.

**Aggravated Felony:** Divisible. An offense “relating to racketeer influenced corrupt organizations,” as described in 18 USC § 1962, is an aggravated felony if “a sentence of one year imprisonment or more *may be* imposed.” INA § 101(a)(43)(j)(emphasis added). Racketeering, as defined at ARS § 2301(D)(4)(b), is divisible because it includes at least two offenses not explicitly listed in the federal racketeering statute: “intentional or reckless false statements or publications concerning land for sale or lease or sale of subdivided lands or sale and mortgaging of unsubdivided lands” at (D)(4)(b)(xvi), and “making [o]bscene or indecent telephone communications to minors for commercial purposes” at (D)(4)(b)(xxvii). *Murillo-Prado v. Holder*, 735 F.3d 1152, 1157 (9th Cir. 2013). Convictions under the other subdivisions, however, will be an aggravated felony. Note that a sentence of a year is not required for a racketeering offense to constitute an aggravated felony. As such, a plea to 364 days will not save conviction under this statute from constituting an aggravated felony. The only way to avoid an aggravated felony is to make explicit, or leave open the possibility, that the plea is to racketeering as defined at (D)(4)(b)(xvi) or (D)(4)(b)(xxvii).

Note that the Ninth Circuit specifically held that the statute is divisible and that courts may proceed to the modified categorical approach. *Id.* at 1157. In practice, charges under this statute often involve multiple, long and detailed counts. If your client pleads to a count in the original indictment, the courts will likely read the plea or sentencing document together with the language of the count in the indictment, unless it is clear from the record that your client is pleading to a new and different charge, or to the count “as amended.” *See Note: “Divisible Statutes: Record of Conviction.”*

### **53. Smuggling, ARS § 13-2319**

A. It is unlawful for a person to intentionally engage in the smuggling of human beings for profit or commercial purpose.

B. A violation of this section is a class 4 felony.

C. Notwithstanding subsection B, a violation of this section is a class 2 felony if the human being smuggled is under eighteen years of age and not accompanied by a family member over the age of eighteen...

2. "Smuggling of human beings" means the transportation or procurement of transportation by a person or an entity that knows or has reason to know that the person or persons transported or to be transported are not United States citizens, permanent resident aliens or persons otherwise lawfully in this state.

**Summary:** This statute has been held unconstitutional and preempted by federal law. *United States v. State of Arizona*, 119 F. Supp. 3d 955 (D. Ariz. 2014). Immigration counsel should advise clients previously convicted under this statute to seek post-conviction relief to have the conviction vacated. Immigration counsel can attempt to argue that conviction under a statute now deemed unconstitutional should not support a removal charge. In the alternative, see advice below.

**Crime Involving Moral Turpitude (CMT):** Before the statute was ruled unconstitutional, individuals were convicted under it for conspiracy to smuggle themselves. Immigration attorneys can argue that smuggling one's self is not a CMT. Since conspiracy to commit an offense constitutes a CMT if the substantive offense constitutes a CMT, even conspiracy to commit § 13-2319 will likely be a CMT. See *Matter of Vo*, 25 I&N Dec. 426 (BIA 2011); 9 U.S. Dep't of State, (FAM) § 40.21(a), n.2.4(a)(4).

**Aggravated Felony:** Yes, as a smuggling offense pursuant to 8 U.S.C. § 1101(a)(43)(N). However, there is an exception if the person smuggled is a spouse, child, or parent of the smuggler. Immigration counsel may be able to argue that the statute is overbroad because the mens rea for 13-2319 is negligence while the mens rea for 8 U.S.C. § 1101(a)(43)(N) requires recklessness or higher. Additionally, 8 U.S.C. § 1101(a)(43)(N) requires that the smuggling be in furtherance of the alien's unlawful presence in the U.S., while 13-2319 does not contain such a requirement.

**Other - Smuggling:** Smuggling is a ground of removability for all non-citizens. If a non-citizen has not been lawfully admitted to the U.S., smuggling committed "at any time" will make her inadmissible. 8 U.S.C. § 1182(a)(6)(E). If the non-citizen has been lawfully admitted, she will be deportable if the smuggling was committed "prior to the date of entry, at the time of any entry, or within five years of the date of any entry." 8 U.S.C. § 1227(a)(1)(E). Therefore, smuggling that was committed by a lawfully-admitted person over five years ago may not be removable as long as the person does not leave the country. An exception may also exist for a lawfully-admitted person if the individual smuggled is the spouse, parent or child of the smuggler.

Smuggling does not require a conviction but only need be proven in immigration court by clear and convincing evidence that a person "knowingly has encouraged, induced, assisted, abetted, or aided any other alien to try to enter" the U.S. Because it requires the act to be committed against "any other alien," it should arguably not apply for being convicted of a conspiracy to smuggle oneself.

#### **54. Compounding, ARS § 13-2405**

A. A person commits compounding if such person knowingly accepts or agrees to accept any pecuniary benefit as consideration for:

1. Refraining from seeking prosecution of an offense; or
2. Refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to the offense.

B. Subsection A shall apply in all cases except those which are compromised by leave of court as provided by law.

C. Compounding is a class 6 felony if the crime compounded is a felony. If the crime compounded is not a felony, compounding is a class 3 misdemeanor.

**Summary:** This may be a good alternative to a controlled substance offense, particularly for defendants who are involved in a drug trafficking scheme but must avoid a controlled substance conviction for immigration purposes. Immigration counsel can also make the argument that it is not a CMT.

**Crime Involving Moral Turpitude (CMT):** While this may be held a CMT, immigration attorneys have strong arguments against this. The elements of this offense most closely match the elements of misprision or accessory after the fact, with the added element of a pecuniary benefit. In *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc) (overturned on other grounds), the Ninth Circuit found that a conviction for accessory after the fact was not categorically a crime involving moral turpitude since it could include such conduct as a person providing food and shelter to a family member who has committed a crime. While ICE may argue that the element of a "pecuniary benefit"

turns the offense into a CMT, there is not necessarily any legal authority for this position. There is no required intent to do harm, and a person might refrain from reporting a crime not only for the pecuniary gain, but out of desire to help a relative, or fear of reprisal from the perpetrator.

**Aggravated Felony:** It should not be, although counsel should attempt to avoid a sentence of 365 or more on any single count because of the danger that the government would assert that this constitutes obstruction of justice. A conviction relating to obstruction of justice is an aggravated felony if a sentence of one year or more is imposed. 8 U.S.C. § 1101(a)(43)(S). The BIA held that accessory after the fact under 18 USC § 3 (hiding and giving comfort to a person who committed a crime) is obstruction of justice. *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997). However, it held that Misprision of a felony under 18 USC § 4 (concealing that a crime was committed) is not obstruction of justice. *Matter of Espinoza*, 22 I&N Dec. 889 (BIA 1999). Compounding requires even less action than federal misprision, because it can be violated by merely refraining from reporting while misprision requires active concealment. The addition of pecuniary gain does not make the offense more closely related to obstruction. There also is no requirements of ongoing proceedings, which the Ninth Circuit has suggested might be required for an offense to constitute obstruction of justice. See *Valenzuela-Gallardo v. Lynch*, No. 12-72326, 2016 WL 1253877, at \*8 (9th Cir. Mar. 31, 2016), see also, analysis under “Aggravated Felony” at ARS 13-2510-12, *supra*. As always counsel should attempt to secure a sentence of 364 days or less to definitively avoid an aggravated felony.

**55. Tampering with a Public Record, ARS § 13-2407**

A. A person commits tampering with a public record if, with the intent to defraud or deceive, such person knowingly:

1. Makes or completes a written instrument, knowing that it has been falsely made, which purports to be a public record or true copy thereof or alters or makes a false entry in a written instrument which is a public record or a true copy of a public record; or
2. Presents or uses a written instrument which is or purports to be a public record or a copy of such public record, knowing that it has been falsely made, completed or altered or that a false entry has been made, with intent that it be taken as genuine; or
3. Records, registers or files or offers for recordation, registration or filing in a governmental office or agency a written statement which has been falsely made, completed or altered or in which a false entry has been made or which contains a false statement or false information; or
4. Destroys, mutilates, conceals, removes or otherwise impairs the availability of any public record; or
5. Refuses to deliver a public record in such person's possession upon proper request of a public servant entitled to receive such record for examination or other purposes.

B. In this section "public record" means all official books, papers, written instruments or records created, issued, received or kept by any governmental office or agency or required by law to be kept by others for the information of the government.

C. Tampering with a public record is a class 6 felony.

**Crime Involving Moral Turpitude (CMT):** Should not categorically be a CMT. An intent to deceive is not necessarily a CMT unless elements of fraud and materiality are present. *Hirsch v. INS*, 308 F.2d 562 (9th Cir. 1962); see also *Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2007). Counsel should plead to language of an intent to deceive, rather than to defraud. Immigration counsel may attempt to argue that defraud and deceive are alternative means of satisfying the mens rea element, not alternative elements, and that the statute is not divisible. See Note: Divisible Statute: Record of Conviction.

**Aggravated Felony – Fraud:** Yes, if the loss to the victim is more than \$10,000, regardless of whether the amount appears in the record of conviction. See *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), see also *Fuentes v. Lynch*, 788 f.3d 1177 (9th Cir. 2015). Regarding proof of \$10,000 loss to the victim,

*see* Note: Fraud. If the loss to the victim was over \$10,000 but the sentence would be less than a year, consider a plea to theft, without designating theft by misrepresentation.

**Aggravated Felony – Forgery:** A conviction relating to a document that has been “falsely made” in which there is a sentence of 365 days or longer may constitute an aggravated felony as forgery under 8 U.S.C. § 1101(a)(43)(R). *See Vizcarra-Ayala v. Mukasey*, 514 F.3d 870 (9th Cir. 2008). Counsel should plead to language that the person made a “false entry” rather than that the document was “falsely made,” and try to secure a sentence of 364 days or less.

**56. Securing the Proceeds of an Offense, ARS § 13-2408**

A. A person commits securing the proceeds of an offense if, with intent to assist another in profiting or benefiting from the commission of an offense, such person aids the person in securing the proceeds of the offense.

B. Securing the proceeds of an offense is a class 6 felony if the person assisted committed a felony. Securing the proceeds of an offense is a class 2 misdemeanor if the person assisted committed a misdemeanor.

**Crime Involving Moral Turpitude (CMT):** This may be a good alternative for immigration purposes. While there is no case law on point, the statute is extremely broad and could encompass conduct that is not necessarily a CMT, including accessory after the fact. *See Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc) (overturned on other grounds). Counsel should plead to the straight statutory language of the offense.

**Aggravated Felony:** No. This offense is an excellent alternative to offenses that may be considered drug trafficking offenses. A plea to securing the proceeds should avoid removal altogether under the controlled substance or aggravated felony drug trafficking grounds for removal. Note, however, that it does not escape a non-citizen being inadmissible under the “reason to believe” ground of inadmissibility at INA § 212 (a)(2)(C). No conviction is required. Thus, defense counsel should advise their client that, while this is an excellent plea that will avoid most immigration consequences, they should not travel outside of the United States, because they will be inadmissible when they attempt to re-enter. This means that they will either be denied entry, or subject to lengthy detention and removal proceedings, and in either case potentially lose any lawful permanent residence.

While it still should not be an aggravated felony, defense counsel should be more wary in cases involving monetary transactions in an amount of \$10,000 or more. If the record of conviction establishes a monetary transaction in the amount of \$10,000 or more, there is some risk that DHS could attempt to charge the offense as removable under INA § 101(a)(43)(D), as an offense described in 8 § USC 1957 “relating to engaging in monetary transactions in property derived from specific unlawful activity.” Immigration counsel would have a good argument that the statute is overbroad and not divisible, because it is missing the element of a “monetary transaction.” ARS § 13-2408 requires only that the defendant “aid” in securing the proceeds, which is arguably broader than a “monetary transaction.” To be safe, defense counsel should avoid reference to a monetary transaction in the record of conviction, or should specify an amount less than \$10,000. *See* Note: “Divisible Statutes: Record of Conviction,” *see also* discussion of circumstance specific approach for \$10,000 amount at Note: Fraud.

**57. Escape, ARS §§ 13-2502 – 13-2504**

**Escape in the third degree, § 13-2502**

A. A person commits escape in the third degree if, having been arrested for, charged with or found guilty of a misdemeanor or petty offense, such person knowingly escapes or attempts to escape from custody.

**Escape in the second degree, § 13-2503**

A. A person commits escape in the second degree by knowingly:

1. Escaping or attempting to escape from a juvenile secure care facility, a juvenile detention facility or an adult correctional facility; or
2. Escaping or attempting to escape from custody imposed as a result of having been arrested for, charged with or found guilty of a felony; or
3. Escaping or attempting to escape from the Arizona state hospital if the person was committed to the hospital for treatment pursuant to section 8-291.09, 13-502, 13-3994, 13-4507, 13-4512 or 31-226, title 36, chapter 37 or rule 11 of the Arizona rules of criminal procedure.

**Escape in the first degree, § 13-2504**

A. A person commits escape in the first degree by knowingly escaping or attempting to escape from custody or a juvenile secure care facility, juvenile detention facility or an adult correctional facility by:

1. Using or threatening the use of physical force against another person; or
2. Using or threatening to use a deadly weapon or dangerous instrument against another person.

**Crime Involving Moral Turpitude (CMT):** While §§ 13-2502 and 13-2503 are likely not CMT's, § 13-2504 is probably a CMT due to the use or threatened use of force. *See Matter of M*, 2 I&N Dec. 871 (BIA 1947) (conviction of breaking prison does not involve moral turpitude since it does not require the element of force or fraud); *Matter of Z*, 1 I&N Dec. 235 (BIA 1942) (prison breach does not involve moral turpitude since the offense did not require force or fraud as an essential element).

**Aggravated Felony:** Escape in the second degree could potentially be charged as an aggravated felony under 8 U.S.C. § 1101(a)(43)(S) as an offense relating to obstruction of justice for which the sentence imposed is one year or more. Escape in the first degree could be charged as obstruction of justice or under 8 U.S.C. § 1101(a)(43)(F) as a crime of violence for which the sentence imposed is one year or more.

*As obstruction of justice:* Unclear. The BIA may soon issue a decision clarifying and possibly changing the definition of obstruction of justice. If possible, obtain a sentence of 364 days or less.

The Ninth Circuit has held that escape from custody that occurs either before or after the initiation of judicial proceedings does not meet the definition of obstruction of justice. *Salazar-Luviano v. Mukasey*, 551 F.3d 857, 862-63 (9th Cir. 2008). Many convictions under this statute occur as a result of defendants who are sentenced to a work release program and fail to appear, which should not qualify as obstruction of justice since no pending judicial proceedings existed at the time of the offense. The BIA subsequently broadened the definition of obstruction of justice to include “an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice, irrespective of the existence of an ongoing criminal investigation or proceeding.” *Matter of Valenzuela-Gallardo*, 25 I&N Dec. 838 (BIA 2012). The Ninth Circuit, however, recently rejected this definition as unconstitutionally vague. *Valenzuela-Gallardo v. Lynch*, No. 12-72326, 2016 WL 1253877 (9th Cir. Mar. 31, 2016). The Court found the requirement of “specific intent to interfere with the process of justice” insufficient to narrow the range of conduct constituting an aggravated felony obstruction of justice. *Id.* The court indicated that requiring “ongoing proceedings” could sufficiently narrow the definition to avoid constitutional concerns with vagueness, but remanded to allow the BIA to formulate a new definition. *Id.* at 11.

*As a crime of violence:* Escape in the third or second degree would not meet the definition of a “crime of violence.” However, the element of “using or threatening to use” physical force, a deadly

weapon, or a dangerous instrument would make conviction for first degree Escape a “crime of violence” pursuant to 18 U.S.C. §16(a) if a sentence of one year or more is imposed. Counsel should try to plead to second or third degree Escape and/or secure a sentence of 364 days or less.

**58. Failure to Appear, ARS §13-2506-7**

**FTA in the first degree, §13-2507**, occurs when a person, having been required by law to appear in connection with any felony, knowingly fails to appear as required. **FTA in the second degree, ARS §13-2506**, occurs when a misdemeanor or petty offense is involved.

**Summary:** While §13-2506 is harmless, §13-2507 can be very dangerous. Plead to something else and take additional time on the underlying offense.

**Crime Involving Moral Turpitude (CMT):** Probably not a CMT.

**Aggravated Felony:** An offense is an aggravated felony if it involves (a) failure to appear for service of sentence if the underlying offense carries a possible sentence of five years or more, or (b) failure to appear before a court pursuant to a court order to answer to or dispose of a felony carrying a possible sentence of two years or more. 8 USC §§ 1101(a)(43)(Q), (T). Because § 13-2506 requires failure to appear for a misdemeanor or petty offense, it cannot be an aggravated felony. However, a conviction under § 13-2507 will be an aggravated felony if it satisfies either of the above grounds.

**59. Resisting Arrest, ARS § 13-2508**

A. A person commits resisting arrest by intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer, acting under color of such peace officer's official authority, from effecting an arrest by:

1. Using or threatening to use physical force against the peace officer or another; or
2. Using any other means creating a substantial risk of causing physical injury to the peace officer or another.
3. Engaging in passive resistance.

B. Resisting arrest under (A)(1) and (2) is a class 6 felony. Resisting arrest under (A)(3) is a class 1 misdemeanor.

Passive resistance means “a nonviolent physical act or failure to act that is intended to impede, hinder or delay the effecting of an arrest.” ARS 13-2508(C). Physical force is defined in ARS 13-105(28) as “force used upon or directed toward the body of another person and includes confinement, but does not include deadly physical force.”

**Summary:** Conviction under A3 should not be a CMT. With careful pleading, conviction under A1 and A2 may not constitute CMTs, although immigration judges would likely find it to be so. Obtain a sentence of 364 days or less to avoid an aggravated felony.

**Crime Involving Moral Turpitude:** Resisting arrest by engaging in passive resistance under (A)(3) should not be a CMT. Resisting arrest under (A)(1) and (A)(2) is probably not a CMT, although it is possible. This is akin to simple assault against a police officer, in that only the added factor that the victim is an officer would make it a CMT. Certainly it is a better alternative than aggravated assault against an officer under ARS §13-1204. If possible plead specifically to an offensive touching under §13-1203(A)(3).. Or, to prevent inadmissibility or deportability for a single moral turpitude conviction, plead to attempt or another ancillary offense with a lesser potential sentence.

A1. While there may be some confusion on this issue, the better view is that only *aggravated* assault against a police officer (involving, e.g., felonious intent, use of physical force or violence, serious bodily harm, or use of deadly weapon) has been held to involve moral turpitude. See discussions in *Matter of Logan*, 17 I&N Dec. 367 (BIA 1980); *Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988); *Matter of Short*, 20 I&N 136, 139 (BIA 1989); *Matter of B-*, 5 I&N Dec. 538 (BIA 1953). *Matter of Fualaau*, 21 I&N Dec. 475, 478 (BIA 1996); *Matter of Baker*, 15 I&N Dec. 50 (BIA 1974); *Matter of O*, 4 I&N Dec. 301 (BIA 1951).

A2. This should not be held to involve moral turpitude because there is no intent to injure, only to stop the arrest.

**Aggravated Felony:** This should not be an aggravated felony, though defense counsel should secure a sentence of 364 days or less to be certain. In *United States v. Flores-Cordero*, 723 F.3d 1085, 1088 (9th Cir. 2013), *as amended on denial of reh'g* (Oct. 4, 2013), the Ninth Circuit held that conviction under ARS § 13-2508(A)(1) is not categorically a crime of violence because recent Arizona case law made clear that de minimus force was sufficient for conviction. In so holding, the Court specifically addressed, and disagreed with, the Court's ruling in *Estrada Rodriguez v. Mukasey*, 512 F.3d 517 (9th Cir. 2007)(holding that Resisting Arrest under 13-2508 with a sentence imposed of one year is a categorical crime of violence). The Court further held that ARS § 13-2508(A)(1) is not a divisible statute under *Descamps*, meaning that an Immigration Court may not review the record of conviction. See Note: "Divisible Statutes: Record of Conviction." To be safe, defense counsel should protect the record of conviction by eliminating any reference to violent force, and either specify de minimus force or leave open the possibility that de minimus force was used.

Following *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), conviction under either subsection should not be a crime of violence pursuant to 18 USC § 16(b), for substantial risk that force will be used, because that section is void for vagueness. See "Aggravated Felony" under ARS § 13-1002, *supra*.

It is possible but unlikely that a conviction with a one-year sentence imposed also would be an aggravated felony as obstruction of justice under 8 USC §1101(a)(43)(S). See *Matter of Joseph*, 22 I&N 799 (BIA 1999) ("we find that it is substantially unlikely that the offense of simply obstructing or hindering one's own arrest will be viewed as an obstruction of justice aggravated felony under section 101(a)(43)(S) of the Act for removal purposes"); see also *Valenzuela-Gallardo v. Lynch*, No. 12-72326, 2016 WL 1253877, at \*8 (9th Cir. Mar. 31, 2016), see also, analysis under "Aggravated Felony" at ARS 13-2510-12, *supra*. As always counsel should attempt to secure a sentence of 364 days or less to definitively avoid an aggravated felony.

#### **60. Hindering, ARS § 13-2510-12**

For purposes of sections 13-2511 and 13-2512 a person renders assistance to another person by knowingly:

1. Harboring or concealing the other person; or
2. Warning the other person of impending discovery, apprehension, prosecution or conviction. This does not apply to a warning given in connection with an effort to bring another into compliance with the law; or
3. Providing the other person with money, transportation, a weapon, a disguise or other similar means of avoiding discovery, apprehension, prosecution or conviction; or
4. Preventing or obstructing by means of force, deception or intimidation anyone from performing an act that might aid in the discovery, apprehension, prosecution or conviction of the other person; or

5. Suppressing by an act of concealment, alteration or destruction any physical evidence that might aid in the discovery, apprehension, prosecution or conviction of the other person; or
  6. Concealing the identity of the other person.
- Hindering a person for prosecution of a misdemeanor is a class 1 misdemeanor; for a felony, it is a class 5 felony.

**Summary.** Hindering can be a useful plea because it does not take on the character of the underlying offense; thus it is a good alternative to a drug plea, firearms, domestic violence or sex offense plea. Obtain a sentence of 364 or less to avoid an aggravated felony as obstruction of justice. If that is not possible, set a record that makes clear, or leaves open as a possibility, the lack of ongoing proceedings.

**Aggravated felony:** Hindering, similar to the federal accessory after the fact statute, can be a useful plea because it does not take on the character of the underlying offense. An immigrant's conviction for helping someone who may have committed a drug offense, firearms offense, or sexual offense is not itself a drug, firearms, or sexual offense conviction.

However, the BIA has held that accessory after the fact does constitute "obstruction of justice," and therefore is an aggravated felony under 8 USC 1101(a)(43)(S) *if a one-year sentence is imposed*. *Matter of Batista-Hernandez*, 21 I&N 955 (BIA 1997) (accessory after the fact is not an offense "relating to controlled substances" but is an aggravated felony as obstruction of justice if a one-year sentence is imposed); *Matter of Valenzuela-Gallardo*, 25 I&N Dec. 838 (BIA 2012). While the BIA held in *Matter of Espinoza*, 22 I&N 889 (BIA 1999) that misprision is not obstruction of justice even if a one-year sentence is imposed, that decision relied on the absence of a specific intent in the federal misprision statute. *Matter of Valenzuela-Gallardo*, 25 I&N Dec. at 841 ("[t]his element—the affirmative and intentional attempt, with specific intent, to interfere with the process of justice—demarcates the category of crimes constituting obstruction of justice"). Since Hindering requires "the intent to hinder the apprehension, prosecution, conviction or punishment of another," it would likely be found to constitute obstruction of justice under the Board's rationale in *Valenzuela-Gallardo*.

The Ninth Circuit, however, recently rejected the BIA's interpretation of "obstruction of justice" in *Valenzuela-Gallardo* as unconstitutionally vague. *Valenzuela-Gallardo v. Lynch*, No. 12-72326, 2016 WL 1253877, at \*8 (9th Cir. Mar. 31, 2016). The Court found the requirement of "specific intent to interfere with the process of justice" insufficient to narrow the range of conduct constituting an aggravated felony obstruction of justice. *Id.* The court indicated that requiring "ongoing proceedings" could sufficiently narrow the definition to avoid constitutional concerns with vagueness. *Id.* The Court did not, however, require the definition to be tied to ongoing proceedings, but rather remanded to the BIA to offer a new construction consistent with its ruling. *Id.* at 11.

Hindering does not require that there be an ongoing investigation or prosecution in order to be convicted under the statute. Therefore, counsel should attempt to plead to a factual basis that suggests there was no ongoing investigation or prosecution at the time of the offense in hopes that the Board will adopt a definition that requires ongoing proceedings, as *Valenzuela-Gallardo* suggests. But for the time being, defense counsel should conservatively assume that *any* Hindering conviction with a sentence of one year or more will be an aggravated felony.

There may also be some dispute about whether a Hindering offense that was committed *during* a police investigation, but *before* a formal judicial proceeding was commenced qualifies as an obstruction of justice. Compare *Salazar-Luviano v. Mukasey*, 551 F.3d 857, 863 (9th Cir. 2008) (escape that occurred after arrest but *before* the commencement of any judicial proceedings is not obstruction of

justice), with *Hoang v. Holder*, 641 F.3d 1157, 1165 (9th Cir. 2011) (obstruction of justice includes offense in which defendant “provided assistance to an individual who was subject to a pending judicial proceeding or ongoing police investigation”). Defense counsel should create a factual basis that leaves open the possibility that the Hindering offense was committed before a police investigation was initiated.

**Crime Involving Moral Turpitude.** The Ninth Circuit has held that accessory after the fact under California law is not categorically a crime involving moral turpitude. *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc) (overturned on other grounds). It also recently held that a misprision of a felony under federal law is not a CMT because it does not require a specific *intent* to conceal or obstruct justice, but only *knowledge* of the felony. *Robles-Urrea v. Holder*, 678 F.3d 702, 710 (9th Cir. 2012). But since Hindering requires “the *intent* to hinder the apprehension, prosecution, conviction or punishment of another,” it may be found a CMT under *Robles-Urrea*. However, the BIA has held that accessory after the fact is only a CMT if the underlying offense in which the principal engaged is a CMT. *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011). Counsel should attempt to plead to accessory of a non-CMT offense to ensure that the conviction is not found to be a CMT. Immigration counsel, however, has a strong argument that a hindering conviction is never a CMT. In *Navarro-Lopez v. Gonzales*, the Ninth Circuit held that accessory after the fact under California law is missing an element of the generic offense, that is, it is missing the element of moral turpitude. While that portion of the case was overturned in *Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011), *Aguila-Montes de Oca* was in turn overruled by the Supreme Court in *Descamps v. U.S.*, 133 S.Ct. 2276 (9th Cir. 2013) on precisely that issue. Hindering is substantially similar to California’s accessory after the fact statute, and arguably lacks the element of moral turpitude based on its broad scope.

**Other Grounds: Drug conviction, firearms conviction, domestic violence, sexual abuse of a minor.** As long as a sentence of a year is not imposed, hindering can be an excellent alternative to any of these offenses, since the conviction will not take on the character of the principal’s offense.

**Reason to believe trafficking.** If the principal committed a drug trafficking crime, the government may assert that a hindering conviction provides “reason to believe” that the defendant aided a drug trafficker and therefore the person is inadmissible under 8 USC § 1182(a)(2)(C). This will have a devastating effect on persons who must apply for lawful status in the future, although not such a harsh effect on a permanent resident unless she plans to travel outside the country. See discussion of “reason to believe” at Note: Controlled Substances.

#### **61. Bribery of a public servant or party officer, ARS § 13-2602**

A. A person commits bribery of a public servant or party officer if with corrupt intent:

1. Such person offers, confers or agrees to confer any benefit upon a public servant or party officer with the intent to influence the public servant's or party officer's vote, opinion, judgment, exercise of discretion or other action in his official capacity as a public servant or party officer; or
2. While a public servant or party officer, such person solicits, accepts or agrees to accept any benefit upon an agreement or understanding that his vote, opinion, judgment, exercise of discretion or other action as a public servant or party officer may thereby be influenced...

C. Bribery of a public servant or party officer is a class 4 felony.

**Crime Involving Moral Turpitude (CMT):** Yes, corrupt intent to influence. *See, e.g., Matter of H-*, 6 I&N Dec. 358, 361 (BIA 1953).

**Aggravated Felony:** No. Bribery of a public servant under ARS § 13-2602 is not an aggravated felony under 8 USC §1101(a)(43)(R) as an offense relating to commercial bribery, even with a year’s

sentence. *Matter of Gruenangerl*, 25 I&N Dec. 351 (BIA 2010). The BIA has also declined to find that bribery of a public servant is an aggravated felony as obstruction of justice under 8 USC §1101(a)(43)(S). *Id.* Besides commercial bribery, only “bribery of a witness” with a year’s sentence imposed is listed in the aggravated felony definition. See 8 USC §1101(a)(43)(S).

**62. Commercial Bribery, ARS § 13-2605**

A. A person commits commercial bribery if:

1. Such person confers any benefit on an employee without the consent of such employee's employer, corruptly intending that such benefit will influence the conduct of the employee in relation to the employer's commercial affairs, and the conduct of the employee causes economic loss to the employer.
2. While an employee of an employer such employee accepts any benefit from another person, corruptly intending that such benefit will influence his conduct in relation to the employer's commercial affairs, and such conduct causes economic loss to the employer or principal.

B. Commercial bribery is a class 5 felony if the value of the benefit is more than one thousand dollars. Commercial bribery is a class 6 felony if the value of the benefit is not more than one thousand dollars but not less than one hundred dollars. Commercial bribery is a class 1 misdemeanor if the value of the benefit is less than one hundred dollars.

**Crime Involving Moral Turpitude (CMT):** Yes, corrupt intent to influence. See, e.g., *Matter of H-*, 6 I&N Dec. 358, 361 (BIA 1953).

**Aggravated Felony:** Commercial bribery will be held an aggravated felony if a sentence of a year or more is imposed. See 8 USC § 1101(a)(43)(R).

**63. Perjury, ARS § 13-2702.**

A. A person commits perjury by making either:

1. A false sworn statement in regard to a material issue, believing it to be false.
2. A false unsworn declaration, certificate, verification or statement in regard to a material issue that the person subscribes as true under penalty of perjury, believing it to be false. Perjury is a class 4 felony.

**Crime Involving Moral Turpitude (CMT):** Divisible. Because materiality is an element of § 13-2702, perjury was traditionally considered a CMT. *Matter of H*, 1 I&N 669 (BIA 1943) (Michigan statute included materiality as a required element of the crime of perjury and therefore necessarily involves moral turpitude). However, the Ninth Circuit recently held that perjury under California Penal Code § 118, which is substantially similar to 13-2702, is not categorically a CMT. See *Rivera v. Lynch*, 816 F.3d 1064 (9th Cir. 2016). The court found the statute to be divisible, because it included oral perjury, requiring a “willful statement, under oath, of any material matter which the witness knows to be false,” as well as written perjury, which requires only that “the false statement be in writing under penalty of perjury.” *Id.* at \*11. Under the court’s analysis, conviction under 13-2702(A)(1) will be a CMT, but conviction under subsection (A)(2) should not be. Like the California statute at issue in *Rivera*, subsection (A)(2) does not require an oral statement under oath, does not require proof of intent to defraud, and does not require intent to induce another to act to his detriment or obtain something tangible. By statute, it is no defense if the defendant mistakenly believed the false statement to be immaterial. ARS § 13-2706(A)(1)(3). Defense counsel should plead to subsection (A)(2), and should keep the record of conviction clean of any reference to an intent to defraud, induce another to his detriment, or obtain something tangible. Defense counsel should also leave open the possibility that the client believed the false statement to be immaterial.

As an additional alternative, see false swearing, ARS § 13-2703.

**Aggravated Felony:** Perjury is an aggravated felony where the court imposes a term of imprisonment of one year or more. 8 U.S.C. § 1101(a)(43)(S). If such a sentence cannot be avoided, consider false swearing, ARS § 13-2703.

**64. False swearing, ARS § 13-2703.**

A person commits false swearing by making a false sworn statement, believing it to be false. False swearing is a class 6 felony.

**Crime Involving Moral Turpitude (CMT):** False swearing should not be found to be a CMT because it does not involve materiality, or necessarily a fraudulent intent. *Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2007); *Hirsch v. INS*, 308 F.2d 562 (9th Cir. 1962); *Matter of C*, 1 I&N Dec. 14 (BIA, AG 1940) (false statements held not to involve moral turpitude where there is no indication that fraud was involved). Materiality is not an element of the offense and immigration counsel can argue that it is never a CMT, regardless of factual basis or what is in the record of conviction. To be safe, and because case law in this area frequently changes, defense counsel should attempt to plead specifically to false swearing of a non-material fact. See Note: “Divisible Statutes: Record of Conviction.”

**Aggravated Felony as Perjury.** Even if a sentence of a year or more is imposed, false swearing should not be considered an aggravated felony as perjury, because there is no requirement of materiality. See, e.g., discussion in *Matter of Martinez-Recinos*, 23 I&N Dec. 175 (BIA 2001) (Calif. statute requiring knowingly false sworn material statement is perjury). Still, as always counsel should obtain 364 days or less where possible. Counsel should also attempt to specify in the plea agreement or factual basis that the false statement was non-material.

**Aggravated Felony as Fraud or Deceit with a \$10,000 Loss.** A crime of fraud or deceit that results in a loss of over \$10,000 to the government (including tax revenue) or other victim is an aggravated felony, regardless of whether the amount appears in the record of conviction. See *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), see also *Fuentes v. Lynch*, 788 f.3d 1177 (9th Cir. 2015). Because “deceit” is not well-defined, it is possible that a conviction under §13-2703 would be held an aggravated felony under this category. Regarding proof of \$10,000 loss to the victim, see Note: Fraud.

**65. Tampering, ARS § 13-2809.**

A. A person commits tampering with physical evidence if, with intent that it be used, introduced, rejected or unavailable in an official proceeding which is then pending or which such person knows is about to be instituted, such person:

1. Destroys, mutilates, alters, conceals or removes physical evidence with the intent to impair its verity or availability; or
2. Knowingly makes, produces or offers any false physical evidence; or
3. Prevents the production of physical evidence by an act of force, intimidation or deception against any person...

C. Tampering with physical evidence is a class 6 felony.

**Summary.** While there are no cases on point, tampering with the evidence probably shares the immigration benefits and disadvantages of hindering and accessory after the fact. Please read Annotation to ARS § 13-2510. Tampering with the evidence should not take on the character of the underlying offense, so for example tampering with evidence relating to a drug sale is not itself a drug aggravated

felony. However, it will be held to be an aggravated felony as obstruction of justice *if a sentence of a year or more is imposed*. As a class 6 felony, tampering may present a better chance of avoiding such a sentence. However, tampering, as opposed to hindering, really should be classed as obstruction of justice, since it relates to an ongoing proceeding. *See Valenzuela-Gallardo v. Lynch*, No. 12-72326, 2016 WL 1253877, at \*8 (9th Cir. Mar. 31, 2016). Note that a new definition of obstruction of justice may be forthcoming from the BIA. *See* analysis under “Aggravated Felony” at ARS 13-2510-12, *supra*.

**Aggravated Felony.** Because this will likely be held obstruction of justice, counsel must avoid a sentence of 365 days. 8 U.S.C. § 1101(a)(43)(S).

**Crime Involving Moral Turpitude.** The BIA has held that obstruction of justice is a crime involving moral turpitude, so this should not be considered a safer plea to avoid a CMT.

**Other Grounds: Drug conviction, firearms conviction, domestic violence, rape or sexual abuse of a minor.** Tampering is a good alternative to any of these offenses, since the conviction will not take on the character of the principal’s offense.

**Reason to believe trafficking.** If the principal committed a drug trafficking crime, the government may assert that a tampering conviction provides “reason to believe” that the defendant aided a drug trafficker and therefore the person is inadmissible under 8 USC § 1182(a)(2)(C). This will have a devastating effect on persons who must apply for lawful status in the future, although not such a harsh effect on a permanent resident, unless s/he plans to travel outside the country. *See* discussion of “reason to believe” at Note: Controlled Substances.

#### **66. Interfering with judicial proceedings, ARS § 13-2810**

A. A person commits interfering with judicial proceedings if such person knowingly:

1. Engages in disorderly, disrespectful or insolent behavior during the session of a court which directly tends to interrupt its proceedings or impairs the respect due to its authority; or
2. Disobeys or resists the lawful order, process or other mandate of a court; or
3. Refuses to be sworn or affirmed as a witness in any court proceeding; or
4. Publishes a false or grossly inaccurate report of a court proceeding; or
5. Refuses to serve as a juror unless exempted by law; or
6. Fails inexcusably to attend a trial at which he has been chosen to serve as a juror.

B. Interfering with judicial proceedings is a class 1 misdemeanor.

**Summary:** Unlikely to trigger immigration consequences EXCEPT A2 is likely deportable for violating a DV protective order. 8 U.S.C. § 1227(a)(2)(E)(ii).

**Crime Involving Moral Turpitude:** While possible, it is unlikely that any subsection will be found a CMT. *See Blanco v. Mukasey*, 518 F.3d 714, 719 (9th Cir. 2008) (“[w]hen the only ‘benefit’ the individual obtains is to impede the enforcement of the law, the crime does not involve moral turpitude”).

**Aggravated Felony:** An offense relating to obstruction of justice with a sentence of one year or more is an aggravated felony under 8 U.S.C. § 1101(a)(43)(S). However, since the maximum sentence under the statute is six months, this offense should never be an aggravated felony.

**Other – Domestic Violence:** Under 8 U.S.C. § 1227(a)(2)(E)(ii), a noncitizen who engages in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury is deportable. The Ninth Circuit has interpreted this

broadly to include most convictions under protection orders. *Alanis-Alvarado v. Holder*, 558 F.3d 833, 836 (9th Cir. 2009); *Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011). While a straight plea to this offense may be safe (particularly if no subsection is cited), any citation or reference in the plea to DV or §§ 13-3601, 13-3601.01, or 13-3602 will likely trigger deportability. Use of Telephone to Annoy, ARS § 13-2916 is a better option.

**67. Disorderly Conduct, ARS § 13-2904**

A. A person commits disorderly conduct if, with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person:

1. Engages in fighting, violent or seriously disruptive behavior; or
2. Makes unreasonable noise; or
3. Uses abusive or offensive language or gestures to any person present in a manner likely to provoke immediate physical retaliation by such person; or
4. Makes any protracted commotion, utterance or display with the intent to prevent the transaction of the business of a lawful meeting, gathering or procession; or
5. Refuses to obey a lawful order to disperse issued to maintain public safety in dangerous proximity to a fire, a hazard or any other emergency; or
6. Recklessly handles, displays or discharges a deadly weapon or dangerous instrument.

B. Disorderly conduct under subsection A, paragraph 6 is a class 6 felony. Disorderly conduct under subsection A, paragraph 1, 2, 3, 4 or 5 is a class 1 misdemeanor.

**Summary:** A good plea for immigration, except for A6.

**Crime Involving Moral Turpitude:** Except for A6, this offense should not be held a CMT. However, to be safe it is advisable to leave the record of conviction vague as to the underlying facts. Normally petty offenses such as disturbing the peace are not CMTs. See e.g. *Matter of P*, 2 I&N Dec. 117, 122 (1944) (stating in dicta that “most states also have, in the exercise of their police powers, statutes punishing the disturbance of the peace, sauntering and loitering, and like trivial breaches of the peace. It could be hardly contended that a violation of such statutes involves moral turpitude”).

Section A6, recklessly discharging a dangerous weapon, ought not to be held a CMT. Generally recklessness is a CMT only if coupled with serious physical injury. See, e.g., *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996); See also *Mtoched v. Lynch*, 786 F.3d 1210, 1216-1217 (9th Cir. 2015). However, where possible counsel should avoid specifically pleading to A6, and if a plea is made to A6, counsel should attempt to leave the record of conviction vague. An alternate plea would be to carrying a deadly weapon under ARS §13-3102(A)(1) (a class 1 misdemeanor), which has no immigration consequences as long as the weapon is not identified as a firearm or explosive device.

Immigration counsel also has a strong argument that conviction under this section is never removable, because Arizona law does not recognize an antique firearms exception. The federal statute includes an exception for antique firearms. In *U.S. v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014), the Ninth Circuit held that “any conviction under a state firearms statute lacking an exception for antique firearms is not a categorical match for the federal firearm ground of removal.” *Id.* At 634. The Arizona State Attorney General has confirmed that offenses involving antique firearms are equally subject to prosecution. Ariz. Op. Att’y Gen. No. I14-009 (Jan. 2, 2015).

**Aggravated Felony: AF as Crime of Violence:** No. The Ninth Circuit has held that a *mens rea* of “recklessness” does not meet the definition of a “crime of violence” as defined by 18 U.S.C. § 16. See *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc)

*AF as Firearms Offense:* No, because this offense does not deal with trafficking and does not have a federal analogue.

**Firearms Ground of Deportation:** If defendant pleads to A6 *and* the record of conviction clearly identifies that defendant had a firearm or destructive device (i.e. explosive), then he/she may be deportable under this ground. Defense counsel should keep the record of conviction vague as to the type of weapon used, i.e., plead defendant to the statutory language, “a deadly weapon or dangerous weapon.” Immigration counsel will have strong arguments that conviction under this statute is not removable under the firearms ground, because use of a firearm is not itself an element, but rather a means of fulfilling the element of “dangerous weapon” or “deadly instrument.” See ARS § 13-3102, *supra*.

**DV Ground of Deportation:** Some immigration judges have held this to be deportable as a crime of domestic violence with a § 13-3601 tag, although immigration counsel have strong arguments against this. If defendant pleads to A6 and the offense was committed against a child, he/she may be deportable under the child abuse ground. See Note: Domestic Violence. Defense counsel should attempt to cleanse the record of any mention that the victim was a minor. If the age of the victim is in the record of conviction, immigration counsel should argue that the BIA’s decision permitting review of the record to ascertain age, in *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008), was an incorrect interpretation of Ninth Circuit and Supreme Court law, and implicitly overruled in *Descamps v. U.S.* 133 s.Ct. 2276 (US). Therefore an immigration judge may not consider this fact in characterizing the offense of conviction. See Other Grounds, ARS 13-1102, *supra*.

**68. False reporting to law enforcement agencies, ARS § 13-2907.01**

A. It is unlawful for a person to knowingly make to a law enforcement agency of either this state or a political subdivision of this state a false, fraudulent or unfounded report or statement or to knowingly misrepresent a fact for the purpose of interfering with the orderly operation of a law enforcement agency or misleading a peace officer.

B. Violation of this section is a class 1 misdemeanor.

**Summary.** This offense is not an aggravated felony and might fit the facts of the aftermath of a domestic violence or statutory rape event, i.e. when the perpetrator denies wrongdoing. If the prosecution is willing to plead to a class 1 misdemeanor, it is not a crime of violence or sexual offense.

**Crime Involving Moral Turpitude.** Maybe not, no requirement of materiality or bad intent. See *Blanco v. Mukasey*, 518 F.3d 714, 719 (9th Cir. 2008) (falsely identifying oneself to law enforcement is not a CMT since fraudulent intent only inheres when the individual employs false statements to obtain something tangible).

**Other grounds:** This may be a good alternate plea where overly harsh immigration consequences would attach to a relatively minor offense, and where a false statement was made at some point.

**69. Criminal Nuisance, ARS § 13-2908**

A. A person commits criminal nuisance:

1. If, by conduct either unlawful in itself or unreasonable under the circumstances, such person recklessly creates or maintains a condition which endangers the safety or health of others.

2. By knowingly conducting or maintaining any premises, place or resort where persons gather for purposes of engaging in unlawful conduct.
- B. Criminal nuisance is a class 3 misdemeanor.

**Summary:** This is a useful plea if the government is willing to plead to a class 3 misdemeanor, because it has few consequences and the facts can fit a variety of situations such as having people use controlled substances, engage in sex with a minor, etc.

**Aggravated felony.** No.

**Crime involving moral turpitude.** No, except possibly if the record of conviction reveals that the unlawful conduct involves moral turpitude. Even then, recklessness should not involve moral turpitude in this case.

**Other grounds.** No. The best resolution is to leave the record of conviction vague. However, even if the record revealed details of the unlawful activity that went on (possessing an unregistered weapon, using drugs, sexual encounters, etc.), this should not transform the offense into a firearms, drug, etc. offense.

#### **70. Use of telephone to terrify, intimidate, threaten or harass; ARS § 13-2916**

A. It is unlawful for any person, with intent to terrify, intimidate, threaten or harass a specific person or persons, to do any of the following:

1. Direct any obscene, lewd or profane language or suggest any lewd or lascivious act to the person in an electronic communication;
2. Threaten to inflict physical harm to any person or property in any electronic communication.
3. Otherwise disturb by repeated anonymous, unwanted or unsolicited electronic communications the peace, quiet or right of privacy of the person at the place where the communications were received.

B.  
C.

D. Any person who violates this section is guilty of a class 1 misdemeanor;

E. For the purposes of this section, “electronic communication” means a wire line, cable, wireless or cellular telephone call, a text message, an instant message or electronic email.

**Summary:** Not as safe as previously advised, because intent to “annoy or offend” has been taken out of the statute.

**Aggravated felony:** Not as a crime of violence, since the offense carries a maximum sentence of six months.

**Crime involving moral turpitude:** Possibly, if the offense involved threats. Previous versions of this statute included an intent to annoy or offend, which was eliminated from the statute in 2012. Immigration counsel faced with a conviction before the statute was amended can argue that the offense is not a CMT because it included an intent to annoy or offend. The elimination of “annoy or offend” makes conviction under this statute more likely to be held a CMT.

**Other grounds:** If the record shows that the victim had a domestic relationship with the defendant (either by § 13-3601 or other evidence in the record) and the offense involved threats with an

intent to terrify, intimidate, or threaten, this may be deportable as a domestic violence offense or a stalking offense under 8 USC §1227(a)(2)(E)(i).

Note that the BIA just ruled, in *Matter of Estrada*, 26 I & N Dec. 749 (BIA 2016), that the circumstance specific approach, not the categorical approach, applies to determine whether there is a domestic relationship. *See* Note: Domestic Violence.

**71. Harassment, ARS § 13-2921**

A. A person commits harassment if, with intent to harass or with knowledge that the person is harassing another person, causing a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person, does the following:

1. Anonymously or otherwise communicates or causes a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harasses.
2. Continues to follow another person in or about a public place for no legitimate purpose after being asked to desist.
3. Repeatedly commits an act or acts that harass another person.
4. Surveils or causes another person to surveil a person for no legitimate purpose.
5. On more than one occasion makes a false report to a law enforcement, credit or social service agency.
6. Interferes with the delivery of any public or regulated utility to a person.

C. Harassment under subsection A is a class 1 misdemeanor. Harassment under subsection B (public employee) is a class 5 felony.

E. For purposes of this section, "harassment" means conduct directed at a specific person which would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person.

**Summary:** This is a possible alternative to stalking, to avoid immigration consequences.

**Crime Involving Moral Turpitude (CMT):** No, because it does not require the transmission of threats or intent to harm or the intent to commit a CMT. However, in practice, some immigration judges may find it to be a CMT.

**Aggravated Felony:** No, because as a class 1 misdemeanor simple harassment has a maximum six-month sentence. Additional time imposed for recidivist behavior will be counted toward the required one-year sentence.

**Domestic violence ground:** If the record shows that the victim had a domestic relationship with the defendant (either by § 13-3601 or other evidence in the record), the offense might be held to cause deportability under the domestic violence ground at 8 USC §1227(a)(2)(E) as a crime of stalking. However, it is a better alternative than §13-2923, Stalking.

A conviction of "stalking" is a basis for deportation under 8 USC §1227(a)(2)(E). While stalking remains an undefined term in this context, it is unlikely that §13-2921 would categorically come within this because it involves no threats and can result only in annoying the person. *See Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir. 2000) (conviction under Cal. Penal Code § 646.9 is not categorically a crime of violence because it need not be proven that the defendant had the intent, or the ability to carry out, the threat). A plea that left open the possibility of conviction under A6 might especially avoid this possibility. Also, immigration counsel will argue that the existence of the more serious §13-2923 argues against this categorization, and stalking should be defined as more harmful than merely "annoying."

Note that a civil or criminal finding that a noncitizen violated a domestic violence protection order is a basis for deportability. See 8 USC § 1227(a)(2)(E)(i). To the extent the § 13-3601 conviction is part of a finding of a violation of such an order, it may cause deportability. See also ARS § 13-3601.01(A)(1).

This offense does *not* constitute a “crime of domestic violence,” because a misdemeanor is a “crime of violence” only if it has as an element the intent to use or threaten force. See Note: Domestic Violence.

**72. Aggravated harassment, ARS § 13-2921.01**

A. A person commits aggravated harassment if the person commits harassment as provided in section 13-2921 and any of the following applies:

1. A court has issued an order of protection or an injunction against harassment against the person and in favor of the victim of harassment and the order or injunction has been served and is still valid.

2. The person has previously been convicted of an offense included in section 13-3601.

B. The victim of any previous offense shall be the same as in the present offense.

C. A person who violates subsection A, paragraph 1 of this section is guilty of a Class 6 felony. A person who commits a second or subsequent violation of subsection A, paragraph 1 of this section is guilty of a Class 5 felony. A person who violates subsection A, paragraph 2 of this section is guilty of a Class 5 felony.

D. For the purposes of this section, "convicted" means a person who was convicted of an offense included in section 13-3601 or who was adjudicated delinquent for conduct that would constitute a historical prior felony conviction if the juvenile had been tried as an adult for an offense included in section 13-3601.

**Summary:** A conviction under A2 may avoid immigration consequences and certainly is safer than a conviction for stalking. A conviction under A1 offers few immigration benefits.

**Crime Involving Moral Turpitude (CMT):** If analogies to DUI hold, A1 is a CMT but A2 is not. A1 may be held a CMT because the inclusion of the element of an existing protection order is sufficient to establish the bad intent required for a CMT. See *Matter of Lopez-Meza*, 22 I&N. Dec. 1188, 1195 (BIA 1999) (the aggravated circumstances of being on a suspended license while DUI under predecessor to ARS 23-1383(A)(1) “establishes a culpable mental state adequate to support a finding of moral turpitude”); *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc). A2 should not be held to be a CMT, because multiple commissions of an offense do not cause the offense to become a CMT. See *Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001) (predecessor to ARS 28-1383(A)(2), aggravated driving with prior DUI convictions, is not a CMT because no culpable mental state is required).

**Aggravated Felony:** Under recent Supreme Court and Ninth Circuit case law, this should not be a “crime of violence,” because it does not have as an element the use, threatened use, or attempted use of force. See “Aggravated Felony” under ARS § 13-1002, *supra*.

**Domestic violence ground:** Counsel should assume that a conviction under A1 will cause deportability under 8 USC § 1227(a)(2)(E)(ii) if the conduct involved a violation of the DV protective order.

Criminal defense counsel should assume that a conviction under A2 also will be charged as a deportable “crime of domestic violence” under 8 USC § 1227(a)(2)(E)(i), although immigration counsel

have arguments against this. To be a crime of domestic violence, the offense must be a “crime of violence,” and this should not be a crime of violence because it does not have as an element the use, threatened use, or attempted use of force. *See* “Aggravated Felony” under ARS § 13-1002, *supra*. Furthermore, if the offense is a misdemeanor, it can only qualify as a “crime of violence” under 18 USC § 16(a), which requires the offense to have use or threat of force as an element.

A conviction of “stalking” is a basis for deportation under 8 USC § 1227(a)(2)(E)(i). This would depend on whether § 13-2921 would be classed as stalking. Arguably, the offense is not stalking ‘categorically’ and would not be so held if the record of conviction was sufficiently vague; see discussion of § 13-2921, above.

### **73. Stalking, ARS § 13-2923**

A. A person commits stalking if the person intentionally or knowingly engages in a course of conduct that is directed toward another person and if that conduct either:

1. Would cause a reasonable person to fear for the person's safety or the safety of that person's immediate family member and that person in fact fears for their safety or the safety of that person's immediate family member.
2. Would cause a reasonable person to fear death of that person or that person's immediate family member and that person in fact fears death of that person or that person's immediate family member.

B. Stalking under subsection A, paragraph 1 of this section is a class 5 felony. Stalking under subsection A, paragraph 2 is a class 3 felony.

C. For the purposes of this section:

1. "Course of conduct"

(a) Means any of the following:

(i) Maintaining visual or physical proximity to a specific person or directing verbal, written or other threats, whether express or implied, to a specific person on two or more occasions over a period of time, however short.

(ii) Using any electronic, digital or global positioning system device to surveil a specific person or a specific person's internet or wireless activity continuously for twelve hours or more or on two or more occasions over a period of time, however short, without authorization.

(b) Does not include constitutionally protected activity or other activity authorized by law, the other person, the other person's authorized representative or if the other person is a minor, the minor's parent or guardian.

2. "Immediate family member" means a spouse, parent, child or sibling or any other person who regularly resides in a person's household or resided in a person's household within the past six months.

**Summary:** This is a CMT and possibly a basis for deportability under the domestic violence ground. Avoid a sentence of 365 days to avoid an aggravated felony. Consider harassment, aggravated harassment, or other alternatives.

**Crime Involving Moral Turpitude (CMT):** Stalking is a CMT. *Jose Ricardo Zavaleta v. INS*, 261 F.3d 951 (9th Cir. 2001); *Matter of Ajami*, 22 I. & N. Dec. 949 (BIA 1999).

**Aggravated Felony:** Counsel should avoid a sentence imposed of 365 days or more to avoid a crime of violence. Immigration counsel, however, may argue that this not a crime of violence, because it does not have as an element the use, attempted use, or threatened use of force as required by 18 USC § 16(a). A crime of violence under 18 USC § 16(a) requires the intentional use of force. While the intentional or knowing conduct must cause a person to feel threatened, the “course of conduct” includes

maintaining visual or physical proximity to a person. Previously, this may have been a crime of violence under 18 USC § 16(b), because there is a substantial risk that force will be used, but the Supreme Court and the Ninth Circuit have recently held 18 USC § 16(b) to be void for vagueness. *See* “Aggravated Felony” under ARS § 13-1002, *supra*.

**Domestic Violence Ground:** A crime of “stalking” is a basis for deportability under the domestic violence ground. 8 U.S.C. § 1227(a)(2)(E)(i)

**74. Weapons misconduct, ARS § 13-3102(A)(1-15)**

Misconduct involving weapons under subsection A, paragraph 15 of this section is a class 2 felony. Misconduct involving weapons under subsection A, paragraph 9, 14 or 16 of this section is a class 3 felony. Misconduct involving weapons under subsection A, paragraph 3, 4, 8 or 13 of this section is a class 4 felony. Misconduct involving weapons under subsection A, paragraph 12 of this section is a class 1 misdemeanor unless the violation occurs in connection with conduct which violates the provisions of section 13-2308, subsection A, paragraph 5, section 13-2312, subsection C, section 13-3409 or section 13-3411, in which case the offense is a class 6 felony. Misconduct involving weapons under subsection A, paragraph 5, 6 or 7 of this section is a class 6 felony. Misconduct involving weapons under subsection A, paragraph 1, subdivision (b) of this section or subsection A, paragraph , 10 or 11 of this section is a class 1 misdemeanor. Misconduct involving weapons under subsection A, paragraph 2 of this section is a class 3 misdemeanor.

**Summary:** A conviction involving firearm or “destructive device” (explosive), including possession of an unregistered firearm, may cause deportability under the firearms ground. 8 USC § 1227(a)(2)(C). Conviction of trafficking in firearms or destructive devices, or conviction of a state offense that is analogous to certain federal offenses such as felon in possession of a firearm, is an aggravated felony. 8 USC § 1101(a)(43)(C), (E). *See Note: Firearms.* Counsel can fashion a plea under § 13-3102 to avoid these consequences by avoiding identification of a qualifying weapon in the record of conviction, and/or avoiding a match-up with the analogous federal offense. This can be a valuable alternate plea. Following recent developments in Supreme Court and Ninth Circuit case law, Immigration Counsel has a strong argument that conviction under this statute is never a removable firearms conviction, because it is overbroad and not divisible.

**Note on Sentence.** *Avoiding a sentence imposed of a year or more will not avoid the firearms deportation ground or the firearms aggravated felony classification.* The one-year sentence threshold does remain relevant for an offense that arguably has as an element the use, attempted use, or threatened use of force.

**Note: “deadly weapons,” “prohibited weapons,” and “prohibited possessors” and the firearms categories.** Section 13-3102 can be a valuable plea because it is not categorically removable as a firearms offense, and arguably not divisible under the Supreme Court’s holding in *Descamps v. U.S.*, 133 S.Ct. 2276 (2013). *See Note: “Divisible Statutes: Record of Conviction.”*

**Note on Deferred Action for Childhood Arrivals:** This conviction will likely bar a non-citizen from qualifying for DACA, or subject a DACA recipient (or recipient of prosecutorial discretion) to renewed removal proceedings, if the offense involves a firearm. Unlawful possession or use of a firearm is considered a serious misdemeanor for DACA purposes, meaning that the U.S. Citizenship and Immigration Services will only grant DACA if the applicant can show extraordinary circumstances. *See Note: Deferred Action for Childhood Arrivals.*

***Deadly weapons and prohibited weapons.*** An offense is an aggravated felony firearms offense, or causes deportability under the firearms ground, if it involves certain actions relating to a firearm or explosive device. Both “deadly weapon” and “prohibited weapon” are defined to include weapons that are not firearms or explosive devices. (“Deadly weapon” is any lethal weapon, and “prohibited weapon” includes a nunchaku. See § 13-3101.) In these cases, counsel may be able to avoid conviction of a firearms aggravated felony or a deportable firearms offense by (a) specifically identifying a non-firearms/explosive device in the record, or (b) keeping the record vague enough to permit the possibility that this was the weapon, e.g. pleading to a “deadly weapon.”

Immigration Counsel may argue that conviction under Section 13-3102 is never removable as a firearms offense, because it is overbroad. The Supreme Court has held that a statute is only divisible if it contains multiple, alternative elements, not multiple, alternative means. See *Descamps v. U.S.*, 133 S. Ct. (9th Cir. 2013), *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016). The Court used the example of a statute which requires only “an indeterminate ‘weapon,’” which a jury would not necessarily have to find is a firearm, as an example of an indivisible statute. Under this rationale, Section 13-3102 is indivisible because a deadly weapon is any lethal weapon, and a firearm is a means to violate that element, not an element. Defense counsel must proceed with caution, however, as the Supreme Court has accepted certification in a case which will revisit the meaning of “divisible” in *Descamps*, and which could impact this analysis. See Note: “Divisible Statutes: Record of Conviction.” To be safe, defense counsel should sanitize the record of reference to a firearm.

Immigration counsel also has a strong argument that conviction under this section is never removable, because Arizona law does not recognize an antique firearms exception. The federal statute includes an exception for antique firearms. In *U.S. v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014), the Ninth Circuit held that “any conviction under a state firearms statute lacking an exception for antique firearms is not a categorical match for the federal firearm ground of removal.” *Id.* At 634. The Arizona State Attorney General has confirmed that offenses involving antique firearms are equally subject to prosecution. Ariz. Op. Att’y Gen. No. I14-009 (Jan. 2, 2015).

***“Prohibited possessor.”*** A state offense that has the same elements as certain federal firearms offenses will be held an aggravated felony, even if it doesn’t involve trafficking. See federal offenses referenced at 8 USC § 1101(a)(43)(E). The list of “prohibited possessors” at ARS § 13-3101(A)(7) does not exactly match the federal crimes designated as firearms aggravated felonies for immigration purposes. The following categories relating to prohibited possessors are safer pleas. In an offense involving a prohibited possessor using a firearm or explosive device, counsel should specifically identify one of the following categories, or leave the record of conviction vague as to which subset of ARS § 13-3101(A)(7) is implicated. *Note that possession of a firearm or destructive device by a felon or an undocumented immigrant is an aggravated felony,*

Safer categories:

- A person who has been found a danger to self or others, where the record of conviction does not establish commitment to a mental institution. While the analogous federal offense requires commitment to a mental institution (18 USC § 922(g)(4)), ARS §26-540 permits various options including outpatient care.
- A person who is imprisoned at the time of possession. There is no federal analogue.
- A person who is serving probation for a domestic violence conviction, under ARS § 13-3101(A)(7)(d). (Federal law has similar provisions at 18 USC § 922(g)(8), (9), but these are not included in the aggravated felony definition at 8 USC 1101(a)(43)(E).)

**A1 and A2: Carrying a concealed deadly weapon without a permit pursuant to ARS § 13-3112; carrying it without the permit within immediate control of any person in or on a means of transportation.**

**Crime Involving Moral Turpitude (CMT):** No. Carrying a concealed weapon without a license or permit has been held not to involve moral turpitude because an act licensed by the state is merely a regulatory offense and cannot properly be considered morally turpitudinous. *Ex parte Sarceno*, 182 F. 955, 957 (Cir. Ct. N.Y. 1910); *United States ex rel. Andreacchi v. Curran*, 38 F.2d 498 (S.D.N.Y. 1926); *Matter of Granados*, 16 I. & N. Dec. 726 (1979) (possession of sawed-off shotgun).

**Aggravated Felony:** Simple possession of a machine-gun may be found an aggravated felony because it is analogous to 18 USC §922(o). Otherwise not an aggravated felony.

**Firearms Deportation Ground:** Only if the record of conviction specifies that the weapon was a firearm or other destructive device. Even then, this should not be removable under the firearms ground under current case law. To definitively avoid this ground, defense counsel should plead defendant to carrying a “deadly weapon” or to a specific weapon that is not a firearm or destructive device.

The Supreme Court has held that a statute is only divisible if it contains multiple, alternative elements, not multiple, alternative means. *Descamps v. U.S.*, 133 S. Ct. (9th Cir. 2013), *see also Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016). The Court used the example of a statute which requires only “an indeterminate ‘weapon,’” which a jury would not necessarily have to find is a firearm, as an example of an indivisible statute. *Id.* Under this rationale, this statute is indivisible because a “deadly weapon” is any lethal weapon, and a firearm is a means to violate that element, not an element itself. Note, however, that this case law is new and the subject of ongoing litigation. *See Note: “Divisible Statutes: Record of Conviction.”*

Immigration counsel also has a strong argument that conviction under this section is never removable, because Arizona law does not recognize an antique firearms exception. The federal statute includes an exception for antique firearms. In *U.S. v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014), the Ninth Circuit held that “any conviction under a state firearms statute lacking an exception for antique firearms is not a categorical match for the federal firearm ground of removal.” *Id.* At 634. The Arizona State Attorney General has confirmed that offenses involving antique firearms are equally subject to prosecution. *Ariz. Op. Att’y Gen. No. I14-009* (Jan. 2, 2015).

**A3. Manufacturing, possessing, transporting, selling or transferring a prohibited weapon**

**Crime Involving Moral Turpitude (CMT):** Probably not; at least divisible. While possession of a weapon is not a CMT, it is possible that a conservative judge would hold that the manufacture, transport, sale, or transfer of prohibited weapons is a CMT because of pecuniary gain. *Matter of R*, 6 I&N Dec. 444, 451 (1954) (element of pecuniary gain creates a distinction between fornication, not a CMT, and prostitution, a CMT). Against this is the fact that firearms can be legally sold, so this is merely a regulatory offense, and such offenses usually are held not to involve moral turpitude. Where possible, defense counsel should keep the record of conviction vague by pleading either to “possessing” or “manufacturing, possessing, transporting, selling, or transferring.”

**Aggravated Felony: AF as a Firearms Trafficking Offense:** Trafficking in firearms or explosive devices is an aggravated felony. The record should not preclude the possibility that a nunchaku was the weapon, and/or should be vague as to whether trafficking versus possession was involved. Avoid reference to a machine-gun.

**Firearms Deportation Ground:** Should not be under current case law. To definitively avoid this ground, defense counsel should plead defendant to a “prohibited weapon” and avoid any reference to a firearm. Immigration counsel will argue that conviction under the statute is never removable under the firearms ground. *See* discussion at ARS § 13-3102 A1-A2, *supra*.

**A4. Possessing a deadly weapon or prohibited weapon if such person is a prohibited possessor;**

**Crime Involving Moral Turpitude (CMT):** Probably not, but this is not established. Carrying a concealed weapon without a license or permit has been held not to involve moral turpitude because an act licensed by the state cannot properly be considered morally turpitudinous. *Ex parte Sarceno*, 182 F. 955, 957 (Cir. Ct. N.Y. 1910); *United States ex rel. Andreacchi v. Curran*, 38 F.2d 498 (S.D.N.Y. 1926). The additional factor of the status of the person (e.g., undocumented immigrant, felon) should not make it a CMT.

**Aggravated Felony:** To avoid an aggravated felony, avoid identifying in the record that a firearm or destructive device was involved. Even if that is not possible, avoid an aggravated felony by avoiding identifying in the record that the defendant was a prohibited possessor due to being a felon or an illegal immigrant, as opposed to other category. *See* discussion above.

**Firearms Deportation Ground:** Should not be under current case law. To definitively avoid this ground, defense counsel should plead defendant to a “deadly weapon” and avoid any reference to a firearm. Immigration counsel will argue that conviction under the statute is never removable under the firearms ground. *See* discussion at ARS § 13-3102 A1-A2, *supra*.

**A5. Selling or transferring a deadly weapon to a prohibited possessor**

**Crime Involving Moral Turpitude (CMT):** Possibly. *See* A3.

**Aggravated Felony: Firearms Trafficking Offense:** Yes, if the weapon is identified as a firearm or destructive device. Avoid identification of the weapon on the record of conviction.

**Firearms Deportation Ground:** To avoid this ground, defense counsel should plead defendant to a “deadly weapon.” *See* discussion at ARS § 13-3102, A1-A2, *supra*.

**A6, A7. Defacing a deadly weapon; or possessing a defaced deadly weapon knowing the deadly weapon was defaced;**

Counsel should try to plead to possession under a different subsection.

**Crime Involving Moral Turpitude (CMT):** Probably not, but no cases on point. *See* A1.

**Aggravated Felony: Firearms Offense:** Yes, if the offense is identified as a firearm (or if by law only a firearm could be recognized as being capable of being defaced). This could be held analogous to 26 U.S.C. § 5861(g), (h), which makes it a federal offense to alter the identification of a firearm or to possess such an altered firearm.

**Firearms Deportation Ground:** To definitively avoid this ground, defense counsel should plead defendant to defacing or possessing a “deadly weapon,” if it is possible for deadly weapons that are not

firearms or destructive devices to be “defaced” as the term is intended. *See* discussion at ARS § 13-3102, A1-A2, *supra*.

**A8. Using or possessing a deadly weapon during the commission of any felony offense included in chapter 34 of this title (drug offenses).**

**Crime Involving Moral Turpitude (CMT):** Yes. The actual use of a deadly weapon during the commission of a felony is a CMT. Mere possession of a deadly weapon or firearm is not a CMT, *Matter of Granados*, 16 I. & N. Dec. 726 (BIA 1979), but the possessing of a deadly weapon during a felony offense may or may not be a CMT depending upon the type of drug offense involved. If there is mere possession in the commission of a drug trafficking offense, then it is a CMT. However, if counsel leaves the record of conviction vague as to whether the offense involved was possession or use of a deadly weapon and also vague as to the drug offense involved, i.e., leaving open possibility of use or possession, then immigration counsel can argue that it is not a CMT.

**Aggravated Felony: Summary:** Avoid a sentence of one year or more and leave the record vague as to deadly weapon involved, whether use or possession of the deadly weapon was involved, and/or whether use or possession of drugs was involved.

*Crime of Violence:* This should not be a crime of violence since the Supreme Court and the Ninth Circuit held 18 USC § 16(b) to be void for vagueness. *See* “Aggravated Felony” under ARS § 13-1002, *supra*. To definitively avoid a crime of violence, defense counsel should secure a sentence of less than 365 days.

*Firearms Trafficking:* 18 USC § 922(g)(3) criminalizes anyone who is an (1) unlawful *user* of a controlled substance listed in 21 USC § 802 and (2) possesses a firearm or ammunition. It is therefore, possible that if defense counsel pleads her client to the specific offense of possession of a firearm or ammunition while in the course of using drugs listed in the Controlled Substances Act, this could be an aggravated felony. Counsel should leave the record of conviction vague as to the type of deadly weapon involved, whether use or possession of a deadly weapon was involved, whether the client was in possession or using drugs, and/or what kind of drugs were involved.

*Firearms Offense:* Not trafficking and no federal analogue.

**Firearms Deportation Ground:** To avoid this ground, defense counsel should keep the record of conviction vague as to what kind of deadly weapon was used. *See* discussion at ARS § 13-3102, A1-A2, *supra*.

**A9. Discharging a firearm at an occupied structure to further the interests of a criminal street gang, a criminal syndicate or a racketeering enterprise**

**Crime Involving Moral Turpitude (CMT):** Yes.

**Aggravated Felony: Crime of Violence:** An aggravated felony crime of violence requires as an element the use, attempted use, or threatened use of physical force against *the person or property of another* 18 U.S.C. § 16(a). By careful pleading, counsel can provide immigration counsel with an argument that a particular disposition is not against the person or property of another and thus is not an aggravated felony. Counsel must not permit the record to preclude the possibility that (a) the property was unoccupied (i.e., there was not a current resident, as opposed to the current resident was not home at

the time) and (b) the property was owned by the defendant. Counsel should plead to the generic language of the statute and avoid references to an inhabited residence or the property of another.

Rationale: Regarding “against a person,” shooting at an “inhabited dwelling place” under California law has been held a crime of violence since it “necessarily threatens the use of physical force against the resident.” *U.S. v. Cortez-Arias*, 403 F.3d 1111, 1116 (9th Cir. 2005). However, the Ninth Circuit in *U.S. v. Martinez-Martinez*, 468 F.3d 604 (9th Cir. 2006) distinguished the Arizona statute by finding that the definition of “residence” in ARS § 13-1211 is broader than that of a California “inhabited dwelling house,” because it includes dwellings in which no one is currently living. Therefore, the discharge of a firearm at either a residential or nonresidential structure appears not to be a categorical crime of violence against a person, since it can be committed against a structure where no one is currently living.

The government may argue that the offense is a crime of violence under 18 U.S.C. § 16(b) as a felony that involves a “substantial risk” that force will be used – an issue that *Martinez-Martinez* did not address. However, the Ninth Circuit, following Supreme Court precedent, recently held § 16(b) is void for vagueness. See “Aggravated Felony” under ARS § 13-1002, *supra*.

Defense counsel can definitively avoid an aggravated felony crime of violence by securing a sentence of 364 days or less.

Other Grounds: RICO offense: Nothing in the RICO statutes refers to use of a firearm to further interest in racketeering enterprise, but statute is written broadly enough to possibly include use of a firearm to further interests.

**Firearms Ground of Deportation:** Probably not under current case law, because firearms as defined by Arizona law does not include an exception for antique firearms. In order to qualify as a removable firearms offense under the Immigration and Nationality Act, a state firearms offense must match the federal definition of firearm at 18 USC § 921(a). See INA § 237(2)(C). The federal statute includes an exception for antique firearms. In *U.S. v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014), the Ninth Circuit held that “any conviction under a state firearms statute lacking an exception for antique firearms is not a categorical match for the federal firearm ground of removal.” *Id.* At 634. The Arizona State Attorney General has confirmed that offenses involving antique firearms are equally subject to prosecution. Ariz. Op. Att’y Gen. No. I14-009 (Jan. 2, 2015).

Still, a better option is a plea to simple possession of a weapon not identified as a firearm; see § 13-3102. This plea leaves open two arguments: the possibility of an antique firearms, and the argument that the statute is indivisible under *Descamps v. U.S.* 133 S. Ct. 2276 (2013). See Note: Firearms and Note: “Divisible Statutes: Record of Conviction.”

**A10. Unless specifically authorized by law, entering any public establishment or attending any public event and carrying a deadly weapon on his person after a reasonable request by the operator or sponsor to remove his weapon;**

**A11-13. Unless specifically authorized by law, entering an election polling place on the day of any election carrying a deadly weapon; or possessing a deadly weapon on school grounds; or entering a nuclear or hydroelectric generating station carrying a deadly weapon on his person or within the immediate control of any person.**

**Crime Involving Moral Turpitude (CMT):** Probably not. Mere possession of a weapon with no malice or intent to harm is not a CMT. *Matter of Rainford*, 20 I. & N. Dec. 598 (BIA 1992).

**Aggravated felony.** No, except that possession of an explosive in an airport is an aggravated felony. See 18 USC § 844(g).

**Firearms Deportation Ground:** Should not be under current case law. To definitively avoid this ground, defense counsel should plead defendant to a “deadly weapon” and avoid any reference to a firearm. Immigration counsel will argue that conviction under the statute is never removable under the firearms ground. See discussion at ARS § 13-3102 A1-A2, *supra*

**A14. Supplying, selling or giving firearm to another person if the person knows or has reason to know that the other person would use the firearm in the commission of any felony.**

**Crime Involving Moral Turpitude (CMT):** Probably.

**Aggravated Felony: Firearms Offense:** Probably. 18 U.S.C. § 924(h) criminalizes the transfer of a firearm with knowledge it will be used to commit a crime of violence or drug trafficking offense. An analogous state law is an aggravated felony. To attempt to avoid this aggravated felony ground, defense counsel should avoid any mention of the type of felony to be committed, i.e., plead defendant to the statutory language “commission of any felony.” It still might be so held, however, on the theory that a firearm could not be used in the commission of a non-violent felony. Avoiding a one-year sentence will not prevent a conviction from being an aggravated felony under this category.

**Crime of Violence:** Should not be under current case law. To be safe and because case law could change, counsel should plead to less than a year. Previously, the government could argue that this is a crime of violence because the situation as a whole could lead to use of force. See *Prakash v. Holder*, 579 F.3d 1033 (9th Cir. 2009) (soliciting a violent act poses a substantial risk that physical force will be used against another even if the actual violence may occur after the solicitation itself); *Matter of Guerrero*, 25 I&N Dec. 631 (BIA 2011). Because the Supreme Court and the Ninth Circuit have recently held §16(b) to be void for vagueness, however, this should not be a crime of violence under that ground. See “Aggravated Felony” under ARS § 13-1002, *supra*.

**Firearms Trafficking Offense:** “Supplying” and “selling” can be construed as trafficking in firearms. “Giving possession or control of a firearm” probably is not trafficking. Either avoid pleading defendant to this subsection or keep the record of conviction vague by pleading defendant to “supplying, selling, or giving possession or control.”

**Firearms Deportation Ground:** Possibly not, since Arizona law does not include an exception for antique firearms. See section A9, *supra*.

**A15. Deadly weapon in furtherance of any act of terrorism as defined in section 13-2301 or possessing or exercising control over a deadly weapon knowing or having reason to know that it will be used to facilitate any act of terrorism as defined in section 13-2301. Avoid a plea to this ground.**

**Crime Involving Moral Turpitude (CMT):** Assume that this is a CMT.

**Aggravated Felony: Crime of Violence:** Assume that this is a crime of violence and if possible obtain a sentence of under a year or plead to an alternate offense.

**Terrorism Grounds:** This offense will likely elicit a charge from the government accusing and possibly leading to deportation, inadmissibility, and other penalties.

**Firearms Deportation Ground:** Should not be under current case law. To avoid this ground, defense counsel should plead defendant to the statutory language, “deadly weapon.” *See* Immigration counsel will argue that conviction under the statute is never removable under the firearms ground. *See* discussion at ARS § 13-3102 A1-A2, *supra*

#### **75. Unlawful discharge of firearms, ARS § 13-3107**

A person who with criminal negligence discharges a firearm within or into the limits of any municipality is guilty of a Class 6 felony.

**Crime Involving Moral Turpitude (CMT):** Section 13-3107 should not be considered a CMT because negligence does not describe the requisite intent for a CMT and the nature of crime is not “inherently base, vile, or depraved.”

**Aggravated Felony:** Negligent discharge of a firearm will not be an aggravated felony as a “crime of violence” within 8 U.S.C. § 16 because an offense with a *mens rea* of negligence or less is not a crime of violence. *Leocal v. Ashcroft*, 125 S.Ct. 377 (2004). Where possible, however, counsel should get 364 or less, in case of future changes in the law.

**Firearms Ground:** Negligently discharging a firearm has traditionally been charged as a deportable firearms offense within 8 U.S.C. § 1227(a)(2)(C). *Valerio-Ochoa v. U.S.*, 241 F.3d 1092 (9th Cir. 2001) (violation of Cal. Pen. Code § 246.3 for discharging a firearm in a grossly negligent manner is a deportable firearms offense pursuant to 8 U.S.C. § 1227). Under current case law, conviction under this statute should not be removable because the statute does not include an exception for antique firearms. *See U.S. v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014), Ariz. Op. Att’y Gen. No. I14-009 (Jan. 2, 2015).

**Deferred Action for Childhood Arrivals:** This conviction will likely bar a non-citizen from qualifying for DACA, or subject a DACA recipient (or recipient of prosecutorial discretion) to renewed removal proceedings. Unlawful possession or use of a firearm is considered a serious misdemeanor for DACA purposes, meaning that the U.S. Citizenship and Immigration Services will only grant DACA if the applicant can show extraordinary circumstances. *See* Note: Deferred Action for Childhood Arrivals.

#### **76. Prostitution, ARS § 13-3214**

It is unlawful for a person to knowingly engage in prostitution. A person who violates this section is guilty of a class 1 misdemeanor, except that a person who has previously been convicted of three or more violations of this section and who commits a subsequent violation of this section is guilty of a class 5 felony.

**Crime Involving Moral Turpitude (CMT):** Engaging in prostitution will likely be held a CMT. *Matter of W*, 4 I&N Dec. 401 (BIA 1951). The Ninth Circuit has also held that soliciting a prostitute is a CMT. *Rohit v. Holder*, 670 F.3d 1085, 1090 (9th Cir. 2012)

**Aggravated Felony:** No. Although running a prostitution business or transporting a prostitute for commercial advantage is an aggravated felony, the elements of the statute are limited to an individual who engages in prostitution. 8 U.S.C. § 1101(a)(43)(K).

**Other Grounds – Prostitution:** Divisible. Under 8 U.S.C. § 1182(a)(2)(D), a person who is coming to the U.S. to engage in prostitution, or who has engaged in prostitution within ten years of the date of application for admission is inadmissible. However, the Department of State requires an act of sexual *intercourse* in order to meet the definition of “prostitution.” 22 C.F.R. § 40.24(b) (2006). The Arizona statute is broader since a person may be convicted under § 13-3214 for engaging in sexual contact, oral sexual contact, or sadomasochistic abuse. ARS § 13-3211(8); *Kepilino v. Gonzales*, 454 F.3d 1057, 1061 n. 2 (9th Cir. 2006). Additionally, a single conviction under this statute might not trigger inadmissibility since the Dept. of State definition requires “elements of continuity and regularity, indicating a pattern of behavior or deliberate course of conduct...as distinguished from the commission of casual or isolated acts.” 22 C.F.R. § 40.24(b) (2006). Counsel should plead to acts other than sexual intercourse and avoid references to prior prostitution convictions.

#### **77. Possession, use, production, sale or transportation of marijuana, ARS §13-3405**

*NOTE:* On July 14, 2011, the Ninth Circuit prospectively overturned *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), which had held that a single state drug possession conviction expunged pursuant to “rehabilitative relief” would not trigger removability as a controlled substance offense. See *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc). Therefore, a single conviction received on or after July 14, 2011 for simple possession, possession of paraphernalia, or another minor drug offense can no longer be eliminated for immigration purposes by obtaining a set aside under ARS § 13-907.

A single conviction for simple drug possession or possession of paraphernalia offense entered prior to July 14, 2011 may still be eliminated for immigration purposes under § 13-907 as long as the defendant did not violate probation. See *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009). However, a conviction for use or under the influence of drugs will trigger removability as a controlled substance offense even if the conviction occurred prior to July 14, 2011. See *Nunez-Reyes v. Holder*, 646 F.3d at 695 (overruling *Rice v. Holder*, 597 F.3d 952 (9th Cir.2010)).

Note also that a TASC disposition in certain Arizona counties where the prosecutor rather than the court imposes counseling requirements does not constitute a conviction for immigration purposes. See discussion of these options at Note: Controlled Substances.

*SPECIAL NOTE: DACA* If your client was present in the United States and under 31 as of June 15, 2012, had no lawful status, and came to the United States as a minor, remember that he or she may qualify for DACA. If so, a plea to any drug offense, even simple possession of less than thirty grams of marijuana, could affect his or her eligibility, and you should advise your client accordingly. See Note: Deferred Action for Childhood Arrivals, *supra*.

#### **A1. Possession or use**

##### **a. Possession**

**Crime Involving Moral Turpitude:** No. The BIA reserved judgment on the question in *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997), but it probably would not be so held. See also *Hampton v. Wong Ging*, 299 F. 289, 290 (9th Cir. 1924) (possession of opium is not a CMT).

**Aggravated felony:** Where there is no prior drug conviction, a conviction for possession of marijuana is not an aggravated felony. Where there is a drug prior, the law is not established and counsel should be cautious. (Note that a plea to use, rather than possession, always will prevent an aggravated felony conviction; see below).

Counsel should avoid pleading to a controlled substance offense in which a prior drug offense is an element, is alleged or is otherwise included as an “enhancement” in the charging document or judgment. The BIA has held that where a prior controlled substance conviction is pleaded or proved as part of an “enhancement” of a subsequent possession offense, it will convert the subsequent offense into an aggravated felony. If the prior conviction was not pleaded or proved for enhancement purposes, the subsequent possession offense is not an aggravated felony. See *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2586, 177 L. Ed. 2d 68 (2010); *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382, 386 (BIA 2007). Currently, the rule in the Ninth Circuit is that a possession conviction is not an aggravated felony despite a drug prior. *Oliveira-Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004). However, the Ninth Circuit is likely to reconsider this holding, because it was based on the court’s general rule not to consider the effect of recidivist sentence enhancements, a rule that was overturned in *United States v. Rodriguez*, 128 S.Ct. 1783 (2008); see also comments in *Lopez v. Gonzales*, 127 S. Ct. 625, n. 3 (2006). Note also that a single conviction of possession of flunitrazepam is an aggravated felony, even if there is no prior drug conviction; see discussion of ARS § 13-3407/3408.

**Whenever possible, criminal defense counsel should plead to “use” or leave the record vague between possession and use. Criminal defense counsel should reduce a possession conviction to a misdemeanor wherever possible.** This is because a felony *may* be treated as an aggravated felony in immigration proceedings outside the Ninth Circuit, and in federal criminal prosecutions for illegal re-entry. “Use,” and a first misdemeanor possession, will not be so treated. See Note: Controlled Substances, Part V.

**Controlled Substance Conviction Causing Deportability and Inadmissibility.** Yes in general, but see exception below. The person will be inadmissible and will not be allowed to seek legal status in the United States. If the client is a lawful permanent resident, the conviction will render him deportable but eligible for a waiver of removal (immigration pardon) if the offense is not an aggravated felony and if he has had his lawful permanent residence for at least five years and has been living in the United States for at least seven years after any legal admission.

**Exception for possession of 30 grams or less or for being under the influence of marijuana, hashish, THC-carboxylic acid.** Generally a conviction for simple possession of a controlled substance is a deportable and inadmissible offense. The only statutory exceptions are that a **single** offense for 30 grams or less of marijuana will not cause deportability (8 USC § 1227(a)(2)(B)(i)), may be amenable to a discretionary waiver of inadmissibility (8 USC § 1182(h)), and is not a bar to good moral character (8 USC 1101(f)(3)). Where the possession exception applies, make sure it is reflected in the record of conviction and if the quantity was more than 30 grams make sure the record of conviction is sanitized of the quantity. Note, however, that the IJ may go beyond the traditional record of conviction to determine whether the offense involved thirty grams of marijuana. In *Matter of Dominguez Rodriguez*, 26 I. & N. Dec. 408 (BIA 2014), the Board reaffirmed its prior holding that the exception for 30 grams of marijuana calls for a circumstance-specific approach, rather than the categorical and modified categorical approaches. See Note: Fraud for further discussion of the “circumstance specific” approach.

The INS extended these exceptions to apply to hashish. INS General Counsel Legal Opinion 96-3 (April 23, 1996). The Ninth Circuit extended the exception to cover being under the influence. *Flores-Arellano v INS*, 5 F.3d 360 (9th Cir. 1993). The Ninth Circuit also extended this to a conviction of attempt to be under the influence of tetrahydrocannabinol (THC)-carboxylic acid in violation of Nevada law. *Medina v Ashcroft*, 393 F.3d 1063 (9th Cir. 2005).

**Eliminating the conviction.** A first conviction for simple drug possession or possession of marijuana that occurred prior to July 14, 2011 can be eliminated by state “rehabilitative relief” such as ARS § 13-907 as long as the defendant did not violate probation prior to the offense being set aside. *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009).

**b. Use**

**Crime Involving Moral Turpitude:** No, see possession.

**Aggravated felony.** No. There is no analogous federal offense, so even a conviction of use where a prior drug conviction is admitted is not an aggravated felony.

**Deportable and Inadmissible Drug Conviction.** Yes, with an exception for a first offense involving certain drugs. The Ninth Circuit has held that a single conviction for being under the influence of marijuana should receive the benefit of the 30 grams or less of marijuana exception that is discussed in possession, supra. *Flores-Arellano v. INS*, 5 F.3d 360 (9th Cir. 1993). Use of marijuana ought to be held equivalent to being under the influence.

**Eliminating the conviction.** A conviction for use of marijuana may NOT be eliminated by state “rehabilitative relief” even if it occurred prior to July 14, 2011. See *Nunez-Reyes v. Holder*, 646 F.3d 684, 695 (9th Cir. 2011) (en banc) (overruling *Rice v. Holder*, 597 F.3d 952 (9th Cir. 2010)).

**A2. Possession of marijuana for sale.**

**Crime Involving Moral Turpitude:** Yes, because it involves drug trafficking. *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997).

**Aggravated felony:** Yes, as a drug trafficking aggravated felony, regardless of sentence imposed.

**Other Grounds:** Deportable and inadmissible for conviction of an offense relating to a controlled substance. Gives the government “reason to believe” that the person has been or aided a drug trafficker, which is a separate ground of inadmissibility.

**A3. Produce**

**Crime Involving Moral Turpitude:** Yes, as trafficking, except that if the record left open the possibility that it was for personal use it might not be so held. *Matter of Khourn*, *id.*

**Aggravated felony.** Probably. Attempt to plead to possession or, better, use. Produce means grow, plant, cultivate, harvest, dry, process or prepare for sale. ARS § 13-3401(25). For a state offense to be an aggravated felony, the state offense must contain the same elements as an offense in one of the identified federal sections and the offense must be a felony in federal court. The federal law prohibits

manufacture of a controlled substance, which could be analogized to production. In practice most Immigration Judges will find this to be an aggravated felony, though immigration counsel can make the difficult argument that the federal definition of manufacture does not match Arizona's definition of production.

**Other Grounds:** Deportable and inadmissible for conviction of an offense relating to a controlled substance. Might or might not give the government "reason to believe" that the person has been or aided a drug trafficker, which is a separate ground of inadmissibility.

**A4. Transport for sale, import into state, sell, transfer, offer to transport/import/sell/transfer**

**a. Transport for sale, sell**

**Crime Involving Moral Turpitude:** Yes, as drug trafficking.

**Aggravated Felony:** Yes. Straight transportation does not meet the general definition of trafficking. *United States v. Casarez-Bravo*, 181 F.3d 1074 (9th Cir. 1999); *Saleres v. INS*, 22 Fed. Appx. 831 (9th Cir. 2001)(Table). But because this offense is transport for sale it will be found to involve an element of trafficking.

**Controlled Substance Conviction Causing Deportability and Inadmissibility.** Yes.

**b. Import into this state**

**Crime Involving Moral Turpitude:** Yes, if the importation is necessarily for trafficking as opposed to personal use.

**Aggravated Felony:** Yes, to the extent that the importation is for trafficking. Or, to the extent that this offense is analogous to 21 U.S.C. § 952(a), which criminalizes the importation of controlled substances or, if they are listed in schedules III, IV, or V, dangerous drugs. However, an argument could be made that importation into the state is akin to transportation, which does not meet the general definition of trafficking. *United States v. Casarez-Bravo*, 181 F.3d 1074 (9th Cir. 1999).

**Controlled Substance Conviction Causing Deportability and Inadmissibility.** Yes, as a ground of inadmissibility and deportability as an offense relating to controlled substances.

**c. Offer to transport for sale; Offer to sell; Offer to transfer.**

**Crimes Involving Moral Turpitude:** Yes as trafficking, except that if the record leaves open the possibility that the offer was to transfer for free, this may not be a CMT.

**Aggravated felony:** No. A conviction for an "offer" to transport for sale, sell, transfer, or import is analogous to a solicitation offense, which does not constitute an aggravated felony. *See Rosas-Castaneda v. Holder*, 655 F.3d 875, 885 (9th Cir. 2011). In *Rosas-Castaneda*, the Ninth Circuit even found that a charging document and plea agreement that showed a conviction for Attempted Transport for Sale under ARS § 13-3405(A)(4) was not categorically an aggravated felony since "[n]either document in the record of conviction produces any specific information that definitively rules out the possibility that Rosas was convicted of a solicitation offense. *Id.* at 886. However, a transcript of a plea colloquy that did not specifically mention an "offer" to transport for sale, sell, transfer, or import would likely trigger removal for an aggravated felony. While a plea to the generic solicitation statute of § 13-1002 is much

safer in avoiding an aggravated felony, defense counsel who cannot otherwise avoid a drug trafficking offense should plead to § 13-3405(A)(4) and specify “offer” in the factual basis.

If pleading to this statute, counsel could also plead to “transfer,” which is defined as furnishing, delivering or giving away marijuana. ARS § 13-3401(37). This will provide immigration counsel with an additional argument that the offense is not an aggravated felony; see Part d, *infra*.

**Other Grounds:** A conviction under Arizona’s “generic” solicitation statute, § 13-1002, is not a deportable controlled substance conviction or an aggravated felony. *Coronado-Durazo v. INS*, 123 F.3d 1322, 1324 (9th Cir. 1997); see also *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999). However, the Ninth Circuit has found that a conviction under a “specific” solicitation statute, such as that contained in ARS §§ 13-3405(A)(4), 13-3407(A)(7), or 13-3408(A)(7) would render a noncitizen removable for an offense relating to a controlled substance. See *Rosas-Castaneda v. Holder*, 655 F.3d 875, 885 (9th Cir. 2011); *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009). Therefore, counsel should attempt to plead their client to the generic solicitation statute under ARS § 13-1002.

**d. Transfer.** “Transfer” means to furnish, deliver *or give away*.

**Crimes Involving Moral Turpitude:** Yes as trafficking, except that if the record leaves open the possibility that the offer was to transfer for free, this may not be a CMT.

**Aggravated felony.** Not if the record does not establish either remuneration or more than a small amount of marijuana. In *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), the Supreme Court recognized that under 21 USC § 841(b)(4), giving away a small amount of marijuana for free is a federal misdemeanor, and non-trafficking offenses are only aggravated felonies if they are analogous to federal felonies. Thus, the Supreme Court held that for a Georgia distribution offense to be an aggravated felony, the record must establish either remuneration or more than a small amount of marijuana. Arizona courts have sustained convictions under ARS 13-3415(A)(7) where the defendant “either gave an undercover police officer usable amounts of marijuana *or* sold him methamphetamine.” *State v. Apolinar*, 2013 WL 5119947, at \*1 (Ariz. Ct. App. Sept. 13, 2013)(emphasis added). If possible, defense counsel should make a record that the conviction was for giving away a small amount of marijuana. If that is not possible, plea to the full text of subsection (A)(4), and leave open the possibility that the offense involves a small amount of marijuana. A class 3 felony under (B)(10), for example, specifying an amount less than four pounds, leaves open this possibility.

**Other Grounds:** Yes, as a ground of inadmissibility and deportability as an offense relating to controlled substances.

**78. Possession, use, administration, acquisition, sale, manufacture or transportation of dangerous drugs, ARS § 13-3407, or narcotic drugs, ARS § 13-3408**

Persons who knowingly

- (1) Possess or use a dangerous or narcotic drug.
- (2) Possess such a drug for sale.
- (3) Possess equipment or chemicals, or both, for the purposes of manufacturing such a drug.
- (4) Manufacture such a drug.
- (5) Administer such a drug to another person.
- (6) Obtain or procure the administration of such a drug by fraud, deceit, misrepresentation or subterfuge.
- (7) Transport for sale import into this state or offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer such a drug.

**NOTE: On July 14, 2011, the Ninth Circuit prospectively overturned *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), which had held that a single state drug possession conviction expunged pursuant to “rehabilitative relief” would not trigger removability as a controlled substance offense. See *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc). Therefore, a single conviction received on or after July 14, 2011 for simple possession, possession of paraphernalia, or another minor drug offense can no longer be eliminated for immigration purposes by obtaining a set aside under ARS § 13-907.**

**A single conviction for simple drug possession or possession of paraphernalia offense entered prior to July 14, 2011 may still be eliminated for immigration purposes under § 13-907 as long as the defendant did not violate probation. See *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009). However, a conviction for use or under the influence of drugs will trigger removability as a controlled substance offense even if the conviction occurred prior to July 14, 2011. See *Nunez-Reyes v. Holder*, 646 F.3d at 695 (overruling *Rice v. Holder*, 597 F.3d 952 (9th Cir.2010)).**

**Note also that a TASC disposition in certain Arizona counties where the prosecutor rather than the court imposes counseling requirements does not constitute a conviction for immigration purposes. See discussion of these options at Note: Controlled Substances.**

***In general, where possible do not have the specific drug identified on the record.*** Criminal defense counsel can leave open a potential defense in immigration proceedings by creating a record of conviction that does not identify the specific dangerous (or narcotic) drug, e.g. by pleading to the language of the statute. If the record of conviction does not specifically identify what the controlled substance was, immigration authorities may not be able to establish that the substance was one of those listed as a controlled substance under federal law. Arguably “dangerous drugs” and “narcotic drugs” are terms that comprise more than controlled substances. For immigration purposes a controlled substance is defined by federal drug schedules at 21 USC §802. In *Matter of Paulus* the BIA held that if the state definition of controlled substance is broader than the federal definition and if the substance is not identified on the record, there is no way to prove that the substance actually was one of those on the federal list. 11 I&N Dec. 274 (BIA 1965); *see also Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007). Therefore the conviction is not necessarily of an offense “relating to” controlled substances under the federal definition. If the offense does not involve a federal controlled substance, the conviction is not a basis for deportability, inadmissibility or aggravated felon status.

Case law is not currently clear as to whether the Arizona controlled substance schedule is coextensive with the federal schedule, though in practice Arizona Judges are finding it is not. In an unpublished decision, the BIA previously held that, even though the Arizona controlled substance schedule contains drugs that do not appear on the federal schedule, the Arizona legislature “intended to” track the federal list of illegal drugs such that the Arizona drug conviction is removable regardless of whether a controlled substance is identified. The Ninth Circuit reversed, citing its decision in *Ragasa v. Holder*, 752 F.3d 1173, 9th Cir. 2014)(analyzing a Hawaii statute that contains the same two substances in the Arizona schedule, lacking in the federal schedule). *But see Matter of Ferreira*, 26 I & N Dec. 415 (BIA 2014)(where a drug schedule is overbroad, non-citizen must show a “realistic probability” that state prosecutes for overbroad substances).

Arizona Judges are currently treating Arizona’s controlled substance schedule as overbroad, but have been allowing the Department to prove the substance under the modified categorical approach by referring to the record of conviction. Defense counsel should therefore try to leave the record vague as to

what controlled substance was involved, but should not assume a controlled substance conviction with an unidentified drug will be safe.

Immigration Counsel may rely on *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), to argue that there must be a strict match between the state and federal list of controlled substances. Immigration counsel can argue that ARS 13-3408 is overbroad and indivisible, because a jury is not required to make a finding regarding which substance was involved. The Ninth Circuit so held in a recent, unpublished opinion. See *Vera-Valdevinos. Lynch*, No 14-73861 (9<sup>th</sup> Cir. May 2016).

**Generic solicitation under ARS § 13-1002 is a good alternate plea.** For more information see Note: Controlled Substances.

## **A1. Possession or use**

### **a. Possession**

**Crime Involving Moral Turpitude:** No. The BIA reserved judgment on the question in *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997), but it probably would not be so held. See also *Hampton v. Wong Ging*, 299 F. 289, 290 (9th Cir. 1924) (possession of opium is not a CMT).

**Aggravated felony:** No, with the exception discussed below involving flunitrazepam. Neither a single conviction nor multiple convictions for felony possession of a controlled substance should be held an aggravated felony in immigration proceedings in the Ninth Circuit. *Oliveira-Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004). However, the BIA in *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382, 386 (BIA 2007) noted that *Oliveira-Ferreira* may be in tension with the Supreme Court's decision in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), which suggests that a prior controlled substance offense that is pleaded to as part of an "enhancement" of a subsequent offense may convert the subsequent offense into an aggravated felony. Therefore, counsel should avoid pleading to a controlled substance offense in which a prior drug offense is an element, is alleged or is otherwise included as an "enhancement" in the charging document or judgment.

A single conviction of possession of flunitrazepam is an aggravated felony, because a first such conviction is punished as a felony under federal law.

**Whenever possible, criminal defense counsel should plead to "use" or leave the record vague between possession and use. Criminal defense counsel should reduce a possession conviction to a misdemeanor wherever possible.** This is because a felony *may* be treated as an aggravated felony in immigration proceedings outside the Ninth Circuit, and in federal criminal prosecutions for illegal re-entry. "Use," and a first misdemeanor possession, will not be so treated. See Note: Controlled Substances, Part V.

**Controlled Substance Conviction Causing Deportability and Inadmissibility.** Yes. The person will be inadmissible and will not be allowed to seek legal status in the United States. If the client is a lawful permanent resident, the conviction will render him deportable but eligible for a waiver of removal (immigration pardon) if the offense is not an aggravated felony and if he has had his lawful permanent residence for at least five years and has been living in the United States for at least seven years after any legal admission.

### **b. Use**

**Crime Involving Moral Turpitude:** No, see possession.

**Aggravated felony.** No. Because it does not involve trafficking and there is no analogous federal offense, even felony use, or use with a prior drug conviction, is not an aggravated felony.

**Deportable and Inadmissible Drug Conviction.** Yes.

**Eliminating the conviction.** A conviction for use of a narcotic or dangerous drug may NOT be eliminated by state “rehabilitative relief” even if it occurred prior to July 14, 2011. *See Nunez-Reyes v. Holder*, 646 F.3d 684, 695 (9th Cir. 2011) (en banc) (overruling *Rice v. Holder*, 597 F.3d 952 (9th Cir. 2010)).

#### **A2. Possession for sale.**

**Crime Involving Moral Turpitude:** Yes. *Matter of Khourn, supra.*

**Aggravated Felony:** Yes. Possession for sale involves trafficking and is an aggravated felony regardless of sentence.

**Controlled substance conviction causing deportability and inadmissibility.** Yes, if the record shows a federally recognized controlled substance.

#### **A3. Possess equipment or chemicals, or both, for the purpose of manufacture**

See “Manufacture.”

#### **A4. Manufacture**

**Crime Involving Moral Turpitude:** Probably. This offense might be seen as akin to drug trafficking, which is a CMT. *Matter of Khourn*, 21 I. & N. Dec. 1041 (BIA 1997). NOTE: Based on the statute’s annotations, it is unclear whether these subsections can include manufacture for personal use. This might create an argument that the offense does not involve trafficking absent evidence on the record showing that it was not for personal use.

**Aggravated Felony:** Yes. A3 is likely to be held an aggravated felony as analogous to 21 U.S.C. § 841(c), unauthorized possession of listed chemicals with intent to manufacture a controlled substance, if the AZ conviction involves a federally listed controlled substance. Subsection (4) likely to be held an aggravated felony as analogous to 21 USC § 841(a)(1), manufacture a controlled substance, if the AZ conviction involves a federally listed controlled substance.

**Controlled Substance Conviction Causing Deportability and Inadmissibility.** Yes, if the record shows a federally recognized controlled substance.

#### **A5. Administer the drug to another person.**

**Crime Involving Moral Turpitude:** Probably not. There is no authority establishing that administering a dangerous drug necessarily involves an evil intent.

**Aggravated Felony:** No, because no trafficking element and no federal analogue.

**Controlled Substance Conviction Causing Deportability and Inadmissibility.** Yes, if the record shows a federally recognized controlled substance.

**A6. Obtain or procure the administration of the drug by fraud, deceit, misrepresentation or subterfuge.**

**Crime Involving Moral Turpitude:** Yes, in the case of fraud. Fraud is by definition a CMT, including where fraud is involved in a drug offense. *Matter of A*, 5 I. & N. Dec. 52 (BIA 1953) (holding that defrauding the U.S. government by falsely issuing dangerous prescription involves both forgery and fraud and is therefore, a CMT).

**Aggravated Felony:** Yes, as analogous to 21 USC § 843(a)(3) (acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge). Try to plead to straight possession or straight fraud.

**Controlled Substance Conviction Causing Deportability and Inadmissibility.** Yes, if the record shows a federally recognized controlled substance.

**A7. Transport for sale, import into this state, offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer the drug.**

These mainly are divided into trafficking offenses, and offering to commit a trafficking offense (solicitation). A conviction for an “offer” to transport for sale, sell, transfer, or import is analogous to a solicitation offense, which does not constitute an aggravated felony. *See Rosas-Castaneda v. Holder*, 655 F.3d 875, 885 (9th Cir. 2011). In *Rosas-Castaneda*, the Ninth Circuit even found that a charging document and plea agreement that showed a conviction for Attempted Transport for Sale under ARS § 13-3405(A)(4) was not categorically an aggravated felony since “[n]either document in the record of conviction produces any specific information that definitively rules out the possibility that Rosas was convicted of a solicitation offense. *Id.* at 886. However, a transcript of a plea colloquy that did not specifically mention an “offer” to transport for sale, sell, transfer, or import would likely trigger removal for an aggravated felony. While a plea to the generic solicitation statute of § 13-1002 is much safer in avoiding an aggravated felony, defense counsel who cannot otherwise avoid a drug trafficking offense should plead to § 13-3405(A)(4) and specify “offer” in the factual basis.

Even if defense counsel can avoid an aggravated felony by pleading to an “offer” to transport for sale, sell, transfer, or import, this will still be found to be a deportable drug conviction. *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009).

**a. Transport for sale, sell**

**Crime Involving Moral Turpitude:** Yes, as drug trafficking.

**Aggravated Felony:** Yes. Straight transportation does not meet the general definition of trafficking. *United States v. Casarez-Bravo*, 181 F.3d 1074 (9th Cir. 1999); *Saleres v. INS*, 22 Fed. Appx. 831 (9th Cir. 2001)(Table). But because this offense is transport for sale it will be found to involve an element of trafficking.

**Controlled Substance Conviction Causing Deportability and Inadmissibility.** Yes, if the record shows a federally recognized controlled substance.

**b. Import into this state**

**Crime Involving Moral Turpitude:** Yes, if the importation is necessarily for trafficking as opposed to personal use.

**Aggravated Felony:** Yes, to the extent that the importation is for trafficking. Or, to the extent that this offense is analogous to 21 U.S.C. § 952(a), which criminalizes the importation of controlled substances or, if they are listed in schedules III, IV, or V, dangerous drugs. However, an argument could be made that importation into the state is akin to transportation, which does not meet the general definition of trafficking. *United States v. Casarez-Bravo*, 181 F.3d 1074 (9th Cir. 1999)

**Controlled Substance Conviction Causing Deportability and Inadmissibility.** Yes, if the record shows a federally recognized controlled substance.

**b. Transfer**

**Crime Involving Moral Turpitude:** Probably. Transfer means “furnish, deliver, or give away” and therefore might be viewed as a drug trafficking offense. If the record leaves open the possibility that no money was involved, immigration counsel can argue against this.

**Aggravated Felony:** Yes. Federal drug laws punish “giving away” a federally listed controlled substance without remuneration as a felony (except giving away a small amount of marijuana, which is a misdemeanor). This makes an analogous state offense an aggravated felony for immigration purposes.

**Controlled Substance Conviction Causing Deportability and Inadmissibility.** Yes, if the record shows a federally recognized controlled substance.

**d. Offer to transport for sale, sell, transfer, or import into the state**

**Crime Involving Moral Turpitude:** Yes

**Aggravated Felony:** No, if offer is specifically mentioned. A conviction for an “offer” to transport for sale, sell, transfer, or import is analogous to a solicitation offense, which does not constitute an aggravated felony. *See Rosas-Castaneda v. Holder*, 655 F.3d 875, 885 (9th Cir. 2011). In *Rosas-Castaneda*, the Ninth Circuit even found that a charging document and plea agreement that showed a conviction for Attempted Transport for Sale under ARS § 13-3405(A)(4) was not categorically an aggravated felony since “[n]either document in the record of conviction produces any specific information that definitively rules out the possibility that Rosas was convicted of a solicitation offense. *Id.* at 886. However, a transcript of a plea colloquy that did not specifically mention an “offer” to transport for sale, sell, transfer, or import would likely trigger removal for an aggravated felony. While a plea to the generic solicitation statute of § 13-1002 is much safer in avoiding an aggravated felony, defense counsel who cannot otherwise avoid a drug trafficking offense should plead to § 13-3405(A)(4) and specify “offer” in the factual basis.

Defense counsel should advise a client pleading to solicitation not to travel outside of the United States, and warn that this argument is only valid in the Ninth Circuit. See below.

**Controlled Substance Grounds.** A conviction under Arizona’s “generic” solicitation statute, § 13-1002, is not a deportable controlled substance conviction or an aggravated felony. *Coronado-Durazo v. INS*, 123 F.3d 1322, 1324 (9th Cir. 1997); see also *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999). However, the Ninth Circuit has found that a conviction under a “specific” solicitation statute, such as that contained in ARS §§ 13-3405(A)(4), 13-3407(A)(7), or 13-3408(A)(7) would render a noncitizen removable for an offense relating to a controlled substance. *Mielewczyk v. Holder*, 575 F.3d 992, 998 (9th Cir. 2009). Therefore, counsel should attempt to plead their client to the generic solicitation statute under ARS § 13-1002.

*Note that solicitation only protects against an aggravated felony or controlled substance removal ground in the Ninth Circuit.* If your client plans to return to another circuit after conviction, and particularly if she will complete probation in another circuit, she may be subject to the aggravated felony or controlled substance removal ground under that circuit’s case law. *Defense counsel should also advise a client pleading to solicitation that they should not leave the United States*, as they will likely be inadmissible under the crime involving moral turpitude and “reason to believe” is or assisted a trafficker grounds of inadmissibility.

**79. Possession, manufacture, delivery, advertisement of drug paraphernalia, ARS §13-3415**

**A.** It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate... conceal, inject, ingest, inhale or otherwise introduce into the human body a drug in violation of this chapter. Class 6 felony.

**Crime Involving Moral Turpitude (CMT):** Not categorically. Possession to use in order to ingest or inhale should not be held a CMT. Possession of drug paraphernalia to plant, manufacture, etc. etc. might be considered akin to a drug trafficking offense, which is a CMT. Plead to “introduce into the body” or the language of the statute to avoid any inference of drug trafficking.

**Aggravated Felony:** Probably not. Although possession of paraphernalia with intent to commit a drug trafficking offense (such as manufacturing) could be held an aggravated felony, the vast majority of Arizona cases include only possession of paraphernalia for personal use and will not be held an aggravated felony.

*Aggravated Felony as a Trafficking Offense:* Not categorically. Unless the charging document specifically refers to possession of paraphernalia that could be used for trafficking offenses, immigration judges will not find this to be an aggravated felony.

*Aggravated Felony as a Federal Analogue:* Appears not to be. The only statute dealing with drug paraphernalia is 21 U.S.C. § 863(a) (sale, offer for sale, use of mails or interstate commerce to transport, or to import or export drug paraphernalia) and it is not sufficiently analogous to ARS 13-3415 to make it an aggravated felony.

**Controlled Substance Ground:** Possibly not. The Ninth Circuit had previously held that ARS § 13-3415 was categorically an offense relating to a controlled substance. *Luu Le v. INS*, 224 F.3d 911 (9<sup>th</sup> Cir. 2000). For possession or distribution offenses to be removable under the Act, the Courts recognized that the state statute must only cover substances proscribed under the federal statute and no others. The Ninth Circuit and the BIA, however, reasoned that a paraphernalia offense, unlike a controlled substance offense, need only be associated with the drug trade in general. *Id.* See also *Martinez Espinoza*, 25 I & N Dec. 118 (2009). The Supreme Court rejected this approach in *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015), holding that, for a paraphernalia offense to trigger removal under the controlled substance ground, “the

Government must connect an element of the alien’s conviction to a drug ‘defined in [§802].’ *Id.* At 1991. The Ninth Circuit has recognized that *Mellouli* implicitly overruled *Luu Le* and its prodigy. *Madrigal-Barcenas v. Lynch*, 797 F.3d 643 (9th Cir. 2015).

Arizona law does not require a jury to make a unanimous finding as to what drug was involved in a paraphernalia offense. *See e.g. State v. Lodge*, 2015 Ariz. App. Unpub. LEXIS 40 (January 14, 2015). Under *Mellouli v. Lynch*, therefore, Immigration Counsel has a good argument that conviction under ARS § 13-3415 is not divisible, meaning that a Judge cannot consult the record of conviction to determine what controlled substance was involved. In practice, many Judges are still consulting the record of conviction to determine the substance. Defense counsel should conservatively assume that courts will proceed to the modified categorical approach and sanitize the record of conviction of the substance involved. Defense counsel should particularly avoid string citations to statutes that identify the controlled substance.

If the substance involved was less than thirty grams of marijuana, and the defendant has no prior controlled substance offenses, specifying less than thirty grams of marijuana in the record and factual basis will avoid deportation for non-citizens lawfully admitted, and allow for a 212(h) waiver for those who are not and are otherwise eligible to adjust status.

- B.** It is unlawful for any person to deliver, possess with intent to deliver or manufacture with intent to deliver drug paraphernalia knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, manufacture . . . conceal, inject, ingest, inhale or otherwise introduce into the human body a drug in violation of this chapter. Class 6 felony.

**Crime Involving Moral Turpitude (CMT):** Probably divisible, see A. A failure to “reasonably know” the use something will be put to should not be held to involve moral turpitude.

**Aggravated Felony:** Not clear.

*As a Drug Trafficking Offense:* This might be a drug trafficking offense if the record of conviction establishes that there was an intent to deliver or manufacture drug paraphernalia knowing that it would be used to “plant, propagate...contain” etc. To avoid this result, defense counsel should plead to the generic language of the statute.

*As a Federal Analogue:* Probably not, as this should not be held sufficiently close to 21 U.S.C. § 863(a) (see Part A, *supra*) to make it an aggravated felony. Better plea is to possession under A, or leave the record of conviction vague as to whether Part A or B was the offense of conviction.

**Controlled Substance Ground:** Possibly not. The Ninth Circuit had previously held that ARS § 13-3415 was categorically an offense relating to a controlled substance. *Luu Le v. INS*, 224 F.3d 911 (9th Cir. 2000). For possession or distribution offenses to be removable under the Act, the Courts recognized that the state statute must only cover substances proscribed under the federal statute and no others. The Ninth Circuit and the BIA, however, reasoned that a paraphernalia offense, unlike a controlled substance offense, need only be associated with the drug trade in general. *Id. See also Martinez Espinoza*, 25 I & N Dec. 118 (2009). The Supreme Court rejected this approach in *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015), holding that, for a paraphernalia offense to trigger removal under the controlled substance ground, “the Government must connect an element of the alien’s conviction to a drug ‘defined in [§802].’” *Id.* At 1991. The Ninth Circuit has recognized that *Mellouli* implicitly overruled *Luu Le* and its prodigy. *Madrigal-Barcenas v. Lynch*, 797 F.3d 643 (9th Cir. 2015).

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- C. It is unlawful for a person to place in a newspaper . . . knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Class 6 felony.

**Crime Involving Moral Turpitude (CMT):** Probably not.

**Aggravated Felony:** Maybe.

*As a Drug Trafficking Offense:* This might be construed as trafficking, although it is attenuated.

*As a Federal Analogue:* This may be held an aggravated felony as analogous with 21 U.S.C. § 863(a); see Part A, *supra*. Better plea is to possession under A, or leave the record of conviction vague as to whether Part A or C was the offense of conviction.

**Controlled Substance Ground:** Possibly not. The Ninth Circuit had previously held that ARS § 13-3415 was categorically an offense relating to a controlled substance. *Luu Le v. INS*, 224 F.3d 911 (9th Cir. 2000). For possession or distribution offenses to be removable under the Act, the Courts recognized that the state statute must only cover substances proscribed under the federal statute and no others. The Ninth Circuit and the BIA, however, reasoned that a paraphernalia offense, unlike a controlled substance offense, need only be associated with the drug trade in general. *Id. See also Martinez Espinoza*, 25 I & N Dec. 118 (2009). The Supreme Court rejected this approach in *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015), holding that, for a paraphernalia offense to trigger removal under the controlled substance ground, “the Government must connect an element of the alien’s conviction to a drug ‘defined in [§802].’” *Id.* At 1991. The Ninth Circuit has recognized that *Mellouli* implicitly overruled *Luu Le* and its progeny. *Madrigal-Barcenas v. Lynch*, 797 F.3d 643 (9th Cir. 2015).

Arizona law does not require a jury to make a unanimous finding as to what drug was involved in a paraphernalia offense. *See e.g. State v. Lodge*, 2015 Ariz. App. Unpub. LEXIS 40 (January 14, 2015). Under *Mellouli v. Lynch*, therefore, Immigration Counsel has a good argument that conviction under ARS § 13-3415 is not divisible, meaning that a Judge cannot consult the record of conviction to determine what controlled substance was involved. Defense counsel, however, should conservatively assume that Courts will proceed to the modified categorical approach and sanitize the record of conviction of the substance involved. If the substance involved was less than thirty grams of marijuana, and the defendant has no prior controlled substance offenses, specifying less than thirty grams of marijuana in the record and factual basis could avoid deportation for non-citizens lawfully admitted, and allow for a 212(h) waiver for those who are not and are otherwise eligible to adjust status. However, it may be difficult to argue that

advertisements for paraphernalia would only related to a single offense of simple possession of 30 grams or less of marijuana.

**80. Child or Vulnerable Adult Abuse, ARS § 13-3623**

A. Under circumstances likely to produce death or serious physical injury, any person who causes a child or vulnerable adult to suffer physical injury or, having the care or custody of a child or vulnerable adult, who causes or permits the person or health of the child or vulnerable adult to be injured or who causes or permits a child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is endangered is guilty of an offense as follows:

1. If done intentionally or knowingly, the offense is a class 2 felony and if the victim is under fifteen years of age it is punishable pursuant to section 13-705.
2. If done recklessly, the offense is a class 3 felony.
3. If done with criminal negligence, the offense is a class 4 felony.

B. Under circumstances other than those likely to produce death or serious physical injury to a child or vulnerable adult, any person who causes a child or vulnerable adult to suffer physical injury or abuse or, having the care or custody of a child or vulnerable adult, who causes or permits the person or health of the child or vulnerable adult to be injured or who causes or permits a child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is endangered is guilty of an offense as follows:

1. If done intentionally or knowingly, the offense is a class 4 felony.
2. If done recklessly, the offense is a class 5 felony.
3. If done with criminal negligence, the offense is a class 6 felony.

**Crime Involving Moral Turpitude (CMT):** Not categorically. A CMT generally requires an intentional or at least reckless *mens rea*. *Matter of Fualaau*, 21 I&N 475 (BIA 1996); *Matter of Sweetster*, 22 I&N Dec. 709 (BIA 1999). Where possible, counsel should plead to a *mens rea* of negligence and that defendant “permitted” the injury, if any, rather than “caused” it.

**Aggravated Felony:** Possibly as a “crime of violence” if the defendant receives a sentence of 365 days or more. 8 U.S.C. 1101(a)(43)(F). A crime of violence requires the intentional use of force, and ICE may argue that causing a person to suffer physical injury with an intentional *mens rea* meets this definition. Counsel should attempt to secure a sentence of less than 365 days. If this is not possible, try to plead to a *mens rea* of recklessness or negligence or to “permitting” the injury to occur, rather than “causing” it.

**Other Grounds – Domestic Violence/Child Abuse:** A noncitizen may be deportable for conviction of a crime of domestic violence, child abuse, child neglect, or child abandonment. 8 U.S.C. § 1227(a)(2)(E)(i). To qualify as a crime of domestic violence, the record of conviction must demonstrate that the offense is a “crime of violence” and was committed against a person who would be included in the DV statute located at § 13-3601. If the record reflects that the offense was committed recklessly or negligently, it will not be deportable as a crime of domestic violence. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc) (recklessly causing physical injury to another does not meet the federal definition of a “crime of violence” under 18 U.S.C. § 16); *Leocal v Ashcroft*, 125 S.Ct. 377 (2004) (negligent DUI is not a crime of violence because does not create risk that force will be used, just that injury will occur).

If the record establishes that the victim is a child, it is likely that a conviction under the statute will be found to fall within the broad definition of child abuse, neglect, or abandonment established by the Board of Immigration Appeals. See *Matter of Velasquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). However, the Ninth Circuit has found that a statute that includes only the *possibility* of harm, with no

actual physical or emotional injury, does not categorically fall within the definition of a “crime of child abuse.” *Pacheco-Fregozo v. Holder*, 576 F.3d 1030 (9th Cir. 2009); *Jimenez-Juarez v. Holder*, 635 F.3d 1169, 1171 n.2 (9th Cir. 2011) (affirming the holding of *Pacheco-Fregozo* that an offense that creates only potential harm to a child falls outside the scope of the BIA’s definition of a crime of child abuse). Following *Pacheco-Fregozo*, the BIA held that the crime of unreasonably placing a child in a situation that poses a threat of injury to the child’s life or health is categorically a crime of child abuse under 8 USC § 1227(a)(2)(E)(i) even though no proof of actual harm or injury to the child is required. *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010). Therefore, case law of the Ninth Circuit and the BIA is currently at odds.

Counsel should conservatively assume that a conviction under the statute will be categorically deportable as a crime of child abuse; however, immigration counsel can argue that it is broader than the generic definition since ARS § 13-3623 reaches conduct in which the child is endangered but not actually injured. Defense counsel should attempt to plead to endangerment language and avoid any mention of actual harm or injury to the victim whenever possible.

### **81. Unlawful Copying or Sale, ARS § 13-3705**

A. A person commits unlawful copying or sale of sounds or images from recording devices by knowingly:

1. Manufacturing an article without the consent of the owner.
2. Distributing an article with the knowledge that the sounds thereon have been so transferred without the consent of the owner.
3. Distributing or manufacturing an article on which sounds or images have been transferred which does not bear the true name and address of the manufacturer in a prominent place on the outside cover, box, jacket or label.
4. Distributing or manufacturing the outside packaging intended for use with articles which does not bear the true name and address of the manufacturer in a prominent place on the outside cover, box, jacket or label.
5. Transferring or causing to be transferred to an article any performance, whether live before an audience or transmitted by wire or through the air by radio or television without the consent of the owner and with the intent to obtain commercial advantage or personal financial gain.
6. Distributing an article with knowledge that the performance on the article, whether live before an audience or transmitted by wire or through the air by radio or television, has been transferred without the consent of the owner.

H. Unlawful copying or sale of sounds or images involving one hundred or more articles containing sound recordings or one hundred or more articles containing audiovisual recordings is a class 3 felony. Unlawful copying or sale of sounds or images involving ten or more but less than one hundred articles containing sound recordings or ten or more but less than one hundred articles containing audiovisual recordings is a class 6 felony. Unlawful copying or sale of sounds or images involving less than ten articles containing sound recordings or less than ten articles containing audiovisual recordings is a class 1 misdemeanor.

**Summary:** This statute is increasingly being used to prosecute illegal downloads and the sale of bootleg music and videos. Since there is little case law on point, immigration judges may find that it constitutes a CMT, although counsel may have arguments to the contrary, particularly if the plea is to A1, A2, or A6. A sentence of 365 days or more may trigger an aggravated felony for counterfeiting.

**Crime Involving Moral Turpitude (CMT):** Probably. The BIA has found that trafficking in counterfeit goods is a CMT due to the inherently fraudulent nature of the offense and the theft of

another's work. *Matter of Kochlani*, 24 I&N Dec. 128 (BIA 2007). Immigration counsel can argue that merely copying music or videos for one's own use is not inherently turpitudinous, but this argument is undercut by the fact that "distributing" and "manufacturing" under the statute are defined to include commercial advantage or financial gain. Therefore, since all of the subsections appear to involve a commercial element, it is likely that the statute will be categorically held a CMT.

**Aggravated Felony:** An offense relating to counterfeiting in which the sentence imposed is 365 days or more will be an aggravated felony. 8 U.S.C. § 1101(a)(43)(R); *Yong Wong Park v. AG of the United States*, 472 F.3d 66 (9th Cir. 2006) (trafficking in counterfeit goods under 18 U.S.C. § 2320 is an aggravated felony). The Ninth Circuit has defined "counterfeiting" as "knowingly us[ing] or possess[ing] counterfeit bills with the intent to defraud." *Albillo-Figueroa v. INS*, 221 F.3d 1070, 1073 (9th Cir. 2000). Immigration counsel can argue that the statute is categorically not an aggravated felony since it is missing the element of an intent to defraud, although ICE may argue that fraud is implicit within the statute. Immigration counsel could also argue that only representations on paper (e.g. securities and bills) fall within the generic definition of counterfeiting. However, the safest route is to secure a sentence of one year or less; if this is not possible, attempt to plead to A1, A2, or A6, since A3, A4, and A5 may be more likely to resemble an intent to counterfeit. If the loss to the victim is \$10,000 or more, ICE may also charge as an aggravated felony for fraud under 8 U.S.C. § 1101(a)(43)(M).

### **82. Unlawful Flight, ARS § 28-622.01**

A driver of a motor vehicle who willfully flees or attempts to elude a pursuing official law enforcement vehicle that is being operated in the manner described in section 28-624, subsection C is guilty of a class 5 felony.

**Crime Involving Moral Turpitude (CMT):** Probably not. The BIA has held that the offense of driving a vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle is a crime involving moral turpitude. *Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011). While § 28-622.01 includes only the element of flight, the statute at issue in *Ruiz-Lopez* required both fleeing from law enforcement *and* reckless disregard for the lives or property of others. Therefore, defense counsel should try to avoid any mention of injury or damage to property that could suggest a "wanton or willful disregard for the lives or property of others."

**Aggravated Felony:** This should not be held an aggravated felony as a crime of violence, since there is no use, attempted use, or threatened use of physical force as required by 18 U.S.C. § 16.

### **83. Driving or actual physical control while under the influence, ARS § 28-1381.**

**Crime Involving Moral Turpitude (CMT):** A simple DUI does not constitute a CMT. *Matter of Torres-Varela*, 23 I. & N. Dec 78 (BIA 2001) (*en banc*).

**Aggravated Felony:** A simple DUI will not be considered an aggravated felony as a crime of violence, even if a sentence of 365 days or more is imposed, because it can be committed with a *mens rea* of mere negligence. See, e.g., *Leocal v. Ashcroft*, 125 S.Ct. 377 (2004) (felony driving under the influence under Florida law, with no *mens rea* requirement, is not an aggravated felony as a crime of violence); *U.S. v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001) (Cal. conviction for DUI with injury Cal. Veh. Code § 23153 is not a COV); *U.S. v. Portillo-Mendoza*, 273 F.3d 1224, 1226 (9th Cir. 2001) (DUI conviction with priors in violation of Cal. Veh. Code §§ 23152 and 23550 was not an aggravated felony).

Legislation passed the Senate, but did not become law, that would make a third DUI a crime of violence and hence an aggravated felony if a sentence of a year or more is imposed. Because of this risk, counsel should attempt to avoid a sentence of a year for a third DUI.

**Deferred Action for Childhood Arrivals (“DACA”) and discretionary matters:** A DUI will likely bar a non-citizen from qualifying for DACA, or subject a DACA recipient (or recipient of prosecutorial discretion) to renewed removal proceedings. A DUI is considered a serious misdemeanor for DACA purposes, meaning that the U.S. Citizenship and Immigration Services will only grant DACA if the applicant can show extraordinary circumstances. *See Note: Deferred Action for Childhood Arrivals.* A simple DUI, particularly if it is not the first, may also make it difficult to obtain prosecutorial discretion and administrative closure, or a bond if your client is detained.

**84. Driving or actual physical control while under the extreme influence of intoxicating liquor, ARS § 28-1382.**

**Crime Involving Moral Turpitude (CMT):** No, see ARS § 28-1381.

**Aggravated Felony:** Not under current law, but counsel should try to obtain 364 days or less because of a risk of future legislation. See § 28-1381.

**Deferred Action for Childhood Arrivals (“DACA”) and discretionary matters:** A DUI will likely bar a non-citizen from qualifying for DACA, or subject a DACA recipient (or recipient of prosecutorial discretion) to renewed removal proceedings. A DUI is considered a serious misdemeanor for DACA purposes, meaning that the U.S. Citizenship and Immigration Services will only grant DACA if the applicant can show extraordinary circumstances. *See Note: Deferred Action for Childhood Arrivals.* A simple DUI, particularly if it is not the first, may also make it difficult to obtain prosecutorial discretion and administrative closure, or a bond if your client is detained.

**85. Aggravated DUI, ARS § 28-1383.**

A. A person is guilty of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs if the person does any of the following:

1. Commits a violation of section 28-1381, section 28-1382 or this section while the person's driver license or privilege to drive is suspended, canceled, revoked or refused or while a restriction is placed on the person's driver license or privilege to drive as a result of violating section 28-1381 or 28-1382 or under section 28-1385.
2. Within a period of sixty months commits a third or subsequent violation of section 28-1381, section 28-1382 or this section or is convicted of a violation of section 28-1381, section 28-1382 or this section and has previously been convicted of any combination of convictions of section 28-1381, section 28-1382 or this section or acts in another jurisdiction that if committed in this state would be a violation of section 28-1381, section 28-1382 or this section.
3. While a person under fifteen years of age is in the vehicle, commits a violation of either: (a) Section 28-1381 or (b) Section 28-1382.
4. While the person is ordered by the court or required pursuant to section 28-3319 by the department to equip any motor vehicle the person operates with a certified ignition interlock device, does either of the following: (a) While under arrest refuses to submit to any test chosen by a law enforcement officer pursuant to section 28-1321, subsection A; (b) Commits a violation of section 28-1381, section 28-1382 or this section.

**Summary:** This is currently a safer plea than it used to be. The primary concern here is with the possibility of a CMT. Before *Descamps v. U.S.*, 133 S. Ct. (9th Cir. 2013), the Ninth Circuit had held the statute to be divisible. *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc.) If the record of conviction showed CMT conduct, discussed below, it was frequently held to be a CMT. Post *Descamps*, however, there are good arguments that the statute is not divisible and is never a CMT.

*A note on endangerment:* Previously, it was common practice to plea to endangerment under ARS § 13-1201 as a safer alternative to aggravated DUI under this section. This is no longer a safe alternative, as the Board and the Ninth Circuit have found felony endangerment is categorically a CMT. *Matter of Leal*, 26 I & N Dec. 20 (BIA 2012), upheld in *Leal v. Holder*, 771 F.3d 1140 (9th Cir. 2014). In light of *Leal*, which makes endangerment a dangerous plea, and *Descamps* and *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016), which provide an argument that aggravated DUI is not divisible and is never a CMT, aggravated DUI is currently a safer plea than endangerment. Defense counsel should, however, take the safeguards detailed below.

**Crime Involving Moral Turpitude (CMT):**

A1. Possibly, if the record of conviction reflects that defendant was driving. *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc). The offense may not be a CMT if the record indicates or leaves open the possibility that the defendant was merely in physical control of the vehicle (e.g., sitting in a parked car), as opposed to driving it. See *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117, 1118 (9th Cir. 2003). Therefore counsel should attempt to have the record indicate, or leave open the possibility, that this was the case.

There may also be an argument that, in order to be a CMT, the evidence must demonstrate that defendant “actually knew” (rather than “should have known”) that his license was suspended. *Marmolejo-Campos v. Holder*, 558 F.3d at 912. For instance, under Arizona law, mailing notice of suspension or revocation of a license to the defendant’s last known address satisfies the “should have known” statutory element. *State v. Gonzales*, 206 Ariz. 469, 471 (2007). However, immigration counsel can argue that the Arizona definition of “should have known” is analogous to a *mens rea* of negligence, which is not sufficient for a CMT. *State v. Hyde*, 921 P.2d 655, 678 (Ariz. 1996); *Perez-Contreras*, 20 I&N Dec. 615, 618-19 (BIA 1992). Counsel should try to avoid pleading to actual knowledge that defendant knew her license had been suspended, canceled, revoked, or refused.

While defense counsel should still take the safeguards listed above, immigration counsel will have good arguments that conviction under this statute is never a CMT. In an unpublished decision, the BIA held that conviction under ARS § 28-1383(A)(1) is neither a categorical CMT, nor divisible under *Descamps v. U.S.*, 133 S. Ct. 2276 (2013), meaning that conviction under the statute can never be a CMT. See Raul Sainz-Rivera, A091-684-104 (BIA Mar. 10, 2014). Recently, DHS has not been charging aggravated DUIs under this statute as CMTs. However, there is no published authority finding that ARS § 28-1383(A)(1) is not divisible, and this case law is subject to change. See *Divisible Statutes, Record of Conviction*. As such, defense counsel should conservatively assume that the statute is divisible, and safeguard the record of conviction accordingly.

A2. Not a CMT. *Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001) (conviction under A2, aggravated driving with prior DUI convictions, is not a CMT because no culpable mental state is required; repeated commission of a non-CMT does not constitute a CMT).

A3. This subsection does not have a *mens rea* sufficient to be a CMT

A4. Maybe. While there is no case law on point, ICE may argue that the “knowing” element for this subsection is similar to that of A1 and that the offense is therefore a CMT. Counsel can argue that the subsection is more akin to A2 since no culpable mental state is required but should conservatively assume that it will be found a CMT, *see* analysis under A1, *supra*.

**Aggravated Felony:** Not under current law, but counsel should attempt to get a sentence of 364 days or less. *See* § 28-1382, *supra*.

**Other Grounds.** A conviction under A3 may trigger a charge of removability for child abuse under 8 U.S.C. § 1227(a)(2)(E)(i). *See Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) (the crime of unreasonably placing a child in a situation that poses a threat of injury to the child’s life or health is categorically a crime of child abuse under 8 USC § 1227(a)(2)(E)(i) even though no proof of actual harm or injury to the child is required). However, immigration counsel can argue that since the statute includes only the *possibility* of endangerment, with no actual physical or emotional injury, it does not fall within the definition of a “crime of child abuse.” *Pacheco-Fregozo v. Holder*, 576 F.3d 1030 (9th Cir. 2009); *Jimenez-Juarez v. Holder*, 635 F.3d 1169, 1171 n.2 (9th Cir. 2011) (affirming the holding of *Pacheco-Fregozo* that an offense that creates only potential harm to a child falls outside the scope of the BIA’s definition of a crime of child abuse).

Also, it is a ground of inadmissibility, to be a current alcoholic, which is classed as a mental disorder that poses a threat to self or others. 8 USC §1182(a)(1)(A)(ii). Being a “habitual drunkard” is a statutory bar to establishing good moral character, necessary for naturalization to U.S. citizenship, cancellation for non-permanent residents, VAWA and some other applications. 8 USC § 1101(f)(1). Multiple DUI convictions might provide evidence of either of these conditions. The Ninth Circuit, however, recently rejected 8 USC § 1101(f)(1) as unconstitutional. *See Ledezma-Cosino v. Lynch*, 2016 WL 1161260 (9<sup>th</sup> Cir. March 2016). Defense counsel should proceed with caution, however, as the case could be reheard, and may not apply outside the Ninth Circuit.

**Deferred Action for Childhood Arrivals (“DACA”) and discretionary matters:** A DUI will likely bar a non-citizen from qualifying for DACA, or subject a DACA recipient (or recipient of prosecutorial discretion) to renewed removal proceedings. A DUI is considered a serious misdemeanor for DACA purposes, meaning that the U.S. Citizenship and Immigration Services will only grant DACA if the applicant can show extraordinary circumstances. *See Note: Deferred Action for Childhood Arrivals*. A simple DUI, particularly if it is not the first, may also make it difficult to obtain prosecutorial discretion and administrative closure, or a bond if your client is detained.