

# for The Defense

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## The Immigration Consequences of Criminal Convictions

Defense Attorneys' Guide to Immigration Issues

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### Introduction

A criminal conviction can have devastating effects on an alien, whether here legally or illegally. In California, judges have a duty to warn non-citizens that a conviction may have collateral consequences regarding their immigration status. Last year the Arizona Civil Liberties Union and the Florence Immigrant and Refugee Rights Project filed a Petition to Amend Rule 17.2 of the Arizona Rules of Criminal Procedure to add such a requirement in Arizona. The petition has since been withdrawn because of opposition, with the idea to wait for a better time. If it had been adopted, criminal defense attorneys negotiating plea bargains would likely be getting a lot more questions about the possible immigration consequences of a plea.

The issue is not cut and dried for court-appointed attorneys. While a non-citizen has the right to counsel in immigration proceedings, he does not have the right to court-

appointed counsel. Yet, with some knowledge of immigration law, court-appointed criminal attorneys may be able to keep their clients out of immigration court altogether. Private defense attorneys must go the extra mile to see that their client is not deported, if possible. According to the ABA Standards for the Defense Function, "the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program." Standard 4-1.2(h). The ABA Standards for Criminal Justice further state that a court should not accept a guilty plea without first advising the defendant of possible collateral consequences. Standard 14-1.4(c). The court should advise the defendant to consult with his lawyer if he does not understand the potential consequences. *Id.* And, to the extent possible, defense counsel should warn clients in advance of entering a guilty plea as to any possible collateral consequences. *Id.*, Standard 14-



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3.2(f). Of course these standards are aspirations and not the law. In the interest of meeting these goals while at the same time avoiding the complaint that we are not paid to be immigration lawyers, I have written this article for public defenders and other court-appointed counsel in Arizona. The crimes I have chosen to address are the ones that appear to be most prevalent and/or most often plea-bargained. There are some differences in interpretation among circuit courts; this article focuses on the Ninth Circuit.

### **Brief Overview of Immigration Consequences of Criminal Convictions**

A criminal conviction can adversely affect non-citizens in three major ways. It can make them inadmissible (unable to enter this country legally). It can make them removable (cause them to be deported). And it can subject them to harsher sentencing if convicted of illegal re-entry after deportation.

#### ***Illegal aliens***

An illegal alien will most likely have an INS hold placed on him while he is in custody, and be deported when released from custody. If released from custody prior to conviction, such as by release to Pretrial Services or paying a bond, non-citizens will avoid the conviction because of deportation but will have a warrant out for failing to appear, should they ever return. When deportation follows conviction,

sentencing, or completion of sentence, the crime of conviction matters. It may destroy their chances of ever being able to return legally, and it may subject them to enhanced penalties for the crime of illegal re-entry. It is helpful to ask how long they have been here, if their spouse or children are American citizens, and whether they have any family still in their country of origin.

#### ***Legal aliens***

A legal alien, even a legal permanent resident (LPR), can be deported if convicted of certain crimes. A conviction can make him unable to return legally, and subject him to harsher sentencing if he returns illegally. These people may be willing to agree to more jail time if it means avoiding a conviction that makes them deportable.

### **Criminal Consequences of Convictions**

#### ***Crimes that make a person inadmissible 8 USC § 1182(a)(2)(A)***

To enter this country legally, an alien must apply for and be granted some type of visa. The law prohibits granting visas to persons with certain types of criminal convictions:

Crimes involving moral turpitude (CIMT) - crimes that are malum in se. Moral turpitude refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. *See In re Fualaau*, 21 I. & N. 475, 475 (BIA 1996). Most of these crimes have an intent element - e.g. intent to permanently deprive, intent to injure, intent to defraud, etc., but in some cases only a reckless state of mind is required.<sup>1</sup> Conspiracy or attempt to commit a CIMT also qualifies. There is one exception - if the CIMT carries a maximum sentence of one year and the alien's sentence did not exceed six months. In Arizona, only misdemeanors fit the exception.

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A violation of any law relating to a controlled substance as defined in 21 USC § 802. An attempt or conspiracy to commit such a crime.

Any two convictions with an aggregate actual sentence of five years or more. Does not matter if same date of offense, or same date of conviction, or sentences run concurrently, or whether crimes involve moral turpitude.

***Crimes that make a person deportable, even if here legally 8 USC § 1227(a)(2)***

Any CIMT, which carries a possible sentence of one year or more (i.e. in AZ any CIMT which is a felony), if committed within five years of entry.<sup>2</sup>

Any two CIMTs committed on different occasions, regardless of possible sentence, regardless of length of time in this country (could be 2 misdemeanor shoplifts)

Any conviction for an aggravated felony. 8 USC § 1101(a)(43) Aggravated felonies include but are not limited to:

> illicit trafficking in a controlled substance (list of substances in 21 USC § 802), including a drug trafficking crime. The term “drug trafficking crime” means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.) See 18 U.S.C. § 924(c)(2). The label is misleading, because by this definition it may include mere possession.

> certain firearms offenses, such as possession of a firearm by a convicted felon, an illegal alien, or an alien here on a nonimmigrant (e.g. tourist, student) visa; illicit trafficking in firearms; trafficking in stolen firearms.

> a crime of violence for which the person’s actual term of imprisonment is at least one

year. “The term “crime of violence” means – an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” 18 USC § 16. Note this includes damage to property, not just violence against persons. For example, arson is a crime of violence. See *In re Palacios*, 22 I. & N. 434 (BIA 1998).

> a theft offense (including receipt of stolen property) or burglary offense for which the person’s actual term of imprisonment is at least one year. Modern-day generic definitions of theft and burglary are used, rather than their common law elements. A theft offense is “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. Perez-Corona*, 295 F.3d 996, 1001 (9<sup>th</sup> Cir. 2002). A “person has been convicted of burglary . . . if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” *Taylor v. U.S.*, 495 U.S. 575, 599 (1990).

> forgery if the person’s actual term of imprisonment is at least one year.

> an attempt or conspiracy to commit an offense described in this paragraph.

> an aggravated felony conviction is “the immigration equivalent of the death penalty.” Robert McWhirter, “Immigration Consequences of Criminal Convictions,” 17:3 *Criminal Justice*, 12, 16 (Fall 2002). Some forms of relief from deportation are available for aliens deportable for other reasons; however, the aggravated felon is ineligible for almost all forms of relief and may be subject

to expedited removal. 8 USC § 1228. “An aggravated felony also will render the lawful permanent resident ineligible for voluntary departure; bar the lawful permanent resident from reentering the United States for 20 years without the permission of the Attorney General; and penalize the alien with imprisonment of up to 20 years” for illegal re-entry. *In re Yanez-Garcia*, 23 I. & N. 390, 402 (BIA 2002) (internal citations omitted).

Any conviction for a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (federal definition 21 USC § 802), other than a single offense involving possession for one’s own use of 30 grams or less of marijuana.

Any conviction under any law for purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying a firearm or destructive device (federal definition 18 USC 921) in violation of any law; or attempt or conspiracy to do the above.

Any conviction for a crime of domestic violence, stalking, violation of an order of protection, child abuse, child neglect, or child abandonment. To be a domestic violence offense, the state definition of relationships considered to be “domestic” is incorporated, but the crime must be a “crime of violence against the person.” A misdemeanor conviction for interference with judicial proceedings is a deportable offense.

### ***Crimes that Increase the Penalty for Illegal Reentry after Deportation 8 USC § 1326***

To be convicted of this federal crime, an alien need only return to this country illegally after having been deported. If the deportation was subsequent to a criminal conviction, whether or not because of the conviction, the alien is subject to an enhanced sentence. Any alien who is offered voluntary departure should take it, if at all possible. The alien must pay his own way back, but it avoids the status

punished by this statute. Voluntary departure is not offered to people with aggravated felonies. See 8 USCA § 1229c.

The penalties for illegal reentry after deportation are:

- > maximum 2 year sentence if no criminal conviction
- > if deportation was subsequent to conviction of 3 or more separate misdemeanors that involved drugs and/or crimes against the person, or any felony that was not an aggravated felony, maximum 10 year sentence
- > deportation subsequent to conviction for aggravated felony, maximum 20 year sentence

To determine the actual sentence for illegal deportation after conviction, one needs to reference USSG-2L1.2. It requires applying the greatest penalty, if the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense,. . . , increase by 16 levels;

Crime of violence means “an offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another; and includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a minor), robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.” USSG 2L1.2. Thus, if the crime of violence was against a person, the sentence enhancement is greater (16 levels) than if against property (8 levels).

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels;

Drug trafficking does not include possession for personal use.

(C) a conviction for an aggravated felony, increase by 8 levels;

Aggravated felony has the same definition here as in 8 USC § 1101(a)(43). The terms crime of violence, drug trafficking offense, firearms offense, felony, and misdemeanor are defined explicitly for this guideline.

(D) a conviction for any other felony, increase by 4 levels; or

Felony means a federal, state or local offense punishable by imprisonment for a term exceeding one year; misdemeanor is for one year or less.

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels. USSG 2L1.2.

A conviction for attempt, aiding and abetting, or conspiracy to commit any of the above qualifies the same as the actual offense.

## Analyzing Arizona Statutory Language Under the Federal Immigration Law Framework

### A. What is a conviction?

A conviction is defined in immigration law as:

a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the

alien's liberty to be imposed. 8 U.S.C. § 1101(a)(48)(A).

Under Arizona law, a diversion program such as TASC is not a conviction, because it does not entail a finding of guilt. *See* ARS § 11-361. A person who fails a diversion program is not automatically guilty but must undergo additional proceedings. Expungement of a conviction has no effect on the immigration consequences. *See* *Murillo-Espinoza v. I.N.S.*, 261 F.3d 771, 774 (9<sup>th</sup> Cir. 2001). There is one exception to this: an expunged first-time drug possession offense. *See* *Lujan-Armenariz v. INS*, 222 F.3d 728, 749-50, (9<sup>th</sup> Cir. 2000).

### B. What is a felony?

For immigration purposes, a felony is generally defined as a crime punishable by more than one year imprisonment. *See* *U.S. v. Robles-Rodriguez*, 281 F.3d 900, 904 (9<sup>th</sup> Cir. 2002). The term “aggravated felonies” is not a subset of felonies but rather a term of art that requires analysis of the state statute. *See id.* at 902. In Nevada, first-time drug possession is an aggravated felony because the offender is sentenced to prison, which sentence is then suspended and he is placed on probation. *See* *U.S. v. Arellano-Torres*, 303 F.3d 1173, 1178-79 (9<sup>th</sup> Cir. 2002). On the other hand, drug possession offenses in Arizona are not aggravated felonies. For possession to be an aggravated felony, it must be a “drug trafficking crime.” U.S.C. § 1101(a)(43)(B). To be a drug trafficking crime, it must be a felony, and punishable by the Controlled Substances Act. *See id.* Possession offenses are punishable by the Controlled Substances Act, but in Arizona they do not meet the first prong, that is they are not felonies. Because of Prop 200, they are not punishable by more than one year imprisonment but instead mandate a sentence of probation. *See* *U.S. v. Robles-Rodriguez*, 281 F.3d 900, 906 (9<sup>th</sup> Cir. 2002); A.R.S. §13-901.01.<sup>3</sup> In Nevada, on the other hand, drug possession is punishable by a year or more in prison, even if that sentence is suspended, thus it is a felony and an aggravated felony.

What about a third strike under Prop 200, which is subject to imprisonment over one year? There is no case law directly on point regarding a third strike. Arguably, it is still not a felony because the court is not to take into account any sentence enhancement based on recidivism. See *U.S. v. Corona-Sanchez*, 291 F.3d 1201, 1208-09 (9<sup>th</sup> Cir. 2002).

Under federal law, possession of an unspecified type and quantity of a controlled substance is punishable by *up to* one year in prison. 21 U.S.C. § 844(a) (emphasis added). If the defendant is a second- or third- offender, the maximum penalty is increased to two and three years, respectively. *Id.* Our recent en banc decision in *United States v. Corona-Sanchez*, 291 F.3d 1201 (9<sup>th</sup> Cir.2002), however, establishes that “we must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements.” *Id.* at 1209. *U.S. v. Arellano-Torres*, 303 F.3d 1173, 1178 (9<sup>th</sup> Cir. 2002) (footnote omitted.)

Once an undesignated felony is designated a misdemeanor, it no longer qualifies as a felony. See *LaFarga v. INS*, 170 F.3d 1213, 1216 (9<sup>th</sup> Cir. 1999). There is no case law on point for a person called into removal proceedings while an offense remains undesignated.

### ***C. What is meant by actual term of imprisonment ?***

The phrase “term of imprisonment” used in the aggravated felony statute and the phrase “sentence imposed” in the illegal re-entry sentencing guideline mean the same thing: the actual sentence imposed by the judge, not including any non-judicial adjustments such as “good-time” credits. See *U.S. v. Moreno-Cisneros*, 319 F.3d 456, 459 n.1 (9<sup>th</sup> Cir. 2003). In Arizona, unlike some other states, a person sentenced to probation is not given a prison sentence first, which is then suspended. So, in Arizona a sentence of probation avoids immigration consequences for those crimes

that require an actual sentence of at least one year. However, if the person’s probation is revoked and he is subsequently sentenced to prison for at least one year, at that point the conviction does meet that part of the definition. See *U.S. v. Jimenez*, 258 F.3d 1120, 1125 (9<sup>th</sup> Cir. 2001).

In determining whether the sentence imposed for a drug trafficking crime exceeds thirteen months, for purposes of sentence enhancement following illegal re-entry, only time that was actually served is counted – not time that was deferred, probated, or suspended. See *U.S. v. Moreno-Cisneros*, 319 F.3d 456, 458 (9<sup>th</sup> Cir. 2003); USSG 2L1.2 application note 1(A)(iv).

### ***D. How is a state statute analyzed under this federal terminology?***

Whether a state felony conviction is a crime involving moral turpitude is decided mainly by looking for a intent element, such as intent to defraud, intent to deprive, or intent to injure. Not much analysis is done. The word “intent” is not found in all CIMT. Sometimes a mental state of knowing or even reckless suffices. Driving under the influence of alcohol is not a CIMT, but doing so while knowing one’s license is suspended is.

There is inherent difficulty in determining whether marginal offenses are crimes involving moral turpitude. In our view, a simple DUI offense is such a marginal crime. However, when that crime is committed by an individual who knows that he or she is prohibited from driving, the offense becomes such a deviance from the accepted rules of contemporary morality that it amounts to a crime involving moral turpitude. *In re Lopez-Meza*, 22 I. & N. 1188, 1196 (BIA 1999) (internal citation omitted).

Immigration and federal courts decide whether a particular state felony conviction falls under the rubric of crime of violence, theft offense, burglary offense, drug trafficking

offense, and so on. The Ninth Circuit takes a two-step approach – first defining the generic offense, and then seeing how it compares with the state definition. See *U.S. v. Trinidad-Aquino*, 259 F.3d 1140, 1143-44 (9<sup>th</sup> Cir. 2001). When the crime is a traditional, common-law crime, the court defines the term according to its elements, adopting a “uniform definition independent of the labels used by state codes.” *U.S. v. Corona-Sanchez*, 234 F.3d 449, 453 (9<sup>th</sup> Cir. 2000). Thus, a burglary offense has the elements: “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” *Taylor v. U.S.*, 495 U.S. 575, 599 (1990). A theft involves the “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). Other offenses described in the statutes, such as “crime of violence” and “sexual abuse of a minor,” do not have common law elements. See *Trinidad-Aquino*, 259 F.3d at 1143-44 (9<sup>th</sup> Cir. 2001). In these instances the ordinary “dictionary” meaning of the words is tested against the conduct described in the state statute. See *id.* “Crime of violence” is defined under federal law, and the dictionary definition of those words is used (e.g. “substantial risk,” “physical force”). See 18 USC § 16.

Once the offense is defined in generic terms, it is compared with the state statute of conviction. The “categorical approach” compares the conduct covered by the state law with the conduct covered by the generic definition. If the “full range of conduct” encompassed by the state law falls within the generic definition, then the offense qualifies as meeting the definition. See *Chang v. INS*, 307 F.3d 1185, 1189 (9<sup>th</sup> Cir., 2002). If the state law is broader than the definition for immigration law purposes, that is, if it criminalizes conduct which falls within the definition and also conduct which does not fall within it, then the “modified categorical approach” is used. See *id.* The court examines

documents in the record of conviction to determine if the conduct involved in the actual facts of the case falls within or outside the generic definition. There is some room for argument as to what documents are judicially noticeable for this purpose. In *Franklin*, which dealt with an analysis of prior convictions as predicate offenses for a different federal crime, the Ninth Circuit found the following to be permissible:

charging papers and jury instructions; charging papers and judgment of conviction; charging papers and a signed plea agreement; transcript of a plea proceeding; charging papers and judgment on a guilty plea when the judgment shows that a defendant pled guilty for reasons stated in the charging papers and the charging papers included the generic elements; charging papers and verdict form when the verdict form refers back to the charging papers, and the charging papers lists the elements of generic burglary. *U.S. v. Franklin*, 235 F.3d 1165, 1170 (9<sup>th</sup> Cir. 2000) (internal citations omitted).

The standard used by the BIA is the same for proving a criminal conviction. See *In re Teixeira*, 21 I. & N. 316, 319-20 (BIA 1996). A list of acceptable documents is found at 8 CFR § 1003.41. Additional types of documents, including police reports, may be used for evaluating an application for discretionary relief. See *id.*

In some cases the presentence report is used for facts regarding a conviction. (See *Franklin* for a discussion of when it is/is not permissible. 235 F.3d at 1171-72 (9<sup>th</sup> Cir. 2000). The immigration court follows the circuit court in circuits where an interpretation of federal criminal law has been decided. See *In re Yanez*, 23 I. & N. 390 (BIA 2002). When there is no precedent, or the phrase being interpreted is not a part of

federal criminal law but rather immigration law (i.e. Title 8, not Title 18 or 21), the immigration court decides.

Understanding this process is important, because it provides some room for manipulation in the alien's favor. If a plea agreement does not specify the subsection of the statute to which the immigrant is pleading, or if the factual basis given is vague and subject to more than one interpretation, the alien may avoid immigration consequences. For example, the phrase "deadly weapon or dangerous instrument" makes it difficult to ascertain whether this was a firearms offense. Some subsections of the theft and theft-of-means statutes do not include the phrase "intent to deprive," which the Ninth Circuit has found to be a required element of a "theft offense." On the other hand, in a conviction for burglary of a non-residential structure, it is best to specify when the structure is an automobile, since this has been found to not fall under the *Taylor* generic definition ("building or structure"), *Taylor v. U.S.*, 495 U.S. 575, 599 (1990). If the crime involved a store, warehouse, or other building, then say "non-residential structure," and the government will have to work harder (bring in judicially noticeable facts) in order to prove it was not a vehicle. Sometimes the class of felony reveals the subsection, such as disorderly conduct class 6 necessarily involves a deadly weapon or dangerous instrument. See ARS § 13-2904 (A)(6). And, although it is not facially a firearm, it could still be analyzed as a possible "crime of violence."

## Specific Arizona Criminal Offenses

### A. General guidelines

Avoid a conviction by accepting a diversion program if offered.

Tell the client to avoid deportation by accepting voluntary departure if it is offered.

For persons here illegally, try to get them pretrial release; they are going to be deported anyway. Better to be deported before conviction than after. Advise them there will be a warrant out if they return, and they will lose their bond money.

If a factual basis can be made for solicitation, then solicitation to commit the charged offense is a good plea bargain. The Ninth Circuit has held that Arizona's solicitation statute is a distinct crime of its own, following *State v. Tellez*, 165 Ariz. 381, 383-84, 799 P.2d 1, 3-4 (App. 1989), and one that is not mentioned in the list of deportable offenses. See *Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9<sup>th</sup> Cir. 1999) (holding solicitation to possess marijuana for sale in Arizona was not an aggravated felony); *Coronado-Durazo v. INS*, 123 F.3d 1322, 1325 (9<sup>th</sup> Cir. 1997) (holding Arizona conviction for solicitation to possess cocaine was not a conviction of a law "relating to a controlled substance").

Current BIA case law on facilitation to commit a drug offense in Arizona holds it is a violation "relating to" a controlled substance. See *Matter of Del Risco*, 20 I. & N. 109, 109 (BIA 1989). However, this opinion predates *Coronado-Durazo* and might be overruled if the issue came before the BIA again. State case law defines it as an offense of its own (not a lesser included). See *State v. Harris*, 134 Ariz. 287, 288, 655 P.2d 1339, 1340 (App.1982) (holding crime of facilitation was not a lesser-included offense of burglary or theft). So, facilitation might also be a good plea. Attempt and conspiracy to commit deportable offenses, on the other hand, are specifically included in the immigration laws.

If pleading to a class 6 with a prison sentence, ask for 364 days instead of one year. This will keep many crimes (e.g. crimes of violence, theft, burglary) from becoming an aggravated felony. A sentence of 365 days or more qualifies for an aggravated felony. See *U.S. v. Gonzalez-Tamariz*, 310 F.3d 1168, 1171 (9<sup>th</sup> Cir. 2002). The conviction may still result in deportation under some other category; this merely avoids the worst case.

## ***B. Assault and related offenses***

Any felony type of assault charge runs the risk of either being a CIMT or crime of violence. There is no case law on each different category of aggravated assault.

### **ARS § 13-1201 Endangerment**

Endangerment is not categorically a crime of violence because a “substantial risk of imminent death or physical injury” does not necessarily require a risk that force may be used. See *U.S. v. Hernandez-Castellanos*, 287 F.3d 876, 880 (9<sup>th</sup> Cir. 2002). For example, endangerment can occur by leaving an infant unattended near a swimming pool, or discarding an old refrigerator in which a child could become trapped. Thus, the modified categorical approach is used, requiring a look at some facts in the record of conviction. *Hernandez-Castellanos* was a DUI case pled to endangerment, which was remanded because the record contained insufficient judicially noticeable facts. See *id.* at 881. The court went on to find, as dicta,

It is doubtful that Arizona’s endangerment statute satisfies the final phrase of [ 8 USC] § 16(b), that there be a risk of physical force being used against another “in the course of committing the offense.” The offense of felony endangerment is complete when the defendant engages in some conduct that could cause the imminent death of another, the conduct in fact creates such a risk as to a specific victim, and the defendant acted in conscious disregard of that risk. Thus, while there may, in some circumstances, be a risk that physical force could be used *after* one has endangered another, there is little risk of physical force being used *in the course of* endangering another. *Id.* (emphasis in original, internal citation omitted).

There is no case law on whether endangerment, with a mens rea of recklessness, is a crime involving moral turpitude. Assault causing bodily injury done with a reckless mens rea is not a CIMT. See

*In re Fualaau*, 21 I. & N. 475, 475 (BIA 1996). This opinion goes on to say that if the assault resulted in *serious* bodily injury, then it would be a CIMT – in other words, a reckless mental state requires an additional aggravating factor in order to be a CIMT. See *id.* So, an endangerment where no one is seriously injured is probably not a CIMT.

### **ARS § 13-1202 Threatening or intimidating**

Threatening to use physical force against the property or person of another is categorically a crime of violence. Threatening and intimidating is also *malum in se* and involves moral turpitude. However, A1 and A2 are misdemeanors, not punishable by a year or more. Thus, a single conviction does not cause deportation for CIMT, and is not a felony so not an aggravated felony.

### **ARS § 13-1203 Simple assault**

Simple assault is generally not considered to involve moral turpitude. See *Matter of Baker*, 15 I. & N. 50 (BIA 1974). Nor is it a crime of violence because it is not a felony. When one considers the types of acts that fall under this statute – spitting, shoving, scratching, etc., they do not rise to the level of baseness and depravity or dangerousness required to be deportable offenses. The exception is a misdemeanor domestic violence assault, which is a deportable offense.

### **ARS § 13-1204 Aggravated assault**

This statute lists aggravating factors that turn simple assault into a felony. Subsections A1 and A11, causing serious injury or temporary but substantial impairment, are probably crimes of violence / aggravated felonies. A2, using a deadly weapon or dangerous instrument, is a CIMT and crime of violence. It will also be a firearms offense, if the word “gun” is put into the record.

In most of the other subsections, the aggravating factor is knowledge of specific types of victims – peace officer, paramedic,

school employee, etc. Assaulting a peace officer with a deadly weapon is a CIMT. *See Matter of Logan* 17 I. & N. 367, 368-69 (BIA 1980). Assault on a police officer which results in bodily harm to the victim is also a CIMT. *See Matter of Danesh*, 19 I. & N. 669 (BIA 1988). The crime of “resisting an officer with violence,” which puts the officer in fear of bodily harm but does not result in bodily harm, is not a CIMT. File No. [IDENTIFYING INFORMATION REDACTED BY AGENCY] 2001 WL 34078274 (INS). From these opinions it appears that knowledge that the victim is a police officer acting in official capacity, absent some additional aggravating factor, is not a CIMT. There is no case law on paramedics, firefighters, school employees, or other categories of victims. Extrapolating from the peace officer cases, there would likely have to be an additional aggravating factor besides the category of victim. When the additional factor is serious injury, temporary but substantial impairment, or use of a deadly weapon or dangerous instrument, and the sentence imposed is a year or more, then it is also a crime of violence / aggravated felony.

### ***C. Criminal trespass and burglary offenses***

Criminal trespass may have no immigration consequences. There is no Ninth Circuit case law on point. Criminal trespass of a residence is a crime of violence in the Fifth Circuit, but then so are a several others which are not crimes of violence in the Ninth Circuit. *See U.S. v. Delgado-Enriquez*, 188 F.3d 592, 595 (5<sup>th</sup> Cir. 1999). The only BIA law on trespass holds that it is not a CIMT unless there is intent to commit a CIMT while trespassing. *See Matter of Esfandiary*, 16 I. & N. 659, 661 (BIA 1979) (conviction for malicious trespass was a CIMT because it included specific intent to commit petit larceny).

A burglary offense is defined in the Ninth Circuit using the Supreme Court’s generic definition in *Taylor*, as the “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” *Ye v. INS*, 214 F.3d 1128, 1132 (9<sup>th</sup> Cir.

2000); *Taylor v. U.S.*, 495 U.S. 575, 598 (1990). A vehicle does not qualify as a building or structure. *See Ye*, 214 F.3d at 1133. Burglary is always a CIMT because of the intent to commit a crime element.

In *Ye*, the longtime permanent resident could not be deported after pleading guilty to two vehicle burglaries in the same year, because they were not burglary offenses, not crimes of violence, and, although CIMTs, INS failed to show they were committed on different occasions.<sup>5</sup> *See id.* Criminal trespass is a possible plea bargain for burglaries, and is probably better than pleading to theft, which may be a CIMT and theft offense aggravated felony.

#### **ARS § 13-1505 Possession of burglary tools**

POBT is a CIMT because it includes intent to use or permit the use of the tool to commit a burglary. *See Matter of Serna*, 20 I. & N. 579 (BIA 1992) It is not a burglary offense, because it involves no unlawful or unprivileged entry; thus it avoids being an aggravated felony.

#### **ARS § 13-1506 Burglary in the third degree**

This offense is not an aggravated felony unless additional facts are supplied. A vehicle and a fenced commercial yard are not buildings or structures; however a store, factory, or warehouse would certainly qualify. A factual basis can be made using the words “nonresidential structure,” omitting from the record the damaging facts.<sup>6</sup> Conversely, if it is a vehicle, say so.

#### **ARS § 13-1507 Burglary in the second degree**

Residential burglary is an aggravated felony if the sentence imposed is a year or more. If a class 6 plea is offered, use criminal trespass in the first degree instead of theft to avoid an aggravated felony. A legal immigrant might be willing to take an aggravated sentence for the class 6, if it avoids the other consequences.

## ARS § 13-1508 Burglary in the first degree

The two types of burglary in the first degree (armed) have the same consequences as above, residential and non-residential. In addition, armed burglary is a crime of violence, involving the use of explosives or weapons. As such, it is an aggravated felony if the sentence imposed is a year or more (even if it involves a vehicle).

### D. Theft offenses

Theft is generally a crime involving moral turpitude, having an intentional or knowing mental state. *See Wadman v. INS*, 329 F.2d 812, 814 (9th Cir.1964) (requirement of knowledge that items were stolen was sufficient to involve moral turpitude). As such, it can make an alien inadmissible or deportable. There are ways to avoid an aggravated felony, however. In order to be an aggravated felony, the person's actual term of imprisonment must be at least one year, and the offense must fall under the generic, modern definition of theft:

A theft offense (including receipt of stolen property) is "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 (9th Cir. 2002).

### ARS § 13-1802 Theft

Subsections A1, A3, and A5 are CIMT because they require an intentional or knowing mental state. Subsections A2, A4, A5, and A6 do not contain the phrase "intent to deprive," and therefore, it could be argued, do not meet the modern, generic definition of theft for aggravated felony purposes. Subsections A2 and A3 are not facially aggravated felonies because they cover services as well as property; thus facts would have to be introduced to show the offense involved

property and not services. *See Corona-Sanchez*, 291 F.3d at 1208. Subsection A6 applies only to services and does not fit the definition. *See id.* A plea agreement and factual basis that use subsection A5 is better than A1, because it leaves out the "intent to deprive" language that creates an aggravated felony. *See Huerta-Guevara v. Ashcroft*, — F.3d —, 2003 WL 721729 (9th Cir. 2003) (where defendant pled guilty to "possession of a stolen vehicle in violation of ARS § 13-1802," court could not tell whether she knew vehicle was stolen or whether she had intent to deprive; thus she was not deportable for an aggravated felony).

### ARS § 13-1803 Unlawful use of means of transportation

Unlawful use is probably a CIMT under either subsection because of the knowing mental state. Unlawful use is not a theft offense as defined for aggravated felony purposes, however. State case law already holds that unlawful use subsection A1 is a lesser included offense of theft of means. *See State v. Kamai*, 184 Ariz. 620, 622, 911 P.2d 626, 628 (App. 1995). The element lacking in unlawful use is the intent to deprive. Thus joyriding in Arizona is not a theft offense or aggravated felony. *See U.S. v. Perez-Corona*, 295 F.3d 996 (9th Cir. 2002) (conviction for unlawful use showed no intent to deprive owner, so it was not a "theft offense" aggravated felony). Subsection A2 likewise includes no such intent.<sup>7</sup>

### ARS § 13-1805 Shoplifting

Shoplifting is a CIMT. Any CIMT makes a person inadmissible, with the exception of one misdemeanor. One felony shoplift committed within five years of entry, or two misdemeanor shoplifts committed any time on separate occasions makes a person deportable. Shoplifting is a theft offense, and if the actual sentence imposed is a year or more, the shoplifter is also an aggravated felon.

**ARS § 13-1814 Theft of means of transportation**

Subsections A1, A3, and A5 are CIMT, requiring intent to deprive or knowledge that property is stolen. Perhaps “having reason to know” property is stolen is not actual knowledge, but statutes are usually worded that way because actual knowledge is difficult to prove; “reason to know” probably also qualifies as a CIMT. A conviction under A2, A4, or A5 is not an aggravated felony, however, because it lacks the generic theft offense element of “intent to deprive.” See *Nevarez-Martinez v. INS*, — F.3d —, 2003 WL 1878279 (9<sup>th</sup> Cir. 2003). If pled to a class 6 theft, be sure to specify the theft subsection as A5 rather than A1. Alternatively, theft of means could be pled to unlawful use, class 5 or 6. Again, it would still be a CIMT but not an aggravated felony.

**E. Forgery and related offenses****ARS § 13-2002 Forgery**

Every subsection of this statute includes the element “intent to defraud” and is a CIMT. Solicitation to commit forgery or possession of a forgery device, first subsection, are possible class 6 plea deals that avoid being CIMTs. Forgery with an imposed sentence of at least one year is also an aggravated felony. See *In re Aldabesheh*, 22 I.&N. 983 (BIA 1999).

**ARS § 13-2003 Criminal possession of a forgery device**

Criminal possession of a forgery device, subsection A1, is probably a safe plea because, unlike possession of burglary tools, it does not include any intent to use in a crime. See *Matter of Serna*, 20 I.&N. 579, 584 (BIA 1992) (possessory offenses are CIMTS only when accompanied by an intent to use to commit a CIMT). Subsection A2 does have such intent and is a CIMT.

**ARS § 13-2008 Taking identity of another person**

This offense is a CIMT because of the intent to use for an unlawful purpose. If a factual basis can be made for solicitation or forgery device, those are good alternatives.

**F. Controlled Substance Offenses**

Any conviction relating to a controlled substance makes a person inadmissible and deportable. These need not be felonies. A conviction for simple possession in Arizona is not considered a felony under federal law, because it is not punishable by a year or more imprisonment. See *U.S. v. Robles-Rodriguez*, 281 F.3d 900, 906 (9<sup>th</sup> Cir. 2002) (holding defendant was not subject to sentence enhancement for illegal re-entry because his two prior possession offenses in Arizona were not “aggravated felonies” since they were not punishable by a year or more in prison). A person who is out of Prop 200 because of recidivism is arguably still not an aggravated felon, as discussed above under the definition of felony. There is no case law on whether a person who is ineligible for Prop 200 because of a violent crime (as in ARS § 13-604.04, not to be confused with “crime of violence”) becomes an aggravated felon based on a conviction for possession. Distribution of a controlled substance, where knowledge or intent is an element of the offense, is also a crime involving moral turpitude. See *In re Khourn*, 21 I. & N. 1041 (BIA 1997).

**ARS § 13-3405 Possession of marijuana**

A state conviction for possession of marijuana renders an alien inadmissible and deportable. A waiver of deportation is available for certain persons convicted of one-time possession of 30 grams or less of marijuana. Where this exception may apply, make sure that the record of conviction states the amount under 30 grams, because it may have to be proved later. Because of Prop. 200, simple possession is not an aggravated felony.

The marijuana statute as a whole does not facially qualify as an offense “relating to a controlled substance” because section (A)(4) includes the phrases “offer to transport for sale or import into this state” and “offer to sell or transfer.” ARS § 13-3405(A)(4). Offering is solicitation. *See U.S. v. Rivera-Sanchez*, 247 F.3d 905, 908-09 (9<sup>th</sup> Cir. 2001). If the plea agreement does not list a subsection, or lists A4 as the subsection, the government would have to provide judicially noticeable facts in order to prove the conviction was for a deportable offense. Possession of marijuana, a class 3 felony, could be either possession for sale of two to four pounds (deportable) or offers to transport less than two pounds (not deportable.)

#### **ARS §§ 13-3407, -3408 Possession of dangerous drugs, narcotic drugs**

An old BIA case (not overruled) states that a conviction which fails to identify the drug involved cannot necessarily establish a federally listed controlled substance. Therefore, it is not a controlled substance offense under immigration law. *See Matter of Paulus*, 11 I. & N. 274 (BIA 1965). The Arizona statute (ARS § 13-3401) listing controlled substances is organized differently from the federal list (21 § USC 802), and it might take a chemist to prove that a substance on the one is necessarily on the other.

In both of these statutes, subsection (A)(7) includes “offer to transport or import into this state” and “offer to sell or transfer.” If the plea agreement says “ARS § 13-3408, a class 2 felony,” then additional facts would be required to support deportation, showing that the conviction was not for solicitation, the same as the marijuana law above.

Possession for sale can perhaps be pled to solicitation to possess for sale. It is better to plead a class 4 possession to a class 6 open solicitation to possess than a 6 open possession of drug paraphernalia, in order to avoid a conviction for an offense relating to a

controlled substance. The state would probably want to count it as a strike under Prop 200, and would list the Prop 200 statute in the plea agreement, but the actual conviction would still be for solicitation and not a controlled substance as far as immigration law is concerned.

#### **ARS § 13-3415 Possession of drug paraphernalia**

A conviction under this statute, even if pled to a misdemeanor, is a conviction “relating to a controlled substance.” *See Luu-LE v. INS*, 224 F.3d 911, 915 (9<sup>th</sup> Cir. 2000) (finding Arizona statute made clear that an object must be in some way linked to drugs in order to be paraphernalia). There is no exception for one-time possession of paraphernalia. *See In re: Applicant [identifying information redacted by agency]*, (2001 WL 1047561 (INS)). Thus, it makes a person inadmissible and deportable. Because of Prop 200, it is not an aggravated felony

#### **G DUI**

Since a DUI requires no specific mental state, it can be committed with mere negligence. *See U.S. v. Portillo-Mendoza*, 273 F.3d 1224, 1228 (9<sup>th</sup> Cir. 2001) (analyzing California’s DUI statute). To be a crime of violence, it would require at least a reckless mens rea. *See id;* *U.S. v. Trinidad-Aquino*, 259 F.3d 1140, 1145 (9<sup>th</sup> Cir. 2001).<sup>8</sup> To be a CIMT requires intent or knowledge. If the DUI results in an injury accident, be very careful about pleading to assault. Assault can have a reckless mens rea and be a crime of violence / aggravated felony. *See U.S. v. Ceron-Sanchez*, 222 F.3d 1169, 1172-73 (9<sup>th</sup> Cir. 2000) (holding aggravated assault committed with a dangerous instrument (automobile), a reckless mens rea, and resulting in physical injury is a crime of violence and aggravated felony.) Try for a plea to the DUI charge with an agreement to pay restitution for the accident. See the section on assaults.

## ARS § 28-1381, 1382 DUI

A misdemeanor DUI under A1 or A2 has no immigration consequences. There is no case law on A3, DUI/drugs, but it is best to steer clear of controlled substances in the record of conviction. Extreme DUI is no worse than a regular DUI.

## ARS § 28-1383 Aggravated DUI

Section A1, aggravated DUI with suspended license, is a CIMT because the person knows he is not supposed to be driving at all. *See In re Lopez-Meza*, 22 I. & N. 1188 (BIA 1999).

Section A2, third DUI in a five-year period, is not a CIMT; it may just be the third instance of negligence. *See In re Torres-Varela*, 23 I. & N. 78 (BIA 2001). Both these cases specifically address Arizona DUI law. Section A3, person under fifteen in the car, is probably the same as a misdemeanor DUI. There is nothing inherently wrong with having a child in the car. Endangerment is probably a good plea bargain for a felony DUI. See the section on endangerment under assaults.

## H. Firearms

Some crimes involving firearms are aggravated felonies. A conviction for any crime that involves any firearm is a deportable offense. A lot of Arizona statutes use the phrase “deadly weapon,” or “deadly weapon or dangerous instrument.” A statute that contains this phrase is not categorically a firearms offense, because there are other deadly weapons besides firearms. If the judicially noticeable documents do not specifically say gun or firearm, then the immigration consequences of a firearm offense may be avoided.

Unfortunately, a crime committed with a deadly weapon is likely to still qualify as a CIMT or crime of violence. The exception might be ARS § 13-2904A6, disorderly conduct with a deadly weapon or dangerous instrument. The mens rea is reckless, and the “substantial risk that physical force... may be used” is arguable.

## Aggravated felony firearms offenses

The following are aggravated felonies: illicit trafficking in firearms; trafficking in stolen firearms; possession of firearm by convicted felon; possession of firearm by illegal alien or alien here on a tourist or student type visa (this is a federal crime, no state counterpart); possession of machinegun; providing or transferring a firearm with knowledge it will be used to commit a felony; possession of a firearm with altered serial number; possession of unregistered firearm.

## Other firearms offenses

Any conviction under any law for doing anything with any firearm or destructive device (i.e. bomb) in violation of any law, or an attempt or conspiracy to do so, is a deportable offense. This category includes both statutes that relate specifically to firearms, and every other criminal offense in which a firearm might be used. ARS § 13-3107 (unlawful discharge within a municipality) and ARS § 13-1209 (drive-by shooting) clearly qualify. An alien’s expunged misdemeanor conviction for carrying a concealed weapon still made him deportable. *See Ramirez-Castro v. I.N.S.*, 287 F.3d 1172, 1175-76 (9<sup>th</sup> Cir. 2002).

## I. Domestic violence offenses

“Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable.” *See* 8 USCA § 1227. “Domestic violence” is defined as a “crime of violence” (18 § USC 16) against a person, committed by a person in a current or former domestic relationship with the victim. The definition of domestic relation includes any person who is protected under the domestic or family violence laws of the state where the offense occurs; thus, all the relationships included in ARS § 13-3601 are also protected under the immigration law.

“Crime of violence” as defined in 18 § USC 16 is the same definition as an aggravated felony crime of violence – but there are two qualifications here. First, unlike the aggravated felony, it does not require an actual sentence of one year; a DV misdemeanor, or felony with a probation sentence, is grounds for deportation. Simple assault is not normally a deportable offense, but a DV misdemeanor assault is. Second, the federal definition of “crime of violence” includes physical force used against either a person or property. Here in the DV definition it is limited to violence “against a person.” Therefore, criminal damage (ARS § 13-1602), although listed in ARS § 13-3601 as a potential DV offense in Arizona, is probably not a deportable DV offense under immigration law. Some items in the list of offenses in ARS § 13-3601 are questionable as to whether they are crimes of violence at all, i.e. by their nature involve a “substantial risk that physical force against the person [or property] of another may be used in the course of committing the offense: criminal trespass, disorderly conduct, and harassment, for example.

Violating an order of protection is specifically listed as a deportable domestic violence offense.

## ***J. Miscellaneous***

### **ARS § 13-2508 Resisting arrest**

Resisting arrest is not a CIMT unless the officer is injured. *See In re: Applicant: [IDENTIFYING INFORMATION REDACTED BY AGENCY]* 2001 WL 34078274 (INS) (where alien was convicted of resisting arrest with violence, and record showed alien knew he was resisting a peace officer, but record did not show that alien’s actions caused bodily harm to victim, conviction was not for a CIMT). It is also not an obstruction of justice aggravated felony.<sup>9</sup> *See In re 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”). Resisting arrest seems to be analyzed similarly to assault; that is, if it results in injury or involves a weapon, then it is a CIMT. *See In re: Applicant: [IDENTIFYING INFORMATION REDACTED BY AGENCY]* 1998 WL 34065761 (INS) (discussing battery to a police officer, resisting arrest with violence, and using violence to interfere with a law enforcement officer along the lines of assault charges).

### **ARS § 13-2904 Disorderly conduct**

The misdemeanor forms of disorderly conduct probably have no immigration consequences. While the mental state is intentionally or knowingly, the actions prohibited do not rise to the level of baseness or depravity that is considered moral turpitude. Even subsections A1 and A3, which involve fighting or provoking a fight, are still at the level of simple assault. Subsection A6, which involves a weapon or instrument and can be charged as a dangerous felony, may be a firearms offense but is probably not a crime of violence / aggravated felony at least in the Ninth Circuit. If it involves a gun, make the factual basis using the phrase “deadly weapon.”

### **ARS § 13-1602 Criminal damage**

Recklessly defacing or damaging property (ARS § 13-1602(A)(1)) is probably a crime of violence. *See Park v. INS*, 252 F.3d 1018, 1024 (9<sup>th</sup> Cir. 2001)(holding involuntary manslaughter, a reckless mens rea that results in force being used against person or property of another, is a crime of violence in the 9<sup>th</sup> Circuit.) An actual sentence of a year or more makes it an aggravated felony. Barring that, however, it does not involve moral turpitude and may have no immigration consequences.



## Endnotes

<sup>1</sup> See, e.g., Franklin v. INS, 72 F.3d 571, 573 (8<sup>th</sup> Cir. 1995) (holding that Missouri statute under which alien was convicted of involuntary manslaughter for causing death of her child required “conscious disregard of a substantial and unjustifiable risk” and was a crime involving moral turpitude).

<sup>2</sup> For LPRs, entry means the date they began living here. The LPR can visit his home country as long as his absence from the U.S. is “brief, casual, and innocent.” Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963). Immigrants with other types of visas who leave must begin the five-year period anew every time they return. Illegal aliens have never officially “entered” no matter how long they have been here.

<sup>3</sup> Sometimes these terms are interpreted by the immigration courts, such as in a removal proceeding, and other times by the federal district and circuit courts, to determine if sentence enhancement is warranted after illegal re-entry. The Bureau of Immigration Appeals has decided that where a circuit court has spoken, and is interpreting a term found in the federal criminal law as opposed to immigration law, it will defer to that circuit’s definition. See In re Yanez-Garcia, 23 I. & N. 390, 393 (BIA 2002). There are some differences by circuit. For example, a felony DUI is a crime of violence and therefore an aggravated felony in the Tenth Circuit but not the Ninth. See Tapia-Garcia v. I.N.S., 237 F.3d 1216, 1222 (10<sup>th</sup> Cir. 2001); U.S. v. Trinidad-Aquino, 259 F.3d 1140, 1145 (9<sup>th</sup> Cir. 2001). See U.S. v. Vasquez-Flores, 265 F.3d 1122, 1124-25 (10<sup>th</sup> Cir. 2001) for a discussion of different courts’ interpretations of the phrase “theft offense (including receipt of stolen property).”

<sup>4</sup> The defense lawyer's first duty is to do what is best for the client. ER 1.2, ER 1.3. Discuss with the client the ramifications of a PTS release. If they want one, ask for it. Neither

the defense lawyer nor the judge can control INS. Tell the client that they have a new court date, which they must attend if they are not deported. Tell them that if they are deported and come back to the US illegally, they may face a federal charge for re-entry after deportation, and there will be a warrant for the state case. The lawyer, as well as everyone else, will have to wait until the next court date to find out if INS has initiated deportation actions.

<sup>5</sup> A permanent resident of over five years cannot be deported for a single CIMT felony.

<sup>6</sup> Burglary of a vehicle is a crime of violence in the Fifth Circuit and some other circuits. See U.S. v. Galvan-Rodriguez, 169 F.3d 217, 219 (5<sup>th</sup> Cir. 1999).

<sup>7</sup> The BIA has found UUMOT as defined in California to be a theft offense. See In re V-Z-S, 22 I. & N. 1338 (BIA 2000). In the Fifth Circuit it is also a crime of violence and aggravated felony if sentenced to a year or more. See U.S. v. Galvan-Rodriguez, 169 F.3d 217, 220 (5<sup>th</sup> Cir. 1999) (“when an illegal alien operates a vehicle without consent, a strong probability exists that the alien may try to evade the authorities by precipitating a high-speed car chase and thereby risking the lives of others, not to mention significant damage to the vehicle and other property.”) This analysis seems really wrong; nothing on the face of the statute or even in the additional facts in the record of conviction likely mentions the immigration status of the defendant; that is not a piece of information the court should be using.

<sup>8</sup> DUI is a crime of violence in the Tenth Circuit. See Tapia-Garcia v. INS, 237 F.3d 1216, 1222 (10<sup>th</sup> Cir. 2001).

<sup>9</sup> The list of aggravated felonies in this document is not the complete list. Obstructing justice is not a very common offense, and was not selected for analysis.

# Finding the Key

## The Unique Challenges of Communicating with Non-English Speaking Clients

Jose Montano, Law Clerk

Defense attorneys often encounter difficulties when dealing with clients who speak little or no English. Even with the aid of interpreters, lawyers often encounter language, trust, and most important, cultural barriers that could make the client's representation a real nightmare. One of the factors we need to always keep in mind is that the majority of these clients are undocumented immigrants from Mexico and often are unfamiliar with our legal system. You will need to spend time explaining our judicial system to them so they can better understand your legal advice.

Another factor that impacts the attorney/client relationship is the fact that we work for the government. As Alex Navidad stated in "Tips for Gringo Lawyers" (*for The Defense* Feb. 2002), "If there is anything that Mexicans can agree on is that you can't trust the government." This stereotype must be dealt with before your client can trust you. What can we do?

You must assure your client that you work for him and not for the government. Is it enough to say it? No, you must show your client motions that you have filed on his behalf and e-mail communications you have had with the state trying to get a fair plea offer. Just keep in mind that one must see to believe (*hay que ver para creer*).



Finally, after working for seven years as a court interpreter, I have realized that the key to effective communication with clients is the use of out of court, consecutive interpretation with an interpreter (as opposed to simultaneous). For example, I would first explain to the interpreter what I want him to tell my client and let the interpreter deal with the level of Spanish he/she must use to convey an understandable context of my thoughts.

Unfortunately, courts require simultaneous interpretation while on the record, which often times requires the interpretation of words, and not context. I believe this is the main reason judges often have difficult obtaining a factual basis for many plea agreements.

Using consecutive interpretation with your client before you go to court can obviate confusion that often occurs at change of plea proceedings.





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-  Dependency/Delinquency Psych Evals
-  Dependency - ICWA
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#### Ethics (Wednesday, 3 hours)

-  Presumed Ethical: Lawyer Portrayals in Cinema  
*or*
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#### P.D. Office Management (Wed)

-  Intro to Urban/Rural PD Management
-  Leading, Supervising, and Evaluating
-  Indigent Defense Policy and Practices

#### Paralegal, Investigator & Mitigation Specialist Program (Tues & \*Wed)

-  Fingerprint Evidence
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-  Digital Photography
-  Reading and Understanding Medical Records and Reports
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-  \*Investigative Case Studies and Experiences

#### Administrative Professionals (Tuesday & \*Wednesday)

-  Criminal Law Practices/Terminology
-  Communication & Interpersonal skills
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-  Checking and Grammar
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-  \*Search and Seizure Overview
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-  \*PCRs & Preserving the Record
-  \*Trial Skills: Objections
-  \*Trial Skills: Cross-x Bias, Motive and Prejudice

\* Tentative. Conflicts may occur due to sessions running concurrently.

# Arizona Advance Reports



The regular column including highlights from

the Arizona Advance Reports will return in our

next issue.

Thank you for your patience...



Happy 40th Birthday,  
*Gideon v. Wainwright*...  
Celebrating 40 Years of  
the Right to  
Representation



# Jury and Bench Trial Results

## March 2003

Due to conversion problems, the Trial Results for this issue are not included in this electronic version. If you would like to view the Trial Results for this issue of *for The Defense*, please contact the Public Defender Training Division.



The Maricopa County Public Defender's Office  
and  
The Criminal Justice Section of the State Bar of Arizona  
will present

## Immigration Consequences

of

## Criminal Convictions

May 30, 2003  
1:30 pm to 3:30 pm



Maricopa County Board of Supervisor's Auditorium  
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### *for The Defense*

*for The Defense* is the monthly training newsletter published by the Maricopa County Public Defender's Office, James J. Haas, Public Defender. *for The Defense* is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.