CRIMINAL ISSUES IN IMMIGRATION LAW

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I. JUDICIAL REVIEW

A. Judicial Review Scheme *Before* Enactment of the REAL ID Act of 2005

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which limited petition-for-review jurisdiction for individuals removable based on enumerated crimes. *See* 8 U.S.C. § 1252(a)(2)(C) (permanent rules); IIRIRA section 309(c)(4)(G) (transitional rules). For § 1252(a)(2)(C)'s jurisdiction-stripping provision to apply, its language requires that the agency determine that the petitioner is actually removable and order the petitioner removed on a basis specified in that section. *See Alvarez-Santos v. INS*, 332 F.3d 1245, 1250–53 (9th Cir. 2003); *see also Unuakhaulu v. Gonzales*, 416 F.3d 931, 936–37 (9th Cir. 2005) (exercising jurisdiction because while agency found applicant *removable* based on aggravated felony conviction, removal was not ordered on that basis and alternate grounds of removal were charged).

Under the IIRIRA provisions, if the court determined that the petitioner was ordered removed or ineligible for relief from removal based on a conviction for an enumerated crime, it lacked direct judicial review over the petition for review. *Cf. Unuakhaulu*, 416 F.3d at 937; *Alvarez-Santos*, 332 F.3d at 1253. However, the court retained jurisdiction to determine its own jurisdiction, *Ye v. INS*, 214 F.3d 1128, 1131 (9th Cir. 2000), and to decide "three threshold issues: whether the petitioner was [1] an alien, [2] removable, and [3] removable because of a conviction for a qualifying crime," *see Zavaleta-Gallegos v. INS*, 261 F.3d 951, 954 (9th Cir. 2001) (internal quotation marks, alteration, and emphasis omitted).

Where direct judicial review was unavailable over a final order of deportation or removal, a petitioner could file a petition for writ of habeas corpus in district court under 28 U.S.C. § 2241. *See INS v. St. Cyr*, 533 U.S. 289, 314 (2001) (AEDPA and IIRIRA did not repeal habeas corpus jurisdiction to challenge the legal validity of a final order of deportation or removal).

Cross-reference: Jurisdiction over Immigration Petitions, Limitations on Judicial Review Based on Criminal Offenses.

B. The Current Judicial Review Scheme under the REAL ID Act of 2005

1. Expanded Jurisdiction on Direct Review

In May 2005, Congress amended the Immigration and Nationality Act ("INA") to expand the scope of direct judicial review over petitions for review brought by individuals removable based on enumerated crimes, and to limit the availability of habeas corpus relief over challenges to final orders of removal, deportation, or exclusion. Congress explicitly made the REAL ID Act's judicial review amendments retroactive and directed that they shall apply to all cases in which the final administrative order was issued before, on, or after May 11, 2005, the date of enactment of the Act. *See Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1052 (9th Cir. 2005) (habeas corpus petition pending when REAL ID Act enacted).

The REAL ID Act added the following new judicial review provision to 8 U.S.C. § 1252:

> Judicial review of certain legal claims
>
> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. § 1252(a)(2)(D); REAL ID Act, Pub. L. No. 109-13, § 106, 119 Stat. 231, 310 (2005). Pursuant to this provision, the court has jurisdiction to review constitutional claims and questions of law presented in petitions for review of final orders of removal, including those brought by individuals found removable based on certain enumerated crimes. *See Nasrallah v. Barr*, 140 S. Ct. 1683, 1690 (2020) ("[J]udicial review of final orders of removal is somewhat limited in cases … involving noncitizens convicted of crimes specified in § 1252(a)(2)(C). In those cases, a court of appeals may review constitutional or legal challenges to a final order of removal, but the court of appeals may not review *factual* challenges to a final order of removal."); *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1067 (2020) (8 U.S.C. § 1252(a)(2)(D) provides that in immigration cases involving noncitizens who are removable for having committed certain crimes, a court of appeals may consider constitutional claims or questions of law); *Orellana v. Barr*, 967 F.3d 927, 931–32 (9th Cir. 2020) ("With the exception of constitutional claims

and questions of law, we lack jurisdiction to review a final order of removal against an alien who is removable for having committed two CIMTs not arising out of a single scheme of criminal misconduct when a sentence of one year or longer may be imposed on each offense."); *Dominguez v. Barr*, 975 F.3d 725, 733–34 (9th Cir. 2020) (as amended) ("We lack jurisdiction to review any final order of removal against an alien who is removable for committing an aggravated felony, retaining jurisdiction only to review jurisdictional issues, questions of law, and constitutional claims." (internal quotation marks and citation omitted)).

See also, e.g., *Bare v. Barr*, 975 F.3d 952, 961 (9th Cir. 2020) (although court lacked jurisdiction over determination that noncitizen committed a particular serious crime, the court retained jurisdiction to determine whether the BIA applied the correct legal standard); *Flores-Vega v. Barr*, 932 F.3d 878, 884 (9th Cir. 2019) (same); *Mairena v. Barr*, 917 F.3d 1119, 1123 (9th Cir. 2019) ("We lack jurisdiction to review any final order of removal against an alien who is removable because he committed an aggravated felony, … , but we retain jurisdiction to decide our own jurisdiction and to resolve questions of law." (internal quotation marks and citation omitted)); *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 996 (9th Cir. 2018) (reviewing whether BIA applied the proper legal standard, concluding BIA's underlying rationale for its decision was unreasonable, and remanding for BIA to consider all reliable, relevant information, when making its particularly serious crime determination); *Blandino-Medina v. Holder*, 712 F.3d 1338, 1343 (9th Cir. 2013) (explaining that while the court cannot reweigh the evidence to determine if the crime was particularly serious, it does have jurisdiction to determine whether the agency applied the correct legal standard); *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 852 (9th Cir. 2013) (jurisdiction to review whether a state crime of conviction is an aggravated felony."); *Arbid v. Holder*, 700 F.3d 379, 382 (9th Cir. 2012) (per curiam) (as amended) (jurisdiction to review BIA's determination that noncitizen was convicted of a particularly serious crime); *Rivera-Peraza v. Holder*, 684 F.3d 906, 909 (9th Cir. 2012) (court had jurisdiction to review whether BIA used erroneous legal standard in its analysis of petitioner's application for waiver of inadmissibility); *Daas v. Holder*, 620 F.3d 1050, 1053 (9th Cir. 2010) (court retains jurisdiction to determine its jurisdiction, and thus has jurisdiction to determine whether an offense is an agg*ravated felony*); *Lopez-Jacuinde v. Holder*, 600 F.3d 1215, 1217 (9th Cir. 2010) (court has jurisdiction to determine whether a particular offense constitutes an offense governed by the jurisdiction-stripping provisions); *Anaya-Ortiz v. Holder*, 594 F.3d 673, 676 (9th Cir. 2010) (stating the court has "jurisdiction to review whether the BIA and IJ failed to consider the appropriate factors, … , or relied on improper

evidence, …, in making the 'particularly serious crime' determination." (citations omitted)).

"[T]he jurisdictional bar set forth in § 1252(a)(2)(C) is subject to two exceptions. The first exception permits [] review of questions of law or constitutional claims. The second exception permits [] review when the IJ denies relief on the merits of the claim rather than in reliance on the conviction, *i.e.*, when the IJ concludes that the petitioner failed to establish the requisite grounds for relief." *Perez-Palafox v. Holder*, 744 F.3d 1138, 1144 (9th Cir. 2014) (internal quotation marks and citations omitted) (reviewing legal question whether the BIA engaged in impermissible fact finding). *See also Mairena v. Barr*, 917 F.3d 1119, 1123 (9th Cir. 2019) (per curiam) ("We lack jurisdiction to review 'any final order of removal against an alien who is removable' because he committed an aggravated felony, *see* 8 U.S.C. §§ 1252(a)(2)(C), 1227(a)(2)(A)(iii), but 'we retain jurisdiction to decide our own jurisdiction and to resolve questions of law,' *Bolanos v. Holder*, 734 F.3d 875, 876 (9th Cir. 2013)'); *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 852 (9th Cir. 2013) ("Although [the court lacks] 'jurisdiction to review any final order of removal against an alien who is removable by reason of having committed' an aggravated felony (among other offenses),8 U.S.C. § 1252(a)(2)(C), [the court] retains jurisdiction over 'constitutional claims or questions of law,'8 U.S.C. § 1252(d), which includes the question whether a state crime of conviction is an aggravated felony.");*Planes v. Holder*, 652 F.3d 991, 997–98 (9th Cir. 2011) (where BIA made no legal error regarding criminal grounds for removability, court lacked jurisdiction to review final order of removal under 8 U.S.C. § 1252(a)(2)(C)).

Although the court does not have jurisdiction to evaluate discretionary decisions by the Attorney General, the court retains jurisdiction to review questions of law raised in a petition for review. *See Mairena*, 917 F.3d at 1123 (although the court cannot reweigh evidence, the court can determine whether the BIA applied the correct legal standard); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1077 (9th Cir. 2015) (explaining review of particularly serious crime determination is limited to ensuring the agency relied on appropriate factors and proper evidence to reach its conclusion); *Konou v. Holder*, 750 F.3d 1120, 1127 (9th Cir. 2014) (the court cannot reweigh evidence to determine if crime was particularly serious, but the court has jurisdiction to determine whether correct legal standard was applied); *Aguilar-Turcios v. Holder*, 740 F.3d 1294, 1299 (9th Cir. 2014) (court lacks jurisdiction to review final order of removal against alien convicted of aggravated felony, but retains jurisdiction to review whether

conviction qualifies as an aggravated felony under federal law); *Anaya-Ortiz v. Holder*, 594 F.3d 673, 676 (9th Cir. 2010) (explaining court had jurisdiction to determine if the BIA applied the correct legal standard in making its particularly serious crime determination); *see also Gomez-Sanchez v. Sessions*, 892 F.3d 985, 996 (9th Cir. 2018) (reviewing whether BIA applied the proper legal standard, concluding BIA's underlying rationale for its decision was unreasonable, and remanding for BIA to consider all reliable, relevant information, when making its particularly serious crime determination); *Rodriguez-Castellon v. Holder*, 733 F.3d 847 (9th Cir. 2013) ("Although [the court lacks] 'jurisdiction to review any final order of removal against an alien who is removable by reason of having committed' an aggravated felony (among other offenses), 8 U.S.C. § 1252(a)(2)(C), [the court] retains jurisdiction over 'constitutional claims or questions of law,' 8 U.S.C. § 1252(d), which includes the question whether a state crime of conviction is an aggravated felony."); *Arbid v. Holder*, 700 F.3d 379, 382 (9th Cir. 2012) (per curiam) (as amended) (jurisdiction to review BIA's determination that alien was convicted of a particularly serious crime); *Rivera-Peraza v. Holder*, 684 F.3d 906, 909 (9th Cir. 2012) (court had jurisdiction to review whether BIA used erroneous legal standard in its analysis of petitioner's application for waiver of inadmissibility); *Daas v. Holder*, 620 F.3d 1050, 1053 (9th Cir. 2010) (court retains jurisdiction to determine its jurisdiction, and thus has jurisdiction to determine whether an offense is an agg*ravated felony*); *Lopez-Jacuinde v. Holder*, 600 F.3d 1215, 1217 (9th Cir. 2010) (court has jurisdiction to determine whether a particular offense constitutes an offense governed by the jurisdiction-stripping provisions); *Prakash v. Holder*, 579 F.3d 1033, 1035 (9th Cir. 2009) (court has jurisdiction to determine as a matter of law whether a conviction constitutes an aggravated felony).

"[J]urisdiction over 'questions of law' as defined in the Real ID Act includes not only 'pure' issues of statutory interpretation, but also application of law to undisputed facts, sometimes referred to as mixed questions of law and fact." *Ramadan v. Gonzales*, 479 F.3d 646, 648 (9th Cir. 2007) (per curiam); *see also Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1067 (2020) (holding that the phrase "questions of law" in 8 U.S.C. § 1252(a)(2)(D) includes the application of a legal standard to undisputed or established facts, sometimes referred to as mixed questions of law and fact); *Chen v. Mukasey*, 524 F.3d 1028, 1031 (9th Cir. 2008); *Ghahremani v. Gonzales*, 498 F.3d 993, 999 (9th Cir. 2007) (applying *Ramadan* to conclude that in assessing equitable tolling, "the due diligence question necessarily falls within *Ramadan*'s ambit as a mixed question of law and fact, requiring merely that we apply the legal standard for equitable tolling to established facts").

With respect to asylum, withholding of removal, and CAT claims of a petitioner who was convicted of an offense covered by § 1252(a)(2)(C), the court has jurisdiction to review the denial of an asylum application and to review the denial of withholding of removal and CAT relief to the extent that a petitioner raises questions of law, including mixed questions of law and fact, or constitutional claims. *See Agonafer v. Sessions*, 859 F.3d 1198, 1202 (9th Cir. 2017) (explaining the court has jurisdiction to review the denial of CAT relief when petitioner raises questions of law, including mixed questions of law and fact, or constitutional claims); *Pechenkov v. Holder*, 705 F.3d 444, 448–49 (9th Cir. 2012) (the court lacked jurisdiction to review particularly serious crime determination where the petitioner asked only for a "re-weighing of the factors involved in that discretionary determination," but holding court had jurisdiction over constitutional claims and questions of law raised regarding petitioner's application to adjust status and the revocation of asylee status).

Although judicial review of a noncitizen's factual challenges to a final order of removal is precluded where the noncitizen has committed a crime specified in § 1252(a)(2)(C), the law does not bar judicial review of a noncitizen's factual challenges to a CAT order. *See Nasrallah v. Barr*, 140 S. Ct. 1683, 1689 (2020) (holding that sections 1252(a)(2)(C) and (D) do not preclude judicial review of a noncitizen's factual challenges to a CAT order). *See also Vinh Tan Nguyen v. Holder*, 763 F.3d 1022, 1029 (9th Cir. 2014) ("Though we generally lack jurisdiction to review orders of removal based on a conviction of a crime involving moral turpitude, 8 U.S.C. § 1252(a)(2)(C), we retain jurisdiction to review denials of deferral of removal under CAT."); *Haile v. Holder*, 658 F.3d 1122, 1130–31 (9th Cir. 2011); *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1083 (9th Cir. 2008) ("The jurisdiction-stripping provision of 8 U.S.C. § 1252(a)(2)(C) does not deprive [the court] of jurisdiction over denials of *deferral* of removal under the CAT, which are always decisions on the merits." (emphasis added)), *overruled on other grounds by Maldonado v. Holder*, 786 F.3d 1155, 1162–64 (9th Cir. 2015) (en banc). Judicial review of factual challenges to CAT orders is highly deferential. *See Nasrallah*, 140 S. Ct. at 1692. "The standard of review is the substantial-evidence standard: The agency's findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Id.*

2. Applicability to Former Transitional Rules Cases

In addition to restoring direct judicial review and eliminating habeas jurisdiction over final orders of removal in cases involving enumerated criminal

offenses, § 106(d) of the REAL ID Act directs that a petition for review filed in a transitional rules case "shall be treated as if it had been filed as a petition for review under section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252) [IIRIRA's permanent rules]." REAL ID Act, Pub. L. No. 109-13, § 106(d), 119 Stat. 231, 311 (2005); *see also Sotelo v. Gonzales*, 430 F.3d 968, 970 (9th Cir. 2005) (applying REAL ID Act and explaining that jurisdiction over transitional rules cases is now governed by 8 U.S.C. § 1252 rather than 8 U.S.C. § 1105(a)). Accordingly, the restoration of direct judicial review over cases involving enumerated offenses applies to both transitional rules and permanent rules cases.

3. Contraction of Habeas Jurisdiction

In addition to expanding the scope of judicial review for noncitizens convicted of certain enumerated crimes, the REAL ID Act also "makes the circuit courts the 'sole' judicial body able to review challenges to final orders of deportation, exclusion, or removal." *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1052 (9th Cir. 2005). "To accomplish this streamlined judicial review, the Act eliminated habeas jurisdiction, including jurisdiction under 28 U.S.C. § 2241, over final orders of deportation, exclusion, or removal." *Alvarez-Barajas*, 418 F.3d at 1052. *See also* 8 U.S.C. § 1252(a)(5); *Mamigonian v. Biggs*, 710 F.3d 936, 941 (9th Cir. 2013) ("the REAL ID Act precludes aliens … from seeking habeas relief over final orders of removal in district courts."); *Momeni v. Chertoff*, 521 F.3d 1094, 1095–96 (9th Cir. 2008) (district court lacked habeas jurisdiction over petition filed after effective date of REAL ID Act).

The REAL ID Act required the district courts to transfer to the appropriate court of appeals all habeas petitions challenging final orders of removal, deportation or exclusion that were pending before the district court on the effective date of the REAL ID Act (May 11, 2005). *See* REAL ID Act, Pub. L. No. 109-13, § 106(b), 119 Stat. 231, 310–11 (2005); *see also Alvarez-Barajas*, 418 F.3d at 1052. Although the REAL ID Act did not address appeals of the denial of habeas relief already pending in the court of appeals on the effective date of the Act, this court has held that such petitions shall be treated as timely filed petitions for review. *See Martinez-Rosas v. Gonzales*, 424 F.3d 926, 928–29 (9th Cir. 2005); *Alvarez-Barajas*, 418 F.3d at 1052–53; *see also Singh v. Gonzales*, 491 F.3d 1090, 1095 (9th Cir. 2007) (holding that "a habeas petition is 'pending' in the district court within the meaning of [REAL ID Act]'s transfer provision when the notice of appeal was not filed at the time [REAL ID Act] was enacted, but was filed within the sixty day limitations period for filing a timely appeal of a habeas petition under

Federal Rules of Appellate Procedure 4(a)(1)(B)"); *cf. Singh v. Mukasey*, 533 F.3d 1103, 1109 (9th Cir. 2008) (holding that noncitizens who lacked opportunity to file petitions for review prior to the enactment of the REAL ID Act had a grace period of 30 days from the Act's effective date in which to seek review).

> [T]he REAL ID Act was not intended to "preclude habeas review over challenges to detention that are independent of challenges to removal orders." … Accordingly, the general rule is that "[e]ven post-[REAL ID Act], aliens may continue to bring collateral legal challenges to the Attorney General's detention authority ... through a petition for habeas corpus."

Singh v. Holder, 638 F.3d 1196, 1211 (9th Cir. 2011) (citations omitted). "By its terms, the jurisdiction-stripping provision does not apply to federal habeas corpus petitions that do not involve final orders of removal." *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075 (9th Cir. 2006) ("[I]n cases that do not involve a final order of removal, federal habeas corpus jurisdiction remains in the district court, and on appeal to this Court, pursuant to 28 U.S.C. § 2241."). *See also Lopez-Marroquin v. Barr*, 955 F.3d 759 (9th Cir. 2020) (order) (stating that "district courts retain jurisdiction under 28 U.S.C. § 2241 to consider habeas challenges to immigration detention that are sufficiently independent of the merits of the removal order" (citing *Singh*, 638 F.3d at 1211–12)); *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012) (en banc) ("The REAL ID Act can be construed as being confined to addressing final orders of removal, without affecting federal habeas jurisdiction.").

Cross-reference: Jurisdiction over Immigration Petitions, Limitations on Judicial Review Based on Criminal Offenses.

II. CRIMINAL CONVICTIONS AS GROUNDS FOR INADMISSIBILITY AND REMOVABILITY

A. Distinguishing between Inadmissibility and Removability

> [There are] two distinct concepts in our immigration law—inadmissibility and removability. "Federal immigration law governs both the exclusion of aliens from admission to this country and the deportation of aliens previously admitted." *Judulang v. Holder*, 565 U.S. 42, 45, 132 S. Ct. 476, 181 L.Ed.2d 449 (2011). "An inadmissible alien is one who was not admitted legally to the United

> States and is removable under § 1182, whereas a deportable alien is in the United States lawfully and is removable under § 1227." *Vasquez-Hernandez v. Holder*, 590 F.3d 1053, 1055 (9th Cir. 2010).

Nguyen v. Sessions, 901 F.3d 1093, 1096 (9th Cir. 2018), *abrogated on other grounds by Barton v. Barr*, 140 S. Ct. 1442 (2020). Note "the grounds for inadmissibility and deportability do not perfectly match, as some conduct and offenses can render a person inadmissible but not deportable, and vice versa." *Nguyen*, 901 F.3d at 1096. Furthermore, "admission to 'committing acts which constitute the essential elements of' a specified offense can make an applicant inadmissible, while, in most cases, a conviction is required to make a noncitizen deportable for commission of a crime." *Id*. at 1097 (comparing 8 U.S.C. § 1182(a)(2)(A)(i), *with* 8 U.S.C. § 1227(a)(2)(A)).

B. Differing Burdens of Proof

When analyzing an immigration case with criminal issues, it is important to determine whether the crime is being used to charge the noncitizen as inadmissible, removable, or ineligible for relief from removal. The posture of the case generally determines who bears the burden of proving the existence and nature of the conviction. When a noncitizen is charged as removable for a criminal conviction, it is the government's burden of proving by clear and convincing evidence that the noncitizen is removable. *See* 8 U.S.C. § 1229a(c)(3); *Cheuk Fung S-Yong v. Holder*, 600 F.3d 1028, 1034 (9th Cir. 2010) ("The government bears the burden of proving by 'clear, unequivocal, and convincing evidence that the facts alleged as grounds for [removability] are true.'" (quoting *Gameros-Hernandez v. INS*, 883 F.2d 839, 841 (9th Cir. 1989)); *Retuta v. Holder*, 591 F.3d 1181, 1184 (9th Cir. 2010) ("The government bears the burden of proving by clear, unequivocal, and convincing evidence that the alien is removable."); *Altamirano v. Gonzales*, 427 F.3d 586, 590–91 (9th Cir. 2005). On the other hand, a noncitizen who is an "applicant for admission" bears the burden of proving that he is "clearly and beyond a doubt entitled to be admitted and is not inadmissible under [8 U.S.C. § 1182]." *See* 8 U.S.C. § 1229a(c)(2); *Altamirano*, 427 F.3d at 590–91; *see also Kepilino v. Gonzales*, 454 F.3d 1057, 1059–60 (9th Cir. 2006) (discussing shifting burden of production in the admission context).

C. Admissions

When a crime is charged as a ground of inadmissibility rather than deportability, a noncitizen may not always have to be convicted of the crime, but

may only need to admit the essential elements of the crime. *Compare* 8 U.S.C. § 1182(a)(2)(A)(i) (ground of inadmissibility for any noncitizen who is convicted of or admits committing the essential acts of a crime involving moral turpitude) *with* 8 U.S.C. § 1227(a)(2)(A)(i) (ground of deportability for a noncitizen convicted of a crime involving moral turpitude). *See also Esquivel-Garcia v. Holder*, 593 F.3d 1025, 1030 (9th Cir. 2010) ("Thus, under 8 U.S.C. § 1182(a)(2)(A)(i)(II), admissions made by an alien to the IJ, enforcement officials, and third parties, apart from any conviction, may be considered to determine an alien's admissibility when considering the question of adjustment of status."). Admissions of controlled substances offenses may also be used to bar a noncitizen's entry. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II); *Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1218 (9th Cir. 2002) (applicant was inadmissible because he admitted prior use of marijuana in the Philippines, which constituted the essential elements of a violation of a foreign state's law relating to a controlled substance).

"[A]dmissions by an alien to facts alleged in the [notice to appear], and concessions concerning matters of law, made in the 8 C.F.R. § 1240.10(c) 'pleading stage' of removal proceedings may be relied upon by an IJ." *Perez-Mejia v. Holder*, 663 F.3d 403, 410 (9th Cir. 2011) (as amended).

D. What Constitutes a Conviction?

A conviction is defined 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); *see also Diaz-Quirazco v. Barr*, 931 F.3d 830, 843–44 (9th Cir. 2019) (discussing what constitutes a conviction and published BIA opinions setting forth the agency's interpretation of what proceedings amount to a "conviction"); *Reyes v. Lynch*, 834 F.3d 1104, 1107 (9th Cir. 2016) ("The federal definition of conviction where adjudication of guilt has been withheld includes aliens who have entered pleas of nolo contendere and 'the judge has ordered some

form of punishment, penalty, or restraint on the alien's liberty to be imposed.'"); *Retuta v. Holder*, 591 F.3d 1181, 1185–86 (9th Cir. 2010); *Murillo-Espinoza v. INS*, 261 F.3d 771, 773–74 (9th Cir. 2001). The court has deferred to the BIA's interpretation "that § 1101(a)(48)(A) does not require that the underlying offense be labeled a crime as long as the proceedings are 'criminal in nature' and contain 'constitutional safeguards normally attendant upon a criminal adjudication.'" *Diaz-Quirazco*, 931 F.3d at 835, 843–46 (holding that petitioner's violation of a protection order rendered him convicted of a removable offense).

An offense committed while a noncitizen is a juvenile qualifies as a conviction if the noncitizen is tried as an adult. *See Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 927 (9th Cir. 2007). *See also Rangel-Zuazo v. Holder*, 678 F.3d 967, 968–69 (9th Cir. 2012) (per curiam) (discussing the term "conviction" and reiterating that "where a juvenile offender is charged and convicted as an adult under state law, the offender has a 'conviction' for purposes of the INA").

Note that 8 U.S.C. "§ 1101 (a)(48)(A) requires only that the trial court enter a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived." *Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011).

1. Final, Reversed and Vacated Convictions

"A criminal conviction may not be considered by an IJ until it is final." *Grageda v. INS*, 12 F.3d 919, 921 (9th Cir. 1993) (pre-IIRIRA), *superseded by statute as stated in Planes v. Holder*, 652 F.3d 991, 995 (9th Cir. 2011). A conviction is final for immigration purposes "[o]nce an alien has been convicted by a court of competent jurisdiction and exhausted the direct appeals to which he is entitled." *Grageda*, 12 F.3d at 921 (internal quotation marks omitted). "A conviction subject to collateral attack or other modification is still final." *Id.* (rejecting petitioner's claim that his conviction was not final because he had a pending petition for writ of error coram nobis). *See also Planes v. Holder*, 652 F.3d 991, 996 (9th Cir. 2011) (holding that "§ 1101 (a)(48)(A) requires only that the trial court enter a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived.").

A conviction overturned for substantive, non-immigration reasons may not be used as the basis for removability. *See Nath v. Gonzales*, 467 F.3d 1185, 1187–89 (9th Cir. 2006) ("[A] conviction vacated because of a procedural or substantive defect is not considered a conviction for immigration purposes and cannot serve as

the basis for removability." (internal quotation marks and citation omitted)); *see also Poblete Mendoza v. Holder*, 606 F.3d 1137, 1141 (9th Cir. 2010) ("A conviction vacated for reasons 'unrelated to the merits of the underlying criminal proceedings' may be used as a conviction in removal proceedings whereas a conviction vacated because of a procedural or substantive defect in the criminal proceedings may not." (citation omitted)); *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107–08 (9th Cir. 2006) (remanding for consideration of whether conviction was vacated on the merits or because of immigration consequences); *Wiedersperg v. INS*, 896 F.2d 1179, 1182–83 (9th Cir. 1990) (noncitizen was entitled to reopen proceedings where state conviction was vacated).

The government bears the burden of proving whether a state court reversed or vacated a prior conviction for reasons other than the merits. *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011) ("[T]he inquiry must focus on the state court's rationale for vacating the conviction, and the burden is on the government to prove that it was vacated *solely* for rehabilitative reasons or reasons related to his immigration status." (internal quotation marks and citation omitted)); *Nath*, 467 F.3d at 1189; *Cardoso-Tlaseca*, 460 F.3d at 1107 n.3 ("[F]or the government to carry its burden in establishing that a conviction remains valid for immigration purposes, the government must prove with clear, unequivocal and convincing evidence that the Petitioner's conviction was quashed *solely* for rehabilitative reasons or reasons related to his immigration status, *i.e.* to avoid adverse immigration consequences." (internal quotation marks and citation omitted)).

2. Expunged (Recalled or Reclassified) Convictions

a. Expungement Generally Does Not Eliminate Immigration Consequences of Conviction

Following codification of the statutory definition of conviction in 8 U.S.C. § 1101(a)(48)(A), this court has deferred to the BIA's interpretation of the statute as "preclud[ing] the recognition of subsequent state rehabilitative expungements of convictions." *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001) (expunged theft conviction still qualified as an aggravated felony). "[F]ederal immigration law does not recognize a state's policy decision to expunge (or recall or reclassify) a valid state conviction." *Prado v. Barr*, 949 F.3d 438, 441 (9th Cir. 2020). For immigration purposes, [therefore,] a person continues to stand convicted of an offense notwithstanding a later expungement under a state's

rehabilitative law." *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002) (expungement of a misdemeanor California conviction for carrying a concealed weapon did not eliminate the immigration consequences of the conviction); *see also Lopez-Vasquez v. Holder*, 706 F.3d 1072, 1078–79 (9th Cir. 2013) (notwithstanding expungement of prior felony offense for possession of marijuana for sale, noncitizen was ineligible for adjustment of status); *Ramirez-Altamirano v. Holder*, 563 F.3d 800, 805–06 (9th Cir. 2009), *overruled by Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (en banc); *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1024 (9th Cir. 2007); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony).

> "A conviction vacated for reasons 'unrelated to the merits of the underlying criminal proceedings' may be used as a conviction in removal proceedings whereas a conviction vacated because of a procedural or substantive defect in the criminal proceedings may not." *Poblete Mendoza v. Holder*, 606 F.3d 1137, 1141 (9th Cir. 2010) (quoting *Nath v. Gonzales*, 467 F.3d 1185, 1189 (9th Cir. 2006)).

Prado, 949 F.3d at 441 (holding that reclassification of felony conviction for possession of marijuana as misdemeanor for rehabilitative, rather than substantive purposes, did not affect removability or eligibility for relief).

See also Velasquez-Rios v. Wilkinson, No. 18-72990, 2020 WL 8642250, at *8 (9th Cir. Oct. 28, 2020) (as amended February 24, 2021) (holding "that California's amendment to § 18.5 of the California Penal Code, which retroactively reduces the maximum misdemeanor sentence to 364 days for purposes of state law, cannot be applied retroactively for purposes of § 1227(a)(2)(A)(i)).

b. Exception for Simple Drug Possession Offenses

In general, for convictions occurring **prior to July 14, 2011**, *see Nunez-Reyes v. Holder*, 646 F.3d 684, 694 (9th Cir. 2011) (en banc), the government may not remove a noncitizen on the basis of a simple drug possession conviction that has been expunged under a state rehabilitative statute and would satisfy the requirements of the Federal First Offender Act ("FFOA"), 18 U.S.C. § 3607. *See Vega-Anguiano v. Barr*, 982 F.3d 542, 546 (9th Cir. 2020) (as amended) ("For convictions occurring prior to July 14, 2011, the government may not remove an alien on the basis of a simple drug possession conviction, if the conviction has been expunged under a state rehabilitative statute and the alien has satisfied the

requirements of the Federal First Offender Act."); *Lujan-Armendariz v. INS*, 222 F.3d 728, 749–50 (9th Cir. 2000), *overruled by Nunez-Reyes*, 646 F.3d at 690; *see also Lopez v. Sessions*, 901 F.3d 1071, 1075 (9th Cir. 2018) (for convictions that occurred prior to the court's holding in *Nunez-Reyes*, a person generally continues to stand convicted of an offense under state law notwithstanding a later expungement, unless the requirements of the FFOA are satisfied); *Rice v. Holder*, 597 F.3d 952, 956–57 (9th Cir. 2010) (noncitizen's conviction in state court for using or being under the influence of a controlled substance was eligible for the same immigration treatment as those convicted of drug possession under FFOA), *overruled by Nunez-Reyes*, 646 F.3d at 695; *Romero v. Holder*, 568 F.3d 1054, 1059–60 (9th Cir. 2009), *overruled by Nunez-Reyes*, 646 F.3d at 690; *Ramirez-Altamirano v. Holder*, 563 F.3d 800, 806–08 (9th Cir. 2009), *overruled by Nunez-Reyes*, 646 F.3d at 690 (noncitizen's conviction for possession of drug paraphernalia under California law qualified for similar treatment under *Lujan-Armendariz* rationale); *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1024–25 (9th Cir. 2007); *Dillingham v. INS*, 267 F.3d 996, 1006–07 (9th Cir. 2001), *overruled by Nunez-Reyes*, 646 F.3d at 690 (reversing BIA's refusal to recognize foreign expungement of simple possession that would have qualified for federal first offender treatment). The noncitizen's offense had to fall within the scope of the FFOA, and not just a state rehabilitative statute, for the noncitizen to avoid immigration consequences. *See Dillingham*, 267 F.3d at 1006–07; *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 815 (9th Cir. 1994); *see also Aguiluz-Arellano v. Gonzales*, 446 F.3d 980, 983–84 (9th Cir. 2006). Further, the federal first offender exception does not apply to convicted noncitizens who are eligible for, but have not yet received, expungement of the conviction. *See Chavez-Perez v. Ashcroft*, 386 F.3d 1284, 1291 (9th Cir. 2004) (removal order based on conviction that had not yet been expunged did not violate equal protection). "FFOA relief is unavailable when an offender has violated a condition of probation." *Estrada v. Holder*, 560 F.3d 1039, 1041 (9th Cir. 2009), *overruled in part as recognized by Madrigal-Barcenas v. Lynch*, 797 F.3d 643 (9th Cir. 2015).

In *Villavicencio-Rojas v. Lynch*, 811 F.3d 1216, 1219 (9th Cir. 2016), the court held that "two counts amount[ed] to a single 'offense' under the FFOA because they arose out of a single event, composed a single criminal case, and triggered a single, undivided sentence." As such, although the petitioner "was charged with possession of two different drugs, that alone does not change [the petitioner's] status as a first-time drug offender under the FFOA." *Id*. (because convictions occurred prior to 2011, *Nunez-Reyes* did not bar Villavicencio from relief).

"[T]he FFOA only applies to first time drug offenders convicted of simple possession of a controlled substance." *Lopez*, 901 F.3d at 1075 ("Because Lopez was convicted of possession *for sale* of a controlled substance, the exception does not apply.").

The court has held that persons convicted for possession of drug paraphernalia may be eligible for the same immigration treatment as those convicted under the FFOA. *See Ramirez-Altamirano*, 563 F.3d at 808–09 (pre-*Nunez-Reyes*, applying rule in *Lujan-Armendariz*) (petitioner convicted of California Health and Safety Code § 11364).

The court held in *Romero*, 568 F.3d at 1062 (pre-*Nunez-Reyes*, applying rule in *Lujan-Armendariz*), that the "facts underlying a conviction that would have been eligible for relief under the FFOA, but was expunged under a state rehabilitative statute, cannot serve as an 'admission' of a drug offense, statutorily barring a finding of good moral character under 8 U.S.C. § 1101(f)(3)."

In *Nunez-Reyes*, the court overruled *Lujan-Armendariz*, holding that the constitutional guarantee of equal protection does not require treating an expunged state conviction of a drug crime the same as a federal drug conviction that has been expunged under FFOA. *Nunez-Reyes*, 646 F.3d at 690. Accordingly, all cases that followed the rule in *Lujan-Armendariz*, were overruled, including *Romero*, 568 F.3d at 1059–60, *Ramirez-Altamirano*, 563 F.3d at 806, *Dillingham v. INS*, 267 F.3d 996, 1006–07 (9th Cir. 2001), and *Cardenas-Uriarte v. INS*, 227 F.3d 1132, 1136 n.4 (9th Cir. 2000). The new rule announced by *Nunez-Reyes* only applies prospectively. *Nunez-Reyes*, 646 F.3d at 690–94 (holding that *Lujan-Armendariz* continues to apply to those noncitizens convicted before the publication date of *Nunez-Reyes*, July 14, 2011). *See also Lopez*, 901 F.3d at 1075 n.2 (applying *Lujan-Armendariz*, where conviction was before the publication date of *Nunez-Reyes*); *Villavicencio-Rojas*, 811 F.3d at 1218 ("The parties agree that *Nunez-Reyes* does not bar Villavicencio from relief, as his convictions occurred before 2011.").

The "en banc decision in *Nunez-Reyes* focused on the equal protection issue, and '[the court] assume[d], without deciding, that the statutory term "'conviction'" includes expunged state convictions." *Reyes v. Lynch*, 834 F.3d 1104, 1107 (9th Cir. 2016) (citation omitted). In *Reyes*, the court held that "a state conviction expunged under state law is still a conviction for purposes of eligibility for cancellation of removal and adjustment of status. And even though incarceration is

not required, the federal definition of conviction is satisfied regardless of the rehabilitative purpose of probation, where the noncitizen was punished or his liberty was restrained by the terms of his probation. 834 F.3d at 1108.

E. Definition of Sentence

Under the INA, "[a]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." 8 U.S.C. § 1101(a)(48)(B). *See also Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1132–33 (9th Cir. 2016) ("'Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.' *Id.* at § 1101(a)(48)(B).").

In the criminal context, the court has held that the sentence imposed may be the term later imposed after revocation of probation. *See United States v. Jimenez*, 258 F.3d 1120 (9th Cir. 2001) (defendant in unlawful reentry case was convicted of aggravated felony because even though he was initially granted probation, probation was revoked and he was sentenced to two years' imprisonment).

1. One-Year Sentences

A sentence "for which the term of imprisonment [is] at least one year" means the actual sentence imposed by the court. *Alberto-Gonzalez v. INS*, 215 F.3d 906, 910 (9th Cir. 2000) (rejecting government's contention that the relevant term of imprisonment is the potential sentence that the judge could have imposed); *see also United States v. Pimentel-Flores*, 339 F.3d 959, 962 (9th Cir. 2003).

The phrase "at least one year" refers to a sentence of 365 days or more. *Matsuk v. INS*, 247 F.3d 999, 1001–02 (9th Cir. 2001) (rejecting petitioner's contention that the phrase "should be read to mean a 'natural or lunar' year, which is composed of 365 days and some hours"), *overruled on other grounds by Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011) (en banc); *Bayudan v. Ashcroft*, 298 F.3d 799, 800 (9th Cir. 2002) (order) (setting aside previous order dismissing petition for lack of jurisdiction because 364-day sentence for manslaughter was not a crime of violence constituting an aggravated felony). *See also Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1132–33 (9th Cir. 2016) ("[S]entence of 365

days equates to imprisonment of 'at least one year'"); *United States v. Gonzalez-Tamariz*, 310 F.3d 1168, 1171 (9th Cir. 2002).

2. Recidivist Enhancements

Recidivist enhancements are not considered when determining the nature of an offense, but may be considered when calculating the amount of time served on account of an offense. In *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), *superseded on other grounds by* U.S.S.G. § 2L1.2 cmt. n.4, the defendant received a two-year sentence for his conviction for petty theft with a prior. This court held that the conviction was not an aggravated felony under federal sentencing law because the maximum possible sentence for petty theft in California, without the recidivist enhancement, was six months. *See also Rusz v. Ashcroft*, 376 F.3d 1182, 1185 (9th Cir. 2004) (petitioner was not convicted of an aggravated felony which would deprive the court of jurisdiction because his California conviction of petty theft with a prior was not a crime for which a sentence of one year or longer could be imposed). However, this court held in *Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1129 (9th Cir. 2007), *implied overruling on other grounds recognized by Cardenas-Delgado v. Holder*, 720 F.3d 1111 (9th Cir. 2013), that for purposes of determining eligibility for relief under former § 212(c), it could consider recidivist enhancements when calculating the amount of time served. *Saravia-Paguada* explained that *Corona-Sanchez* and *Rusz* stand for the proposition that recidivism should not inform the nature of an offense, but may be considered when determining the actual time served. *See id.* at 1127–29.

Note that in *United States v. Rodriguez*, 553 U.S. 377 (2008), the Supreme Court reversed the Ninth Circuit's decision in *United States v. Rodriguez*, 464 F.3d 1072 (9th Cir. 2006), which applied the rule in *Corona-Sanchez* holding that the maximum term of imprisonment under the Armed Career Criminal Act must be determined without taking recidivist enhancements into account. In reversing the Ninth Circuit decision, the Supreme Court held that when determining the "maximum term of imprisonment" it is necessary to refer to the applicable recidivist enhancements for prior offenses. *See Rodriguez*, 553 U.S. at 382–84; *see also United States v. Rivera*, 658 F.3d 1073, 1076 (9th Cir. 2011) ("because the recidivist sentence *does* relate to the commission of the repeat offense and is clearly part of the sentence "prescribed by law," a recidivist sentence may be considered in determining whether a prior conviction qualifies as a predicate

offense"), *overruled in part as stated in Lopez-Valencia v. Lynch*, 798 F.3d 863, 872 n.6 (9th Cir. 2015).

3. Misdemeanors

In *Lopez v. Gonzales*, 549 U.S. 47 (2006), the Supreme Court held that a state drug offense may only be an aggravated felony if it proscribes conduct punishable as a felony under federal law. However, an offense designated by the state as a misdemeanor, but by federal law as a felony, may qualify as an aggravated felony. *See, e.g.*, *United States v. Alvarez-Gutierrez*, 394 F.3d 1241 (9th Cir. 2005); *United States v. Robles-Rodriguez*, 281 F.3d 900, 903 (9th Cir. 2002); *see also Habibi v. Holder*, 673 F.3d 1082, 1088 (9th Cir. 2011); *United States v. Rivera*, 658 F.3d 1073, 1075–76 (9th Cir. 2011) (holding that defendant's state felony petty theft conviction qualified as an aggravated felony, although under California law conviction for petty theft was misdemeanor), *overruled in part as stated in Lopez-Valencia v. Lynch*, 798 F.3d 863, 872 n.6 (9th Cir. 2015). A state conviction for misdemeanor sexual battery has been held to be a crime involving moral turpitude. *See Gonzales-Cervantes v. Holder*, 709 F.3d 1265, 1267 (9th Cir. 2013).

In *Velasquez-Rios v. Wilkinson*, No. 18-72990, 2020 WL 8642250, at *8 (9th Cir. Oct. 28, 2020) (as amended February 24, 2021), the court held that "that California's amendment to § 18.5 of the California Penal Code, which retroactively reduces the maximum misdemeanor sentence to 364 days for purposes of state law, cannot be applied retroactively for purposes of § 1227(a)(2)(A)(i)."

4. Wobblers

An "offense [that] can result in a range of punishments ... is referred to as a 'wobbler' statute, providing for either a misdemeanor or a felony conviction." *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 844 (9th Cir. 2003), *overruled on other grounds by Ceron v. Holder*, 747 F.3d 773, 777 (9th Cir. 2014) (en banc); *see also Arrellano Hernandez v. Lynch*, 831 F.3d 1127, 1132 (9th Cir. 2016); *Ceron*, 747 F.3d at 777 (Certain statutes "are known in California as 'wobblers' because the state court can treat a conviction under [the statute] either as a felony or as a misdemeanor."); *Lopez-Vasquez v. Holder*, 706 F.3d 1072, 1075 (9th Cir. 2013); *Ferreira v. Ashcroft*, 382 F.3d 1045, 1051 (9th Cir. 2004), *overruled on other grounds by Ceron*, 747 F.3d at 777–78; *LaFarga v. INS*, 170 F.3d 1213 (9th Cir. 1999). For wobbler offenses, "it is clear that a state court's designation of a criminal offense [as a misdemeanor or a felony] is binding on the BIA for purposes

of determining whether there has been a conviction under the INA." *Garcia-Lopez*, 334 F.3d 840, 844 (9th Cir. 2003), *overruled on other grounds by Ceron*, 747 F.3d at 777–78.

> "Under California law, a 'wobbler' is presumptively a felony and 'remains a felony except when the discretion is actually exercised' to make the crime a misdemeanor." [*Ewing v. California*, 538 U.S. 11, 16 (2003)]. An offense is "deemed a felony" when a defendant is convicted and "granted probation without the imposition of a sentence." *People v. Feyrer*, 48 Cal. 4th 426, 106 Cal. Rptr. 3d 518, 226 P.3d 998, 1007 (2010), *superseded by statute on another ground as stated in People v. Park*, 56 Cal.4th 782, 156 Cal.Rptr.3d 307, 299 P.3d 1263, 1266 n.4 (2013). The offense remains a felony unless the sentencing court subsequently reduces it to a misdemeanor.

Arellano Hernandez, 831 F.3d at 1132.

In *Ceron*, the en banc court explained that in California, California Penal Code Section 19 "specifies a general statutory maximum penalty of six months' imprisonment in the county jail for all misdemeanors, '*[e]xcept* in cases where a different punishment is prescribed by any law of this state.'" *Ceron*, 747 F.3d at 778 (quoting Cal. Penal Code § 19). When a different maximum penalty is prescribed by statute, the six-month default maximum does not apply. The en banc court in *Ceron* explained that in both *Garcia-Lopez* and *Ferreira* the court erroneously applied the six-month maximum. Accordingly, the en banc court overruled that aspect of those cases.

F. Overlap with Other Immigration and Criminal Sentencing Areas of Law

Some grounds of inadmissibility do not require that a noncitizen be convicted of or admit a crime, but rather require proof of undesirable behavior. Although not considered here, these grounds should be kept in mind as they may overlap with the grounds discussed in this section. *See, e.g.*, 8 U.S.C. § 1182(a)(2)(D)(i) (prostitution and commercialized vice); 8 U.S.C. § 1182(a)(6)(E)(i) (alien smuggling); 8 U.S.C. § 1182(a)(2)(E) (noncitizens asserting immunity from prosecution); 8 U.S.C. § 1182(a)(2)(H) (trafficking in persons); 8 U.S.C. § 1182(a)(2)(I) (money laundering).

The criminal sentencing guidelines also are similar to certain immigration provisions, and thus cases interpreting them may be relevant. U.S.S.G. § 2L1.2 defines "aggravated felony" with specific reference to 8 U.S.C. § 1101(a)(43) (pursuant to § 2L1.2 certain drug trafficking offenses, crimes of violence, aggravated felonies, etc. may be used to enhance a noncitizen's sentence for violating 8 U.S.C. § 1326), and should be relevant to immigration cases considering the same statute. In some cases, the court has found criminal sentencing cases controlling in the immigration context. For example, this court has held that for purposes of determining whether a crime constituted aggravated felony sexual abuse of a minor, prior precedent in a criminal case was controlling. *See Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066–67 (9th Cir. 2003) (citing *United States v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999)); *Montiel-Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002) (per curiam) (applying construction of "crime of violence" from sentencing case); *Castro-Baez v. Reno*, 217 F.3d 1057, 1058–59 (9th Cir. 2000) (applying definition of rape adopted in a criminal case); *Ye v. INS*, 214 F.3d 1128, 1132 (9th Cir. 2000) (applying the uniform definition of "burglary" in the Career Criminals Amendment Act).

In *Lopez v. Gonzales*, 549 U.S. 47 (2006), the Supreme Court held that the same definition of aggravated felony drug offense should be used in both the criminal sentencing and immigration contexts, rejecting the Ninth Circuit's prior cases which defined the term differently in the two contexts. The Court held that in both contexts, a state offense could only be an aggravated felony if it proscribes conduct punishable as a felony under federal law.

U.S.S.G. § 2L1.2 also has provisions regarding crimes of violence, firearms offenses, and drug trafficking offenses. Cases interpreting these statutes may also be useful in analyzing criminal immigration cases, but these terms are defined differently in the immigration statute, and thus cases interpreting them are not controlling. *Compare Valencia v. Gonzales*, 439 F.3d 1046, 1053 (9th Cir. 2006) (statutory rape is not a crime of violence under the immigration statute), *with United States v. Asberry*, 394 F.3d 712, 717–18 (9th Cir. 2005) (holding that statutory rape is a crime of violence under U.S.S.G. § 4B1.2). *See also Cisneros-Perez v. Gonzales*, 465 F.3d 386, 392 (9th Cir. 2006) (holding that the modified categorical approach applies to prior crimes of domestic violence and distinguishing *United States v. Belless*, 338 F.3d 1063, 1065–67 (9th Cir. 2003), *abrogated on other grounds by United States v. Castleman*, 572 U.S. 157 (2014), which held otherwise). *But see Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (discussing rule of lenity and stating that the statutory definition of crime of

violence must be interpreted "consistently, whether we encounter its application in a criminal or noncriminal context").

Cross-reference: Aggravated Felonies, Offenses Defined as Aggravated Felonies, Illicit Trafficking in Controlled Substances, or State Drug Offenses.

III. METHOD OF ANALYSIS

A. Standard of Review

This court reviews de novo whether a state or federal conviction is an offense with immigration consequences. *See, e.g.*, *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1130 (9th Cir. 2016) ("We review de novo whether a particular conviction under state law is a removable offense."); *Quijada-Aguilar v. Lynch*, 799 F.3d 1303, 1305 (9th Cir. 2015) ("We review de novo the BIA's determination that a conviction under California Penal Code § 192(a) is a crime of violence."); *Roman-Suaste v. Holder*, 766 F.3d 1035, 1038 (9th Cir. 2014) (reviewing de novo whether offense constitutes an aggravated felony); *Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1052 (9th Cir. 2011) (reviewing "de novo whether a criminal conviction is a crime of violence and therefore an aggravated felony rendering an alien removable"); *Szalai v. Holder*, 572 F.3d 975, 978 (9th Cir. 2009) (per curiam) ("The Ninth Circuit reviews *de novo* whether a conviction constitutes a removable offense under the Immigration and Nationality Act.").

The court reviews for abuse of discretion whether a crime is particularly serious, rendering a noncitizen ineligible for withholding of removal. *See Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1077 (9th Cir. 2015); *Alphonsus v. Holder*, 705 F.3d 1031, 1043 (9th Cir. 2013), *abrogated on other grounds by Guerrero v. Whitaker*, 908 F.3d 541 (9th Cir. 2018); *Arbid v. Holder*, 700 F.3d 379, 383 (9th Cir. 2012) (per curiam) ("[D]etermining whether a crime is particularly serious is an inherently discretionary decision, and we will review such decisions for abuse of discretion."). "[R]eview is limited to ensuring that the agency relied on the appropriate factors and proper evidence to reach [its] conclusion." *Avendano-Hernandez*, 800 F.3d at 1077 (internal quotation marks and citation omitted).

The court does "not defer to an agency's interpretations of state law or provisions of the federal criminal code." *Sandoval v. Sessions*, 866 F.3d 986, 988 (9th Cir. 2017). *See also Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1068 (9th Cir. 2020) ("We do not defer to the BIA's interpretations of state law ... and

instead must review de novo whether the specific crime of conviction meets the INA's definition of an aggravated felony." (internal quotation marks and citation omitted)).

The court reviews de novo the agency's determination of the elements of a statute of conviction. *See Barbosa v. Barr*, 926 F.3d 1053, 1057 (9th Cir. 2019) (as amended) (explaining the court reviews this step de novo because the BIA has no special expertise by virtue of its statutory responsibilities in construing state or federal statutes); *Vasquez-Valle v. Sessions*, 899 F.3d 834, 838 (9th Cir. 2018); *Escobar v. Lynch*, 846 F.3d 1019, 1023 (9th Cir. 2017); *Uppal v. Holder*, 605 F.3d 712, 714 (9th Cir. 2010).

Deference may be owed to the BIA's interpretation of the statutes and regulations it is charged with administering, including the INA. *See Alvarez-Cerriteno v. Sessions*, 899 F.3d 774, 778 (9th Cir. 2018); *Escobar*, 846 F.3d at 1023; *Uppal v. Holder*, 605 F.3d 712, 714 (9th Cir. 2010); *Fregozo v. Holder*, 576 F.3d 1030, 1034 (9th Cir. 2009).

B. Categorical Approach

In order to determine whether a conviction categorically constitutes a predicate offense for immigration purposes, the court applies the two-step approach set forth in *Taylor v. United States*, 495 U.S. 575, 602 (1990) and *Shepard v. United States*, 544 U.S. 13, 15 (2005). *See Silva v. Barr*, 965 F.3d 724, 731 (9th Cir. 2020) ("To determine whether an alien's crime of conviction subjects the alien to removal under 8 U.S.C. § 1227(a)(2)(A)(ii), we apply the categorical approach set forth in *Taylor v. United States*, [495 U.S. 575 (1990)]"); *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1100 (9th Cir. 2011) (as amended); *see also Barbosa v. Barr*, 926 F.3d 1053, 1057 (9th Cir. 2019) (as amended) (applying the process mandated by *Descamps v. United States*, 570 U.S. 254 (2013) to evaluate whether a conviction under Oregon Revised Statutes § 164.395 was categorically a crime involving moral turpitude); *Myers v. Sessions*, 904 F.3d 1101, 1107 (9th Cir. 2018) (explaining categorical approach as set forth in *Taylo*r and *Descamps v. United States*, 570 U.S. 254 (2013)); *Villavicencio v. Sessions*, 904 F.3d 658, 664 (9th Cir. 2018) (as amended); *Linares-Gonzalez v. Lynch*, 823 F.3d 508, 514 (9th Cir. 2016) ("In determining whether the conduct proscribed by the statute involves moral turpitude, we apply the categorical approach of *Taylor v. United States*, 495 U.S. 575, 598–602 (1990), comparing the elements of the state offense to those of the generic CIMT to determine if there is a categorical match."); *Rodriguez-*

Castellon v. Holder, 733 F.3d 847, 853 (9th Cir. 2013); *Olivas-Motta v. Holder*, 746 F.3d 907, 910 (9th Cir. 2013); *Robles-Urrea v. Holder*, 678 F.3d 702, 707 (9th Cir. 2012); *Parrilla v. Gonzales*, 414 F.3d 1038, 1042 (9th Cir. 2005).

> The categorical approach is best understood as a task of statutory matching—we ask whether the statutory elements of the crime of conviction match the elements of the generic offense which serves as the basis for removal. *See Mathis v. United States*, [136 S. Ct. 2243, 2248 (2016)]. If the elements of the crime of conviction match (or are narrower than) the elements of the generic offense, then the analysis can stop: the crime of conviction qualifies as a predicate for removal. *Id.*

Syed v. Barr, 969 F.3d 1012, 1017 (9th Cir. 2020). *See also Silva*, 965 F.3d at 734 (stating that "under the categorical approach, the [court must determine] 'whether the elements of the alien's state statute of conviction criminalize more conduct than, or the same conduct as, the elements of a generic federal offense.'" (quoting *Diego v. Sessions*, 857 F.3d 1005, 1009 (9th Cir. 2017)); *Barrera-Lima v. Sessions*, 901 F.3d 1108, 1115 (9th Cir. 2018) (after identifying requisite elements for conviction under the statute, "apply the categorical approach to determine whether the elements of conviction match the generic definition of a crime involving moral turpitude"); *Hernandez-Cruz*, 651 F.3d at 1100 (comparing Hernandez-Cruz's convictions under California Penal Code § 459 to the generic crime, attempted theft). "[W]here a statute 'has both criminal and noncriminal applications,' the statute should be consistently interpreted in both criminal and noncriminal, *i.e.*, immigration, applications." *Alvarado v. Holder*, 759 F.3d 1121, 1126 (9th Cir. 2014). "In the immigration context, [the categorical] approach … generally applies in determining whether an alien is removable in the first instance or whether he is statutorily barred from various forms of relief." *Torres-Valdivias v. Lynch*, 786 F.3d 1147, 1152 (9th Cir. 2015).

"Because Congress predicated deportation 'on convictions, not conduct,' the [categorical] approach looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior." *Mellouli v. Lynch*, 575 U.S. 798, 135 S. Ct. 1980, 1986 (2015). *See also Villavicencio*, 904 F.3d at 664 (explaining that the court only examines the statutory definition of the crime to determine whether the state statute of conviction renders a noncitizen removable under the statute of removal, without looking to the actual conduct underlying the petitioner's offense). "[The court] ignore[s] the actual facts of the particular prior conviction and instead

compare[s] the elements of the state statute of conviction to the federal generic crime to determine whether the conduct proscribed by the state statute is broader than the generic federal definition." *Cortes-Maldonado v. Barr*, 978 F.3d 643, 647 (9th Cir. 2020) (internal quotation marks and citation omitted); *see also Ramirez v. Lynch*, 810 F.3d 1127, 1130–31 (9th Cir. 2016) ("To assess whether a state conviction qualifies as an aggravated felony, we generally employ the 'categorical approach' to determine whether the state offense matches the 'generic' federal definition of the pertinent offense listed in the INA: here, a crime of violence under 18 U.S.C. § 16(a) or (b)."); *Mancilla-Delafuente v. Lynch*, 804 F.3d 1262, 1265 (9th Cir. 2015) (compare the elements of the state offense with those of the generic definition of a CIMT to determine if there is a categorical match); *Murillo-Prado v. Holder*, 735 F.3d 1152, 1156 (9th Cir. 2013) (per curiam) ("'[The court] look[s] not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony.'" (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013))). "By 'generic,' [the Court] mean[s] the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison. Accordingly, a state offense is a categorical match with a generic federal offense only if a conviction of the state offense "'necessarily' involved ... facts equating to [the] generic [federal offense]." *Moncrieffe*, 569 U.S. at 190 (citation omitted). "By focusing on the legal question of what a conviction *necessarily* established, the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of immigration law." *Mellouli*, 135 S. Ct. at 1987.

The court will "first make a categorical comparison of the elements of the statute of conviction to the generic definition, and decide whether the conduct proscribed [by the state statute] is broader than, and so does not categorically fall within, this generic definition." *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003); *see also Descamps v. United States*, 570 U.S. 254, 257 (2013) (under the categorical approach "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.*, the offense as commonly understood."); *Dominguez v. Barr*, 975 F.3d 725, 734 (9th Cir. 2020) (as amended) (comparing the elements of the offense of the petitioner's conviction with the elements of a generic offense); *Quintero-Cisneros v. Sessions*, 891 F.3d 1197, 1200 (9th Cir. 2018) (compare the elements of the offense of conviction with the elements of the federal generic offense to see if they are a categorical match); *Ragasa v. Holder*, 752 F.3d 1173, 1176 (9th Cir. 2014) ("Under the categorical approach, we examine only the statutory definition of the

crime to determine whether the state statute of conviction renders an alien removable under the statute of removal, … , without looking to the actual conduct underlying the petitioner's offense." (citation and internal quotation marks omitted)); *Rodriguez-Castellon*, 733 F.3d at 853; *Robles-Urrea*, 678 F.3d at 707; *Rohit v. Holder*, 670 F.3d 1085, 1088 (9th Cir. 2012); *Hoang v. Holder*, 641 F.3d 1157, 1159–60 (9th Cir. 2011); *Tijani v. Holder*, 628 F.3d 1071, 1075 (9th Cir. 2010).

"Under the *Taylor* categorical approach, this court must look to 'the ordinary case' that is prosecuted by the state, not some extreme hypothetical." *Rebilas v. Mukasey*, 527 F.3d 783, 785 (9th Cir. 2008) (citation omitted); *see also Dominguez*, 975 F.3d at 734 (look to the offense as commonly understood). The court will examine "what types of conduct are ordinarily prosecuted … ." *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (explaining that an offender 'must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.')." *Rebilas*, 527 F.3d at 785; *see also Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000) (stating that the categorical approach is based only on the elements of the statute, and the court will not "look to the particular facts underlying the conviction").

> In applying the categorical approach, we "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, [569 U.S. 184] (2013) (quoting *Johnson v. United States*, [559 U.S. 133, 137] (2010) (alterations omitted)). A statute is overbroad if "there is a 'realistic probability' of its application to conduct that falls beyond the scope of the generic federal offense." *Castrijon-Garcia [v. Holder*, 704 F.3d 1205, 1212 (9th Cir. 2013)], (quoting *Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010)).

Menendez v. Whitaker, 908 F.3d 467, 472 (9th Cir. 2018); *see also Duenas-Alvarez*, 549 U.S. at 193; *Vasquez-Valle v. Sessions*, 899 F.3d 834, 839 (9th Cir. 2018); *Robles-Urrea*, 678 F.3d at 707; *Jordison v. Gonzales*, 501 F.3d 1134, 1135 (9th Cir. 2007).

"[I]n conducting the categorical analysis, [the court does] not consider the availability of affirmative defenses; the fact that there may be an affirmative defense under the federal statute, but not under the state statute of conviction, does

not mean that the state conviction does not fall categorically within the federal statute." *Gil v. Holder*, 651 F.3d 1000, 1005 (9th Cir. 2011), *implied overruling on other grounds recognized by United States v. Aguilera-Rios*, 769 F.3d 626, 634 (9th Cir. 2014).

Note the "categorical approach does not apply in assessing whether a noncitizen is ineligible for cancellation of removal under § 1229b(b)(1)(C) based on an offense of violating a protection order under § 1227(a)(2)(E)(ii)." *Diaz-Quirazco v. Barr*, 931 F.3d 830, 838 (9th Cir. 2019) (deferring to the BIA's published decision in *Matter of Medina-Jimenez*, 27 I. & N. Dec. 399, 401 (BIA 2018)).

See also Villavicencio v. Sessions, 904 F.3d 658, 667 (9th Cir. 2018) (as amended) (concluding that petitioner was not removable under 8 U.S.C. § 1227(a)(2)(B)(i) and that N.R.S. §§ 199.480 and 454.351 are both overbroad and indivisible); *Vasquez-Valle v. Sessions*, 899 F.3d 834, 840–41 (9th Cir. 2018) (concluding that O.R.S. § 162.285 is overbroad because the minimum conduct it criminalizes is not necessarily fraudulent, base, vile, or depraved, and thus it is not a categorical match to a CIMT); *Quintero-Cisneros v. Sessions*, 891 F.3d 1197, 1202 (9th Cir. 2018) (concluding that Washington conviction for third degree assault of a child was a categorical match for sexual abuse of a minor, an aggravated felony that bars the relief from removal); *Sandoval v. Sessions*, 866 F.3d 986, 993 (9th Cir. 2017) (as amended) (concluding that because Oregon's definition of "delivery" includes solicitation, O.R.S. § 475.992(1)(a) is not a categorical match to a "drug trafficking crime," and therefore, petitioner's conviction for delivery of heroin did not qualify as an aggravated felony under the categorical approach); *Lopez-Valencia v. Lynch*, 798 F.3d 863, 867 (9th Cir. 2015) (conviction was categorically not generic theft offense); *Garcia v. Lynch*, 786 F.3d 789, 794 (9th Cir. 2015) (conviction under Cal. Penal Code § 487(a) is not categorically an aggravated felony because section 487(a) is doubly overbroad); *Rosales Rivera v. Lynch*, 816 F.3d 1064, 1074–75 (9th Cir. 2015) (Cal. Penal Code § 118 categorically is not a crime involving moral turpitude); *Gonzalez-Cervantes v. Holder*, 709 F.3d 1265, 1267–68 (9th Cir. 2013) (conviction for misdemeanor sexual battery involved moral turpitude); *Rohit*, 670 F.3d at 1088–91 (holding that conviction under Cal. Penal Code § 647(b) constituted a conviction of a crime involving moral turpitude); *Jimenez-Juarez v. Holder*, 635 F.3d 1169, 1170–71 (9th Cir. 2011) (holding that conviction for child molestation in the third degree under Wash. Rev. Code § 9A.44.089 categorically constitutes a crime of child abuse within the meaning of 8 U.S.C. § 1227(a)(2)(E)(i)); *Covarrubias Teposte v.*

Holder, 632 F.3d 1049, 1052–56 (9th Cir. 2011) (determining that California conviction for shooting at an inhabited dwelling or vehicle was not categorically a crime of violence); *Mendoza v. Holder*, 623 F.3d 1299, 1302–04 (9th Cir. 2010) (applying categorical approach and determining that conviction for robbery under Cal. Penal Code § 211 was categorically a crime of moral turpitude); *Hernandez-Aguilar v. Holder*, 594 F.3d 1069, 1073 (9th Cir. 2010) (applying two-step test in *Taylor* analyzing whether Cal. Health & Safety Code § 11379(a) categorically qualified as a crime relating to a controlled substance); *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1012–16 (9th Cir. 2009) (sexual abuse of a minor not categorically an aggravated felony).

C. Modified Categorical Approach

> [T]he relevant inquiry in both categorical and modified categorical cases is the same: A court must compare the elements of the offense of which the noncitizen was convicted to the elements of a generic federal offense disqualifying her from relief, and then determine what facts are *necessarily* established by that conviction. The only difference between the two approaches is that, in modified categorical cases, a statute lists "multiple, alternative versions of [a] crime," … so the court must look to the record of conviction to determine "which particular offense the noncitizen was convicted of." … Once that determination is made, the relevant question is the same as that in categorical cases: A court must ask what the noncitizen's conviction *necessarily* involved, "not what acts [the noncitizen] committed."

Marinelarena v. Barr, 930 F.3d 1039, 1051 (9th Cir. 2019) (en banc) (citations omitted) (holding that if "the record does *not* conclusively establish that the noncitizen was convicted of the elements of the generic offense, then she was *not* convicted of the offense for purposes of the immigration statutes" and overruling *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc)), *petition for cert. filed*, Nov. 15, 2019 (No. 19-632).

"If the state statute is divisible, and the full range of conduct in the state statute is not included in the federal offense, we may use the modified categorical approach so long as one of the crimes included in the statute is a categorical match for the federal generic offense." *Rodriguez-Castellon v. Holder*, 733 F.3d 847 (9th Cir. 2013) (citing *Descamps v. United States*, 570 U.S. 254, 263 (2013)). *See also Syed v. Barr*, 969 F.3d 1012, 1017 (9th Cir. 2020) ("If the elements of the statute

are overbroad, [the court] may continue on with the analysis if the criminal statute is, …, 'divisible.'"); *Altayar v. Barr*, 947 F.3d 544, 549 (9th Cir. 2020); *Villavicencio v. Sessions*, 904 F.3d 658, 664 (9th Cir. 2018) (as amended) ("In a narrow range of cases, when a state statute is broader than the elements of the federal offense, we may employ the modified categorical approach to determine if the state crime is a match for the federal offense."); *Ramirez v. Lynch*, 810 F.3d 1127, 1131 (9th Cir. 2016) ("In a 'narrow range of cases,' when the statute at issue is divisible, we may employ a "modified categorical approach."). "If a statute does not list alternative elements, but merely encompasses different means of committing an offense, the statute is indivisible and the modified categorical approach has no role to play." *Lopez-Valencia v. Lynch*, 798 F.3d 863, 868 (9th Cir. 2015) (internal quotation marks and citation omitted); *see also Dominguez v. Barr*, 975 F.3d 725, 734 (9th Cir. 2020) (as amended); *Sandoval v. Sessions*, 866 F.3d 986, 994 (9th Cir. 2017) (as amended) (concluding the modified categorical approach could not be applied because O.R.S. § 475.992(1)(a) is indivisible with respect to whether an "attempt" is accomplished by solicitation); *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1013 (9th Cir. 2015) (modified categorical approach could not apply where statute was indivisible).

> A divisible statute is one that:
>
> > sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile. If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not, the modified categorical approach permits ... courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction. The court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime.

Descamps, 570 U.S. at 257; *see also Syed*, 969 F.3d at 1017 ("A divisible statute is one that lists elements in the alternative—thereby creating multiple, distinct crimes within a single statute."); *Dominguez*, 975 F.3d at 734 ("A statute is divisible if it sets out elements of the offense in the alternative, effectively containing multiple possible offenses."); *Romero-Millan v. Barr*, 958 F.3d 844, 847–48 (9th Cir. 2020); *Altayar v. Barr*, 947 F.3d 544, 549 (9th Cir. 2020) ("We apply the modified

categorical approach 'only if the statute is divisible,' … , which is to say that the statute contains multiple, alternative sets of elements that define multiple, distinct crimes." (citation omitted)); *Ramirez*, 810 F.3d at 1131 ("A divisible statute lists alternative sets of elements, in essence 'several different crimes.' [*Descamps*, 570 U.S. at 264]. 'If at least one, but not all of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of.' *Id*."); *Lopez-Valencia*, 798 F.3d at 868 (explaining *Descamps*); *Murillo-Prado v. Holder*, 735 F.3d 1152, 1156 (9th Cir. 2013) (per curiam) (quoting *Descamps*); *Duenas-Alvarez v. Holder*, 733 F.3d 812 (9th Cir. 2013) (same). "'[A] statute is divisible only if, *inter alia*, 'it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of 'elements,' more than one combination of which could support a conviction.'" *Vasquez-Valle*, 899 F.3d at 842 (citations omitted).

"In applying the modified categorical approach, the evidence submitted by the government to prove a prior conviction in an immigration proceeding must meet a clear and convincing standard." *Murillo-Prado*, 735 F.3d at 1157. *See also Quintero-Salazar v. Keisler*, 506 F.3d 688, 694 (9th Cir. 2007) ("[T]he government has the burden to establish clearly and unequivocally the conviction was based on all of the elements of a qualifying predicate offense." (internal quotation marks and citations omitted)).

"[T]he modified categorical approach should only be applied to 'determine which alternative element in a divisible statute formed the basis of the defendant's conviction.' … The modified categorical approach 'serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction.'" *Aguilar-Turcios v. Holder*, 740 F.3d 1294, 1300–02 (9th Cir. 2014) (quoting *Descamps*, 570 U.S. 254).

The Supreme Court in *Descamps*, overruled this court's holding in *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 940 (9th Cir. 2011) (en banc), which held that the modified categorical approach applied to analysis of whether a prior conviction under a statute missing an element of the generic crime was a crime of violence. After *Descamps*, the court "no longer analyzes a statute missing an element of a generic offense, …, under the modified categorical approach." *United States v. Gomez*, 757 F.3d 885, 889 (9th Cir. 2014).

> Under the modified categorical approach, "we look beyond the statutory text to a limited set of documents to determine which statutory phrase was the basis for the conviction." *United States v. Martinez-Lopez*, 864 F.3d 1034, 1043 (9th Cir.) (en banc) (internal quotation marks and citation omitted), *cert. denied*, [138 S. Ct. 523] (2017). This narrow set of documents includes: "the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard v. United States*, [544 U.S. 13, 26] (2005).

Vasquez-Valle v. Sessions, 899 F.3d 834, 843–44 (9th Cir. 2018) (considering indictment and plea agreement); *see also Altayar*, 947 F.3d at 549 (When applying the modified categorical approach the court consults a limited class of documents "to determine which alternative formed the basis of the [petitioner's] prior conviction;" when the conviction is based on a guilty plea, the court "may examine the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."); *Diego v. Sessions*, 857 F.3d 1005, 1014 (9th Cir. 2017) (considering the indictment and the plea petition); *Ramirez*, 810 F.3d at 1131 (the court may "look beyond the elements of the statute to the documents of conviction, i.e., to the state charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment, to determine whether the petitioner was convicted of a set of elements that falls within the generic definition." (internal quotation marks and citation omitted)); *Rodriguez-Castellon*, 733 F.3d 847, 853 (9th Cir. 2013) ("Under the modified approach, we examine certain judicial records to determine whether the defendant was necessarily convicted of the elements of a crime listed in a divisible statute that is a federal generic offense." (citing *Shepard*, 544 U.S. at 20 (2005))); *Hoang v. Holder*, 641 F.3d 1157, 1164–65 (9th Cir. 2011) (The court will "consider whether documentation or other judicially noticeable facts in the record indicate that [the petitioner] was convicted of the elements of the generically defined crime."); *Carlos-Blaza v. Holder*, 611 F.3d 583, 589 (9th Cir. 2010).

"The modified categorical approach is thus 'a tool' that allows us to apply the categorical approach. Moreover, '[i]t retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime,' as well as its 'basic method.'" *Ramirez*, 810 F.3d at 1131–32 (quoting *Descamps*, 570 U.S. at

263). "The idea of the modified categorical approach is to determine if the record unequivocally establishes that the defendant was convicted of the generically defined crime, even if the statute defining the crime is overly inclusive." *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc), *superseded on other grounds by* U.S.S.G. § 2L1.2 cmt. n.4; *see also Flores-Lopez*, 685 F.3d at 862–65 ("Under the modified categorical approach, a court may review enumerated documents within the record to determine whether a petitioner's plea 'necessarily' rested on the fact identifying the [offense] as generic." (internal citation and quotation marks omitted)).

Although the court will "look beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction," it will not "look beyond the record of conviction itself to the particular facts underlying the conviction." *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004); *see also Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002) (stating that the court will "conduct a limited examination of documents in the record to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime even though his or her statute of conviction was facially over-inclusive"). If a noncitizen's admissions or concession leave material issues in dispute, the IJ may rely on facts admitted at the pleading stage, but may not consider further statements made by the noncitizen unless they are contained in the specific set of documents that are part of the record of conviction. *Pagayon v. Holder*, 675 F.3d 1182, 1189 (9th Cir. 2011) (per curiam). Note that the modified categorical approach "is concerned only with the crime of which the defendant was convicted, and not with his *conduct*." *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011) (emphasis in original).

"If the record does not conclusively establish that the noncitizen was convicted of the elements of the generic offense, then she was *not* convicted of the offense for purposes of the immigration statutes." *Marinelarena v. Barr*, 930 F.3d 1039, 1048 (9th Cir. 2019) (en banc) (overruling *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) and holding that under *Moncrieffe*, an ambiguous record of conviction does not demonstrate that a petitioner was convicted of a disqualifying federal offense), *petition for cert. filed*, Nov. 15, 2019 (No. 19-632).

There are two limitations on the application of the modified categorical approach: 1) the court may only rely on facts contained in a limited universe of judicial documents, such as the indictment or information and jury instructions, or if a guilty plea is at issue, the plea agreement, plea colloquy, or some comparable

judicial record of the factual basis for the plea; and 2) the court may only take into account the facts on which the defendant's convictions necessarily rested. *See Sanchez-Avalos v. Holder*, 693 F.3d 1011, 1015 (9th Cir. 2012), *abrogated in part by Descamps v. United States*, 570 U.S. 254 (2013).

See also Lazo v. Wilkinson, No. 14-73182, 2021 WL 748482 (9th Cir. Feb. 26, 2021) (holding that Cal. Health and Safety Code § 11350, possession of a controlled substance, is divisible as to controlled substance, and that petitioner's conviction documents unambiguously established his conviction was a violation of law "relating to a controlled substance"); *Gomez Fernandez v. Barr*, 969 F.3d 1077, 1090 (9th Cir. 2020) (considering the only conviction documents in the record – the charging document and the abstract of judgment – the court held that petitioner was removable as charged); *Syed v. Barr*, 969 F.3d 1012, 1020 (9th Cir. 2020) (together the original information and minutes of plea hearing demonstrated that petitioner was properly deemed removable as a noncitizen convicted of a crime involving moral turpitude); *Tejeda v. Barr*, 960 F.3d 1184, 1187 (9th Cir. 2020) (per curiam) ("Applying the modified categorical approach, Tejeda's plea agreement, the charging document, and the minute order are cognizable for modified-categorical-approach purposes, … , and establish the elements of his offense."); *Dominguez v. Barr*, 975 F.3d 725, 740 (9th Cir. 2020) (as amended) (applying the modified categorical approach, and looking to the charging documents, the court held that the "Oregon conviction for manufacture of a controlled substance under § 475.992(1)(a) is a categorical match with the generic drug trafficking offense, meaning Dominguez was convicted of an aggravated felony."); *Altayar v. Barr*, 947 F.3d 544, 550 (9th Cir. 2020) ("Considering the charging document, plea agreement, and plea colloquy together, it is clear Altayar was convicted under A.R.S. §§ 13-1203(A)(2) and 13-1204(A)(2)."); *Myers v. Sessions*, 904 F.3d 1101, 1111–12 (9th Cir. 2018) (concluding the Travel Act was divisible, applying the modified categorical approach, and considering the superseding information and plea agreement in determining the conviction was for a controlled substance offense); *Rosales Rivera v. Lynch*, 816 F.3d 1064, 1080 (9th Cir. 2016) (Cal. Penal Code § 118 is divisible into two separate offenses—written and oral perjury—and under the modified categorical approach, written perjury, which is Rosales Rivera's crime of conviction, is not a crime involving moral turpitude); *Padilla-Martinez v. Holder*, 770 F.3d 825, 831–32 n.3 (9th Cir. 2014) ("A statute is divisible if it contains multiple, alternative elements of functionally separate crimes, and as to each alternative element, the jury must then find that element, unanimously and beyond a reasonable doubt." (internal quotation marks and citation omitted)); *Ragasa v. Holder*, 752 F.3d 1173, 1176 (9th Cir. 2014)

("Because the statute of conviction identifies a number of controlled substances by referencing various [state] drug schedules and statutes and criminalizes the possession of any one, it is a divisible statute, and we may resort to the modified categorical approach to determine whether Ragasa's crime of conviction is a removable offense." (internal citation and quotation marks omitted)); *Coronado v. Holder*, 759 F.3d 977, 983 (9th Cir. 2014) (concluding that petitioner's conviction was not a categorically removable offense and therefore modified categorical approach had to be applied); *Carlos-Blaza*, 611 F.3d at 590 (concluding that under the modified categorical approach a conviction for misapplication of funds under 18 U.S.C. § 656 necessarily involves fraud or deceit and therefore is an aggravated felony); *Carrillo-Jaime v. Holder*, 572 F.3d 747, 754 (9th Cir. 2009) (record was not sufficient to establish Cal. Veh. Code § 10801 conviction was an aggravated felony under modified categorical approach), *overruled in part as stated in Lopez-Valencia v. Lynch*, 798 F.3d 863, 872 n.6 (9th Cir. 2015).

1. Charging Documents, Abstracts of Judgment, and Minute Orders

"[A] court may determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or some comparable judicial record of the factual basis for the plea." *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013); *see also Dominguez v. Barr*, 975 F.3d 725, 735 (9th Cir. 2020) (as amended) (when applying the modified categorical approach, the court examines a limited class of documents—such as the charging instrument, jury instructions, jury verdict, or plea agreement— to determine which of a statute's alternative elements formed the basis of the defendant's prior conviction); *Tejeda v. Barr*, 960 F.3d 1184, 1187 (9th Cir. 2020) (per curiam) ("Applying the modified categorical approach, Tejeda's plea agreement, the charging document, and the minute order are cognizable for modified-categorical-approach purposes, … , and establish the elements of his offense."); *Altayar v. Barr*, 947 F.3d 544, 549 (9th Cir. 2020) ("When, as here, the conviction is based on a guilty plea, we may examine the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." (citation omitted)); *Vasquez-Valle v. Sessions*, 899 F.3d 834, 843 (9th Cir. 2018) (explaining under the modified categorical approach, the court can look beyond the statutory text to a limited set of documents to determine which statutory phrase was the basis for the conviction, including the charging document, the terms of a plea agreement or transcript of colloquy between judge and

defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.); *Ramirez v. Lynch*, 810 F.3d 1127, 1131 (9th Cir. 2016) ([W]e may look beyond the elements of the statute to the documents of conviction, i.e., to the state charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment, to determine whether the petitioner was convicted of a set of elements that falls within the generic definition."); *United States v. Torre-Jimenez*, 771 F.3d 1163, 1167 (9th Cir. 2014) (criminal complaint, abstract of judgment, and docket sheet were appropriate sources for review under the modified categorical approach); *Medina-Lara v. Holder*, 771 F.3d 1106, 1113 (9th Cir. 2014) (reliance on the abstract of judgment in combination with a charging document is permitted under the modified categorical approach); *Ragasa v. Holder*, 752 F.3d 1173, 1176 (9th Cir. 2014) ("Under the modified categorical approach, [the court] review[s] 'a limited set of documents in the record of conviction: the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings'"); *Coronado v. Holder*, 759 F.3d 977, 986 (9th Cir. 2014) ("Where the minute order or other equally reliable document specifies that a defendant pleaded guilty to a particular count of a criminal complaint, the court may consider the facts alleged in the complaint."); *Murillo-Prado v. Holder*, 735 F.3d 1152, 1156 (9th Cir. 2013) (per curiam) (the modified categorical approach permits courts to consider a limited class of documents, such as indictments and jury instructions); *Duenas-Alvarez v. Holder*, 733 F.3d 812 (9th Cir. 2013) (same). Documents such as the indictment, jury instructions, plea colloquy and plea agreement, are merely illustrative and documents of equal reliability may also be considered. *See Rosales Rivera v. Lynch*, 816 F.3d 1064, 1078 (9th Cir. 2015); *Coronado*, 759 F.3d at 985; *United States v. Leal-Vega*, 680 F.3d 1160, 1168 (9th Cir. 2012).

The Supreme Court in *Moncrieffe* held, "If the record does not conclusively establish that the noncitizen was convicted of the elements of the generic offense, then she was *not* convicted of the offense for purposes of the immigration statutes." *Marinelarena v. Barr*, 930 F.3d 1039, 1048 (9th Cir. 2019) (en banc) (discussing *Moncrieffe*), *petition for cert. filed*, Nov. 15, 2019 (No. 19-632). *See also Syed v. Barr*, 969 F.3d 1012, 1017 (9th Cir. 2020) ("If a statute is not divisible or if there is no match under the modified approach, the conviction will not serve as a basis of removal.").

"In the context of a guilty plea, the modified categorical approach inquires whether a guilty plea to an offense defined by a nongeneric statute *necessarily*

admitted elements of the generic offense." *Garcia v. Lynch*, 786 F.3d 789, 795 (9th Cir. 2015) (quoting *Alvarado v. Holder*, 759 F.3d 1121, 1130 (9th Cir. 2014) (internal quotation marks omitted)).

A rap sheet may form part of the record of conviction. *See Lozano-Arredondo v. Sessions*, 866 F.3d 1082, 1087–88 (9th Cir. 2017) (recognizing that a rap sheet may form part of the "record of conviction," but concluding that under the circumstances of this case it was not sufficiently reliable to be considered under the modified categorical analysis).

See also Lazo v. Wilkinson, No. 14-73182, 2021 WL 748482 (9th Cir. Feb. 26, 2021) (charging documents and the transcript of the guilty-plea colloquy in petitioner's case unambiguously established that petitioner's conviction was for possession of cocaine under Cal. Health and Safety Code § 11350 and is a violation of law "relating to a controlled substance" as defined in the CSA); *Gomez Fernandez v. Barr*, 969 F.3d 1077, 1090 (9th Cir. 2020) (considering the only conviction documents in the record – the charging document and the abstract of judgment – the court held that petitioner was removable as charged); *Syed*, 969 F.3d at 1020 (the original information and minutes of plea hearing together demonstrated that petitioner was properly deemed removable as a noncitizen convicted of a crime involving moral turpitude); *Tejeda*, 960 F.3d at 1187 ("Applying the modified categorical approach, Tejeda's plea agreement, the charging document, and the minute order are cognizable for modified-categorical-approach purposes, … , and establish the elements of his offense."); *Altayar*, 947 F.3d at 550 ("Considering the charging document, plea agreement, and plea colloquy together, it is clear Altayar was convicted under A.R.S. §§ 13-1203(A)(2) and 13-1204(A)(2)."); *Myers v. Sessions*, 904 F.3d 1101, 1111–12 (9th Cir. 2018) (concluding the Travel Act was divisible, applying the modified categorical approach, and considering the superseding information and plea agreement in determining the conviction was for a controlled substance offense); *Garcia v. Lynch*, 786 F.3d 789, 795 (9th Cir. 2015) (concluding that nothing in the conviction documents in the record—namely, the abstract of judgment and criminal complaint—established that Garcia's conviction was for non-consensual grand theft); *Kwong v. Holder*, 671 F.3d 872, 879–80 (9th Cir. 2011) (discussing the sufficiency of abstract of judgment to establish conviction); *Anaya-Ortiz v. Holder*, 594 F.3d 673, 678 (9th Cir. 2010) (deferring "to the BIA's reasonable conclusion that all reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of

conviction" (internal quotation marks and citation omitted)); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003) (Under the modified categorical approach, the court may look to the "charging documents in combination with a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding, and the judgment ... to document the elements of conviction.").

In *United States v. Snellenberger*, 548 F.3d 699, 701 (9th Cir. 2008) (en banc), *abrogated on other grounds by Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), *abrogated in part by Moncrieffe v. Holder*, 569 U.S. 184 (2013), the court held that the district court could rely on the state court clerk's minute order in determining whether a prior state burglary conviction qualified as a crime of violence. *Snellenberger*, 548 F.3d at 702; *see also Duenas-Alvarez*, 733 F.3d at 815 (stating in *Snellenberger*, the court "held that we may look to documents such as the minute order or abstract of judgment when applying the modified categorical approach."). In *Cabantac v. Holder*, 736 F.3d 787, 790 (9th Cir. 2013) (as amended), the court held that where the abstract of judgment or minute order "specifies that a defendant pleaded guilty to a particular count of the criminal complaint or indictment" the court may consider the facts alleged in that count. *See id*. (holding that the record was clear that the petitioner pleaded guilty to possession of a controlled substance that supported the order of removal). *See also Coronado v. Holder*, 759 F.3d 977, 986 (9th Cir. 2014) ("Where the minute order or other equally reliable document specifies that a defendant pleaded guilty to a particular count of a criminal complaint, the court may consider the facts alleged in the complaint.").

Prior to *Snellenberger*, abstracts of judgment were found not sufficient to establish the nature of a defendant's conviction. *See, e.g.*, *United States v. Navidad-Marcos*, 367 F.3d 903, 908 (9th Cir. 2004) (holding that a California abstract of judgment was not sufficient to establish unequivocally that defendant was convicted of the sale and transportation of methamphetamine), *implied overruling by Kwong v. Holder*, 671 F.3d 872 (9th Cir. 2011); *cf. United States v. Sandoval-Sandoval*, 487 F.3d 1278, 1280 (9th Cir. 2007) (per curiam) (contrasting impermissible reliance on an abstract of judgment to determine the nature of a conviction with permissibly using it to determine "a discrete fact regarding Defendant's prior conviction, namely, the length of sentence imposed"). This court has stated that although *Snellenberger* did not explicitly overrule *Navidad-Marcos*, it is clear that its reasoning is inconsistent with that decision. *Kwong v. Holder*, 671 F.3d 872, 879 (9th Cir. 2011) (discussing the sufficiency of abstract of judgment to establish conviction).

"When a plea agreement makes direct reference to a specific count in the charging document, the charging document 'may be considered in combination with other documents in the record to determine whether [the petitioner] pled guilty to an aggravated felony.'" *Murillo-Prado*, 735 F.3d at 1157. *See also United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1142 (9th Cir. 2014) (in non-immigration case, plea of guilty to second degree sexual assault was a document that court could consider under the modified categorical approach).

"Charging papers alone are never sufficient" but "may be considered in combination with a signed plea agreement." *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc) (internal citation omitted), *superseded on other grounds by* U.S.S.G. § 2L1.2 cmt. n.4; *see also Medina-Lara v. Holder*, 771 F.3d 1106, 1113 (9th Cir. 2014) (reliance on the abstract of judgment in combination with a charging document is permitted under the modified categorical approach); *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1152 (9th Cir. 2003). *Compare United States v. Savage*, 488 F.3d 1232, 1236 (9th Cir. 2007) (applying the modified categorical approach "[b]ased on the charging document and the transcript of Savage's plea allocution" to establish that he committed a crime of violence). However, "the charging instrument … may not be considered when the original charges are dismissed and the defendant pleads guilty to a different offense." *Alvarado v. Holder*, 759 F.3d 1121, 1131 (9th Cir. 2014).

"The set of noticeable documents includes the indictment (but only in conjunction with a signed plea agreement), the judgment of conviction, the minute order fully documenting the judgment, jury instructions, a signed guilty plea or the transcript from the plea proceedings." *Cheuk Fung S-Yong v. Holder*, 600 F.3d 1028, 1035 (9th Cir. 2010) (where IJ relied solely on noncitizen's judicial admissions and an unidentified "conviction document" to determine that conviction was a controlled substance offense under the INA, the court held the government failed to meet its burden because the judicially noticeable documents in the record were inconclusive); *see also Fregozo v. Holder*, 576 F.3d 1030, 1033 n.1 (9th Cir. 2009) (explaining that neither the court nor the BIA could rely on police reports that were not incorporated by reference into the nolo plea or the record of conviction, to determine whether alien was convicted of a "crime of child abuse" within the meaning of the INA).

"[T]he INA makes clear that '[o]fficial minutes of a court proceeding' are sufficient 'proof of a criminal conviction.'" *Retuta v. Holder*, 591 F.3d 1181, 1184–85 (9th Cir. 2010) (quoting 8 U.S.C. § 1229a(c)(3)(B)(iv)).

"When the modified categorical approach must be employed, an alien's factual admissions may not be used as evidence to establish that he is removable, unless those admissions are included in the 'narrow, specified set of documents that are part of the record of conviction,' such as a plea agreement." *Perez-Mejia v. Holder*, 663 F.3d 403, 410 (9th Cir. 2011) (citations omitted).

2. Police Reports and Stipulations

The court may not "look to police reports or complaint applications to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for," a relevant offense. *Shepard v. United States*, 544 U.S. 13, 16 (2005) (holding "that a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented"); *see also United States v. Almazan-Becerra*, 482 F.3d 1085, 1090–91 (9th Cir. 2007) (remanding to determine whether, in light of *Shepard*, a police report stipulated to form the basis of a guilty plea could be used to support a sentencing enhancement).

However, "[a]lthough police reports and complaint applications, standing alone, may not be used to enhance a sentence following a criminal conviction, the contents of these documents may be considered if specifically incorporated into the guilty plea or admitted by a defendant." *Parrilla v. Gonzales*, 414 F.3d 1038, 1044 (9th Cir. 2005) (Certification for Determination of Probable Cause, incorporated by reference into guilty plea, demonstrated that conviction met the definition of sexual abuse of a minor) (internal citation omitted); *see also Fregozo v. Holder*, 576 F.3d 1030, 1033 n.1 (9th Cir. 2009) (explaining that neither the court nor the BIA could rely on police reports that were not incorporated by reference into the nolo plea or the record of conviction, to determine whether petitioner was convicted of a "crime of child abuse" within the meaning of the INA); *United States v. Espinoza-Cano*, 456 F.3d 1126 (9th Cir. 2006) (superseded by regulation) (police report could be considered in determining whether prior conviction qualified as an aggravated felony because report was incorporated by reference into the charging document and stipulated to form the factual basis of a guilty plea); *United States v. Hernandez-Hernandez*, 431 F.3d 1212 (9th Cir. 2005) (defendant's assent to the statement of facts in a motion to set aside the indictment or information under Cal. Penal Code § 995 was a proper basis for a sentencing court to engage in a modified categorical analysis).

3. Probation or Presentence Reports

In *Corona-Sanchez*, this court held that the defendant's presentence report ("PSR"), which recited the facts of the crime as alleged in the charging papers, was not sufficient to establish that the defendant pled guilty to the elements of the generic definition of a crime. *United States v. Corona-Sanchez*, 291 F.3d 1201, 1212 (9th Cir. 2002) (en banc), *superseded on other grounds by* U.S.S.G. § 2L1.2 cmt. n.4; *see also United States v. Castillo-Marin*, 684 F.3d 914, 919–20 (9th Cir. 2012) (plain error to rely on PSR to determine defendant had prior conviction for crime of violence); *Rebilas v. Mukasey*, 527 F.3d 783, 787 (9th Cir. 2008); *Abreu-Reyes v. INS*, 350 F.3d 966, 967 (9th Cir. 2003) (order) (IJ may not use PSR to determine whether petitioner was an aggravated felon); *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1153–54 (9th Cir. 2003) (BIA erred in relying solely on the PSR to demonstrate the elements of a drug trafficking conviction); *Hernandez-Martinez v. Ashcroft*, 343 F.3d 1075, 1076–77 (9th Cir. 2003) (order); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003). *Cf. United States v. Rodriguez-Guzman*, 506 F.3d 738, 746–47 & n.9 (9th Cir. 2007) (stating that under *Shepard*'s modified categorical approach a sentencing hearing transcript is not judicially noticeable).

4. Extra-Record Evidence

Under the modified categorical approach, evidence outside the record of conviction may not be considered to determine whether a conviction is a predicate immigration offense. *See Cervantes v. Holder*, 772 F.3d 583 (9th Cir. 2014) ("in this circuit, 'an IJ is limited to the record of conviction in determining whether an alien has been 'convicted of' a CIMT.'" (citation omitted)); *Olivas-Motta v. Holder*, 746 F.3d 907, 908 (9th Cir. 2014) (holding that the agency is confined to the record of conviction in determining whether a noncitizen has been convicted of a crime involving moral turpitude); *Tokatly v. Ashcroft*, 371 F.3d 613, 623–24 (9th Cir. 2004) (stating that "[w]e decline to modify this court's – and the Board's – strict rules against extra-record of conviction evidence in order to authorize use of an alien's admissions in determining removability" and holding that IJ erred by relying on testimonial evidence at the removal hearing to determine that petitioner was convicted of a crime of domestic violence); *Cheuk Fung S-Yong v. Holder*, 600 F.3d 1028, 1036 (9th Cir. 2010) (IJ's reliance on petitioner's admissions, coupled with the government attorney's assessment that was based on a "rap sheet" that the IJ never looked at, was insufficient to conclude that petitioner "had been convicted of possession for sale of a controlled substance that would constitute an

aggravated felony under the INA."); *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 393 (9th Cir. 2006) (inferences and admissions during testimony before the IJ could not be used to determine whether petitioner was convicted of a crime of domestic violence); *see also Taylor v. United States*, 495 U.S. 575, 601 (1990) (noting the "practical difficulties and potential unfairness of a factual approach," rather than a categorical approach, to a defendant's prior offenses).

5. Remand

If the court determines that the record in a case does not support attaching immigration consequences to a particular crime of conviction under the modified categorical approach, the case will ordinarily not be remanded under *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam), for the government to submit further documentation. *See Flores-Lopez v. Holder*, 685 F.3d 857, 865 (9th Cir. 2012); *Fregozo v. Holder*, 576 F.3d 1030, 1036 (9th Cir. 2009); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132–35 (9th Cir. 2006) (en banc); *see also Ragasa v. Holder*, 752 F.3d 1173, 1176 n.4 (9th Cir. 2014) (remanding to BIA to conduct modified categorical approach was not warranted). However, remand may be appropriate where it is unclear whether DHS had the opportunity to introduce all relevant evidence regarding the conviction in the proceedings below. *See Flores-Lopez*, 685 F.3d at 865–67 (remanding for BIA to apply modified categorical approach in the first instance where the record of conviction may have been incomplete).

See also Cheuk Fung S-Yong v. Holder, 600 F.3d 1028, 1036 (9th Cir. 2010) (granting petition for review and reversing the order of removal); *Retuta v. Holder*, 591 F.3d 1181, 1190 (9th Cir. 2010) ("Because the Government presented no evidence sufficient to establish that Retuta was subject to removal, we grant the petition for review, reverse the order of removal, and remand to the Board for disposition consistent with this opinion").

IV. CATEGORIES OF CRIMINAL OFFENSES THAT CAN BE GROUNDS OF REMOVABILITY AND/OR INADMISSIBILITY

A. Crimes Involving Moral Turpitude ("CIMT")

1. Removability pursuant to 8 U.S.C. § 1227(a)(2)(A)(i)

a. Single Crime Committed within Five Years of Admission

"Any alien who is convicted of a crime involving moral turpitude committed within five years ... after the date of admission, and ... for which a sentence of one year or longer may be imposed, is deportable." 8 U.S.C. § 1227(a)(2)(A)(i)(I)–(II). *See also Velasquez-Rios v. Wilkinson*, No. 18-72990, 2020 WL 8642250, at *3 (9th Cir. Oct. 28, 2020) (as amended February 24, 2021); *Ortega-Lopez v. Barr*, 978 F.3d 680, 683 (9th Cir. 2020); *Altayar v. Barr*, 947 F.3d 544, 548 (9th Cir. 2020); *Mancilla-Delafuente v. Lynch*, 804 F.3d 1262, 1265 (9th Cir. 2015) ("Section § 1227(a)(2)(A)(i)(I) provides that an alien convicted of a CIMT for which the potential punishment is one year or more is removable.").

The "date of admission" for purposes of calculating the five years is the date of the noncitizen's lawful entry to the United States upon inspection and authorization by an immigration officer. *See Shivaraman v. Ashcroft*, 360 F.3d 1142, 1148–49 (9th Cir. 2004). The noncitizen's subsequent adjustment to lawful permanent resident status will not trigger the five-year provision if he or she continued to maintain lawful presence in the United States after an initial lawful entry. *See id.* at 1149 (applicant was not removable because his CIMT was not committed within five years of his initial lawful admission). Where the noncitizen enters the United States without inspection or admission, "[c]ertain events, such as adjustment to LPR status or acceptance into the Family Unity Program (FUP), qualify as 'admission' for immigration purposes." *United States v. Hernandez-Arias*, 757 F.3d 874, 880 (9th Cir. 2014); *see also Hernandez-Gonzalez v. Holder*, 778 F.3d 793, 798 (9th Cir. 2015) ("Because Hernandez-Gonzalez entered the United States without inspection or admission, the date of his adjustment of status serves as a date of admission that triggers the five-year clock under 8 U.S.C. § 1227(a)(2)(A)(i)); *Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1134–35 (9th Cir. 2001) (applicant's adjustment of status could constitute an "admission" for purposes of removability based on a conviction of an aggravated felony where he initially entered the United States without inspection).

b. Sentence of One Year or Longer.

"Any alien who is convicted of a crime involving moral turpitude committed within five years ... after the date of admission, and ... for which a sentence of one year or longer may be imposed, is deportable." 8 U.S.C. § 1227(a)(2)(A)(i)(I)–(II).

In *Velasquez-Rios v. Wilkinson*, No. 18-72990, 2020 WL 8642250, at *8 (9th Cir. Oct. 28, 2020) (as amended February 24, 2021), the court held that California's amendment to § 18.5 of the California Penal Code, which retroactively reduces the maximum misdemeanor sentence to 364 days for purposes of state law, cannot be applied retroactively for purposes of § 1227(a)(2)(A)(i).

2. Multiple Offenses at Any Time

"Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable." 8 U.S.C. § 1227(a)(2)(A)(ii); *see also Orellana v. Barr*, 967 F.3d 927, 938 (9th Cir. 2020) (holding that LPR's convictions for two counts of criminal stalking did not arise out of a single scheme of conduct); *Coquico v. Lynch*, 789 F.3d 1049, 1053–55 (9th Cir. 2015) (granting petition and remanding where one of the two crimes at issue, "unlawful laser activity" was not a crime involving moral turpitude, so as to subject petitioner to removal); *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011) ("[A]n immigrant is removable if, after being admitted, he is convicted of two or more CIMTs that did not arise out of a single scheme of criminal misconduct." (internal quotation marks, alteration, and citation omitted)). For purposes of removability under 8 U.S.C. § 1227(a)(2)(A)(ii), the government must prove that the crimes were not part of a single scheme of criminal misconduct. *See Ye v. INS*, 214 F.3d 1128, 1134 n.5 (9th Cir. 2000) (rejecting argument that the court lacked jurisdiction, because INS did not show that the two counts of vehicle burglary arose out of different criminal schemes); *Leon-Hernandez v. INS*, 926 F.2d 902 (9th Cir. 1991) (conviction for two counts of oral copulation, one month apart, not part of a single scheme); *Gonzalez-Sandoval v. INS*, 910 F.2d 614 (9th Cir. 1990) (two robberies at same bank arose out of a single scheme).

"The INA does not define 'single scheme of criminal misconduct.'" *Orellana v. Barr*, 967 F.3d 927, 938–39 (9th Cir. 2020). However, the BIA interpreted the phrase "single scheme of criminal misconduct" in *Matter of Adetiba*, 20 I. & N. Dec. 506 (BIA 1992). *See Orellana*, 967 F.3d at 939–40

(discussing the BIA's decision in *Adetiba*) *Szonyi v. Barr*, 942 F.3d 874, 891 (9th Cir. 2019) (same). In *Adetiba*, the BIA explained:

> when an alien has performed an act, which, in and of itself, constitutes a complete, individual, and distinct crime, he is deportable when he again commits such an act, even though one may closely follow the other, be similar in character, and even be part of an overall plan of criminal misconduct.

20 I. & N. Dec. at 509; *see also Orellana*, 967 F.3d at 939 (quoting *Adetiba*, 20 I & N. Dec. at 509); *Szonyi*, 942 F.3d at 891 (quoting *Adetiba*, 20 I & N. Dec. at 509). The BIA announced in *Matter of Islam*, 25 I. & N. Dec. 637, 641 (BIA 2011), that the *Adetiba* standard should be applied uniformly across all circuits. *See Szonyi*, 942 F.3d at 891–96.

In *Orellana v. Barr*, the court held that the BIA reasonably concluded that petitioner's conviction for two CIMTs, which occurred on different dates over different periods of time, did not arise out of a single scheme of criminal misconduct, and therefore he was removable as charged pursuant to 8 U.S.C. § 1227(a)(2)(A)(ii). 967 F.3d at 938–40.

In *Szonyi v. Barr*, deferring to the BIA's interpretation, the court held that the BIA properly determined petitioner's multiple crimes committed over a five to six hour period did not arise from a "single scheme of criminal misconduct, and thus he was removable under 8 U.S.C. § 1227(a)(2)(A)(ii). *Szonyi*, 942 F.3d at 890–91 (concluding the BIA properly applied its interpretation of "single scheme of conduct" and that application of the interpretation was not impermissibly retroactive).

2. Inadmissibility Pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(I)

A noncitizen convicted or who admits the essential elements of a crime involving moral turpitude ("CIMT") is inadmissible. *See* 8 U.S.C. § 1182(a)(2)(A)(i); *see also Safaryan v. Barr*, 975 F.3d 976, 981, 988 (9th Cir. 2020) (concluding that BIA properly held that petitioner's conviction was a CIMT and that he was therefore inadmissible and ineligible for adjustment of status); *Romo v. Barr*, 933 F.3d 1191, 1195 (9th Cir. 2019); *Mtoched v. Lynch*, 786 F.3d 1210, 1216 (9th Cir. 2015) ("Under 8 U.S.C. § 1182(a)(2)(A)(i)(I), an alien may be removed from the United States if convicted of a CIMT.").

A noncitizen with one CIMT is not inadmissible if he or she meets the petty offense exception. *See* 8 U.S.C. § 1182(a)(2)(A)(ii). A CIMT will meet the petty offense exception if "'the maximum penalty possible for the crime of which the alien was convicted ... did not exceed imprisonment for one year and ... the alien was not sentenced to a term of imprisonment in excess of 6 months.'" *Lafarga v. INS*, 170 F.3d 1213, 1214–15 (9th Cir. 1999) (quoting 8 U.S.C. § 1182(a)(2)(A)(ii)(II)); *see also Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161–62 (9th Cir. 2009) ("[S]ingle conviction for a crime of moral turpitude – petty theft – may fall within the petty offenses exception set forth at 8 U.S.C. § 1182(a)(2)(A)(ii)(II)"). For the purpose of the petty offense exception, "'the maximum penalty possible' ... refers to the statutory maximum sentence, not the guideline sentence to which the alien is exposed." *Mendez-Mendez v. Mukasey*, 525 F.3d 828, 835 (9th Cir. 2008) (offense of bribery of a public official did not qualify for petty offense exception where statutory maximum for offense was 15 years). Additionally, this court has deferred to the BIA's reasonable approach of considering the sentence that could have been imposed, not the actual sentence. *See Mancilla-Delafuente v. Lynch*, 804 F.3d 1262, 1265 (9th Cir. 2015) (citing *Matter of Cortez*, 25 I. & N. Dec. 301, 307 (BIA 2010)).

The youthful offender exception will apply if:

> the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States.

8 U.S.C. § 1182(a)(2)(A)(ii)(I).

3. Definition of Crime Involving Moral Turpitude

"The INA does not define the term 'crime involving moral turpitude.'" *Fugow v. Barr*, 943 F.3d 456, 457 (9th Cir. 2019) (per curiam); *see also Safaryan v. Barr*, 975 F.3d 976, 981 (9th Cir. 2020) (noting the court has "described the statutory phrase 'moral turpitude' as 'perhaps the quintessential example of an ambiguous phrase.'"). "[T]he BIA must consider on a case-by-case basis whether a particular crime involves moral turpitude." *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011). *See also Hernandez-Gonzalez v. Holder*, 778 F.3d 793, 801 (9th Cir. 2015) ("[I]mmigration statutes do not specifically define offenses

constituting crimes involving moral turpitude[.]" (internal quotation marks and citations omitted)) *Ceron v. Holder*, 747 F.3d 773, 779–80 (9th Cir. 2014) (en banc) (same); *Latter-Singh v. Holder*, 668 F.3d 1156, 1161 (9th Cir. 2012) (same).

> The BIA has defined a crime involving moral turpitude as having "two essential elements: [1] reprehensible conduct and [2] a culpable mental state." *Matter of Silva-Trevino*, 26 I. & N Dec. 826, 834 (BIA 2016). Conduct is reprehensible if it 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." *Matter of Jimenez-Cedillo*, 27 I. & N. Dec. 1, 3 (BIA 2017) (citation omitted).

Ortega-Lopez v. Barr, 978 F.3d 680, 685 (9th Cir. 2020). *See also Safaryan*, 975 F.3d at 981 ("In determining whether a crime involves this sort of enhanced reprehensibility, we consider the actus reus and the mens rea in concert to determine whether the behavior they describe is sufficiently culpable to be labeled morally turpitudinous." (internal quotation marks and citation omitted)); *Silva v. Barr*, 965 F.3d 724, 731 (9th Cir. 2020) ("The BIA has further explained that to involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state." (internal quotation marks and citation omitted)).

> "[F]raud crimes are categorically crimes involving moral turpitude, simply by virtue of their fraudulent nature." *Planes v. Holder*, 652 F.3d 991, 997 (9th Cir. 2011). "Non-fraudulent CIMTs 'almost always involve an intent to harm someone,'" *Saavedra-Figueroa*, 625 F.3d at 626 (quoting *Nunez v. Holder*, 594 F.3d 1124, 1131 & n. 4 (9th Cir. 2010)), or "intent to injure, actual injury, or a protected class of victim," *Turijan v. Holder*, 744 F.3d 617, 619 (9th Cir. 2014) (citation omitted). In determining whether an offense is a CIMT, the BIA has examined "whether the act is accompanied by a vicious motive or a corrupt mind" because "evil or malicious intent is ... the essence of moral turpitude." *Latter-Singh v. Holder*, 668 F.3d 1156, 1161 (9th Cir. 2012) (citations omitted).

Linares-Gonzalez v. Lynch, 823 F.3d 508, 514 (9th Cir. 2016). "Not every offense that runs against 'accepted rules of social conduct' will qualify as a CIMT, however. *Robles-Urrea*[, 678 F.3d at 708.] Rather, '[o]nly truly unconscionable conduct surpasses the threshold of moral turpitude.' *Id.*" *Turijan*, 744 F.3d at 621

(holding "felony false imprisonment under California law does not qualify as a categorical CIMT").

The phrase "crime involving moral turpitude" is not unconstitutionally vague. *See Martinez-de Ryan v. Whitaker*, 909 F.3d 247, 252 (9th Cir. 2018).

"Almost every Term, the Supreme Court issues a 'new' decision with slightly different language that forces federal judges, litigants, lawyers and probation officers to hit the reset button once again" in determining whether a crime is a CIMT. *Almanza-Arenas v. Lynch*, 815 F.3d 469, 483 (9th Cir. 2015) (en banc) (Owens, J., concurring); *see also Conejo-Bravo v. Sessions*, 875 F.3d 890, 893 (9th Cir. 2017) (quoting *Almanza-Arenas* and noting that the current approach to CIMTs and crimes of violence can lead to unpredictable results).

See also Barbosa v. Barr, 926 F.3d 1053, 1059 (9th Cir. 2019) (as amended) (holding that, although robbery under Oregon Revised Statutes § 164.395 involves a taking of property and the threatened or actual use of force, the minimal force required for conviction is insufficient to categorically label the crime a CIMT); *Menendez v. Whitaker*, 908 F.3d 467, 472–73 (9th Cir. 2018) (recognizing the meaning of the term "crime involving moral turpitude" falls well short of clarity, and explaining that although the court has not articulated a consistent or easily applied set of criteria to determine whether a state offense is a CIMT, past precedents provide a few guideposts); *Vasquez-Valle v. Sessions*, 899 F.3d 834, 839 (9th Cir. 2018) ("There are two categories of CIMTs: those involving fraud and those involving grave acts of baseness or depravity." (internal quotation marks and citation omitted)); *Conejo-Bravo v. Sessions*, 875 F.3d 890, 892–93 (9th Cir. 2017) (concluding that conviction under California Vehicle Code § 20001(a) for felony hit and run qualified as a CIMT); *Mtoched v. Lynch*, 786 F.3d 1210, 1216 (9th Cir. 2015) ("'[T]he federal generic definition of a CIMT is a crime involving fraud or conduct that (1) is vile, base, or depraved and (2) violates accepted moral standards. Non-fraudulent CIMTs almost always involve an intent to harm someone.' *Saavedra–Figueroa v. Holder*, 625 F.3d 621, 626 (9th Cir. 2010) (internal quotation marks and citations omitted)."); *Gonzalez-Cervantes v. Holder*, 709 F.3d 1265, 1267 (9th Cir. 2013) ("'[T]he essence of moral turpitude' is an 'evil or malicious intent.'" (quoting *Latter-Singh*, 668 F.3d at 1161)); *Leal v. Holder*, 771 F.3d 1140, 1146 (9th Cir. 2014) ("[T]he creation of a substantial, actual risk of imminent death is sufficiently reprehensible, or in terms of our case law "base, vile, and depraved," to establish a CIMT, even though no actual harm need occur."); *Nguyen v. Holder*, 763 F.3d 1022, 1027 (9th Cir. 2014) ("Misuse of

a passport to facilitate an act of international terrorism is categorically a crime involving moral turpitude."); *Turijan v. Holder*, 744 F.3d 617, 621 (9th Cir. 2014) (crimes of moral turpitude generally involve base, vile and depraved conduct that shocks the public conscience); *Robles-Urrea v. Holder*, 678 F.3d 702, 707–11 (9th Cir. 2012) (concluding BIA erred in determining that misprision of felony was categorically a CIMT); *Blanco v. Mukasey*, 518 F.3d 714, 718 (9th Cir. 2008) (holding that crime of false identification to a peace officer is not categorically a CIMT).

The court has noted that it is often helpful to determine whether a state crime involves moral turpitude by comparing it with crimes that have previously been found to involve moral turpitude. *Rohit v. Holder*, 670 F.3d 1085, 1089 (9th Cir. 2012).

"When the only benefit the individual obtains is to impede the enforcement of the law, the crime does not involve moral turpitude." *See Latu v. Mukasey*, 547 F.3d 1070, 1074 (9th Cir. 2008) (quotation marks omitted) (concluding that violation of Hawaii Revised Statute § 291C-12.5(a), which requires the driver to give an address or vehicle registration number following an accident resulting in substantial bodily injury, was not a CIMT).

"Crimes involving fraud are considered to be crimes involving moral turpitude." *Tijani v. Holder*, 628 F.3d 1071, 1075–79 (9th Cir. 2010) (internal quotation marks and citation omitted) (conviction for using false statements to obtain credit cards in violation of California law were inherently fraudulent). *See also Ibarra-Hernandez v. Holder*, 770 F.3d 1280, 1281–82 (9th Cir. 2014) (per curiam) (under modified categorical approach, violation of Arizona Revised Statutes § 13-2008(A) was a CIMT because stealing a real person's identity for the purpose of obtaining employment is inherently fraudulent); *Espino-Castillo v. Holder*, 770 F.3d 861, 864 (9th Cir. 2014) (Arizona's conviction for forgery was a crime involving moral turpitude); *Hernandez de Martinez v. Holder*, 770 F.3d 823 (9th Cir. 2014) (per curiam) (conviction for crimination impersonation by assuming a false identity with intent to defraud is categorically a CIMT); *Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011) ("crimes that have fraud as an element, …, are categorically crimes involving moral turpitude). *See, e.g.*, *Rashtabadi v. INS*, 23 F.3d 1562, 1568 (9th Cir. 1994) (California conviction for grand theft is a CIMT); *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir. 1980) (per curiam) (conspiracy to affect the market price of stock by deceit with intent to defraud is a CIMT); *Winestock v. INS*, 576 F.2d 234, 235 (9th Cir. 1978) (dealing in counterfeit

obligations is a CIMT); *see also United States v. Esparza-Ponce*, 193 F.3d 1133, 1136–37 (9th Cir. 1999) (stating in illegal reentry case that petty theft constitutes a CIMT); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017–20 (9th Cir. 2005) (burglary convictions under Wash. Rev. Code §§ 9A.52.025(1) and 9A.08.020(3) do not categorically meet the definition of CIMT, but do meet the definition under the modified categorical approach because petitioner intended to steal property, a fraud crime), *abrogated on other grounds by Holder v. Martinez Guetierrez*, 566 U.S. 583 (2012).

"Although non-fraudulent CIMTs generally involve an 'intent to injure, actual injury, or a protected class of victims,'… , [the court has] held that certain reckless endangerment offenses qualify as CIMTs." *Fugow v. Barr*, 943 F.3d 456, 458 (9th Cir. 2019) (per curiam) (quoting *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1213 (9th Cir. 2013)). In *Fugow*, the court determined that first-degree unlawful imprisonment under Hawaii law is categorically a CIMT. 943 F.3d at 459.

The court has held that "because [California Penal Code] § 114 does not require fraudulent intent, it is not categorically a crime involving moral turpitude." *Jauregui-Cardenas v. Barr*, 946 F.3d 1116, 1121 (9th Cir. 2020) (holding a conviction for using false document to conceal citizenship in violation of CPC § 114 does not qualify as an aggravated felony for purposes of eligibility for cancellation of removal or a CIMT).

Crimes against property that do not involve fraud are generally not considered CIMT's. *See Rodriguez-Herrera v. INS*, 52 F.3d 238, 240 n.5 (9th Cir. 1995) (crime of malicious mischief was not CIMT).

Strict liability offenses and crimes against the state are generally not CIMT's. *See Quintero-Salazar v. Keisler*, 506 F.3d 688, 693 (9th Cir. 2007) (statutory rape under California Penal Code § 261.5(d) is not a categorical CIMT because statute proscribes some conduct that is *malum prohibitum* rather than *malum in se*); *Beltran-Tirado v. INS*, 213 F.3d 1179, 1184 (9th Cir. 2000) (noting difference between *malum prohibitum*, an act only statutorily prohibited, and *malum in se*, an act inherently wrong); *see also Notash v. Gonzales*, 427 F.3d 693, 697 (9th Cir. 2005) (concluding that a conviction for attempted entry of goods by means of a false statement was not a CIMT); *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117, 1118–19 (9th Cir. 2003) (Arizona aggravated driving under the influence is not a categorical CIMT where person may be convicted without

actually driving); *Murillo-Salmeron v. INS*, 327 F.3d 898, 902 (9th Cir. 2003) (simple DUI convictions are not CIMT's); *Beltran-Tirado*, 213 F.3d at 1183–84 (convictions for making a false attestation on an employment verification form and using a false Social Security number do not constitute CIMT's); *United States v. Chu Kong Yin*, 935 F.2d 990, 1003–04 (9th Cir. 1991) (gambling crimes did not necessarily involve moral turpitude). *But see Marmolejo-Campos v. Holder*, 558 F.3d 903, 917 (9th Cir. 2009) (en banc) (concluding that DUI offenses committed with the knowledge that one's driver's license has been suspended or otherwise restricted are crimes involving moral turpitude).

A bribery conviction under 18 U.S.C. § 666(a)(2) categorically qualifies as a crime involving moral turpitude, because it requires proof of a "corrupt mind." *Martinez-de Ryan v. Whitaker*, 909 F.3d 247, 250 (9th Cir. 2018) (stating that the court's holding comports with "decades-old decisions by the BIA and by the Second, Fourth, and Fifth Circuits that bribery involves moral turpitude").

A witness tampering conviction in violation of Oregon Revised Statutes § 162.285 is overbroad, and not categorically a CIMT because the minimum conduct it criminalizes is not necessarily fraudulent, base, vile, or depraved. *Vasquez-Valle v. Sessions*, 899 F.3d 834, 840 (9th Cir. 2018) (concluding statute was divisible, applying modified categorical approach, and determining that petitioner's conviction was not a CIMT). *See also Escobar v. Lynch*, 846 F.3d 1019, (9th Cir. 2017) (holding that witness tampering in violation of Cal. Penal Code § 136.1(a) was not categorically a crime of moral turpitude, and remanding for the agency to consider if the statute was divisible and if so to conduct the modified categorical analysis).

Simple battery is generally not a CIMT, although it may be rendered such by aggravating circumstances. *See Morales-Garcia v. Holder*, 567 F.3d 1058, 1067 (9th Cir. 2009) (concluding that conviction under Cal. Penal Code § 273.5(a) for abuse of a cohabitant was not categorically a CIMT); *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1167 (9th Cir. 2006) (Arizona domestic assault statute is not categorical CIMT because it penalizes reckless conduct); *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9th Cir. 2006) (California conviction for domestic battery under Cal. Penal Code § 243(e) is not a categorical CIMT because it lacks an injury requirement and includes no inherent element evidencing grave acts of baseness or depravity); *but see Grageda v. INS*, 12 F.3d 919 (9th Cir. 1993) (willful infliction of injury to a spouse is CIMT), *superseded by statute on other grounds as stated in Planes v. Holder*, 652 F.3d 991, 995 (9th Cir. 2011).

The court explained in *Altayar v. Barr*:

> [A]n aggravated assault presents a very different situation than mere simple assault. … "[S]ome assault statutes ... have been held to be CIMTs. Those statutes include as an element 'some aggravating dimension' sufficient to increase the culpability of an assault or battery and so to transform the offense into one categorically a CIMT." *Uppal* [*v. Holder*, 605 F.3d 712, 717 (9th Cir. 2010)] (citing various BIA decisions); *see also Leal*, 771 F.3d at 1148; *Latter-Singh*, 668 F.3d at 1161. As a result, "to rise to the level of moral turpitude, an assault crime must involve a particular type of aggravating factor, one that says something about the turpitude or blameworthiness inherent in the action." *Uppal*, 605 F.3d at 717.

Altayar v. Barr, 947 F.3d 544, 551 (9th Cir. 2020). In *Altayar*, applying the modified categorical approach the court held that "an aggravated assault conviction under A.R.S. §§ 13-1203(A)(2) and 13-1204(A)(2) involving the use of a deadly weapon or dangerous instrument qualified as a crime involving moral turpitude." *Altayar*, 947 F.3d at 551–55. *See also Safaryan v. Barr*, 975 F.3d 976, 988 (9th Cir. 2020) (holding the BIA correctly determined that that petitioner's conviction under Cal. Penal Code §245(a)(1), which proscribes certain aggravated forms of assault, was categorically a "crime involving moral turpitude," rendering him ineligible for status adjustment).

"[A] § 646.9(a) conviction [for criminal stalking] is categorically a CIMT." *Orellana v. Barr*, 967 F.3d 927, 938 (9th Cir. 2020) (holding that the BIA did not err in concluding that a § 646.9(a) criminal stalking conviction is a CIMT because a § 646.9(a) offense is categorically a CIMT, further holding that the BIA reasonably concluded that Orellana's two § 646.9(a) counts of conviction did not arise out of a single scheme of criminal misconduct.).

Sex-related offenses (other than statutory rape) are generally considered to be CIMT's. *See Rohit v. Holder*, 670 F.3d 1085, 1089–90 (9th Cir. 2012) (conviction for solicitation of prostitution); *Gonzalez-Alvarado v. INS*, 39 F.3d 245, 246 (9th Cir. 1994) ("Incest ... involves an act of baseness or depravity contrary to accepted moral standards, and we hold that it too is a 'crime involving moral turpitude.'"); *see also Zavaleta-Gallegos v. INS*, 261 F.3d 951 (9th Cir. 2001) (petitioner did not challenge that conviction for stalking was a CIMT). *But see Nicanor-Romero v. Mukasey*, 523 F.3d 992, 997–1008 (9th Cir. 2008)

(conviction under Cal. Penal Code § 647.6(a) for annoying or molesting a child under the age of 18 was not categorically a CIMT), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc). "In the context of sexual offenses, whether the crime involves moral turpitude turns on whether there is (1) actual harm or (2) a protected class of victim." *Gonzalez-Cervantes*, 709 F.3d at 1267 (concluding that California conviction for misdemeanor sexual battery involved moral turpitude).

In *Menendez v. Whitaker*, 908 F.3d 467, 472–74 (9th Cir. 2018), the court held that a conviction for lewd or lascivious conduct in violation of Cal. Penal Code § 288(c)(1) is not categorically a crime involving moral turpitude. The court stated that although § 288(c)(1) involves a protected class of persons (minors aged 14 or 15), not all criminal statutes intended to protect minors involve moral turpitude. *Menendez*, 908 F.3d at 473. However, in *Syed v. Barr*, 969 F.3d 1012, 1015 (9th Cir. 2020), distinguishing *Menendez*, the court held that a conviction under Cal. Penal Code § 288.3(a), attempting to communicate with a child with the intent to commit lewd or lascivious acts upon that child, categorically constitutes a crime involving moral turpitude.

Indecent exposure under Cal. Penal Code § 314(1) is categorically a CIMT. *Betansos v. Barr*, 928 F.3d 1133, 1146 (9th Cir. 2019). In *Betansos*, the court recognized that although the court's prior decision in *Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010) held to the contrary, a subsequent published BIA decision, *Matter of Cortes Medina*, 26 I. & N. Dec. 79 (BIA 2013), which held that § 314(1) is categorically a CIMT, was entitled to deference. *Betansos*, 928 F.3d at 1136. Additionally, the court determined that *Cortes Medina* applied retroactively in Betansos's case. *Id.* at 1143–46 (applying the test adopted in *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322 (9th Cir. 1982), to determine whether the BIA's decision in *Cortes Medina*, should apply retroactively, and noting that the retroactive analysis is conducted on a case-by-case basis).

In contrast, "indecent exposure to a person under the age of fourteen pursuant to Wash. Rev. Code § 9A.88.010(2)(b) is not categorically a crime involving moral turpitude." *Barrera-Lima v. Sessions*, 901 F.3d 1108, 1123 (9th Cir. 2018) (further concluding that Wash. Rev. Code § 9A.88.010(2)(b) is indivisible and that the modified categorical approach is inapplicable). The court in *Barrera-Lima* stated, "Other indecent exposure statutes aimed at protecting a class of victims, such as children, may categorically qualify as crimes involving moral turpitude because they include any number of the elements missing from

Wash. Rev. Code § 9A.88.010(2)(b)—sexual motivation, actual observation, or specific intent—but we are not called upon to assess those statutes." *Barrera-Lima*, 901 F.3d at 1123.

Knowing possession of child pornography is a CIMT. *See also United States v. Santacruz*, 563 F.3d 894, 897 (9th Cir. 2009).

Communication with a minor for immoral purposes in violation of Revised Code of Washington § 9.68A.090 is a crime of moral turpitude. *See Islas-Veloz v. Whitaker*, 914 F.3d 1249, 1251 (9th Cir. 2019), *cert. denied sub nom. Islas-Veloz v. Barr*, 140 S. Ct. 2704 (2020); *see also Morales v. Gonzales*, 478 F.3d 972, 978 (9th Cir. 2007), *abrogated on other grounds in Anaya-Ortiz v. Holde*r, 594 F.3d 673, 677–78 (9th Cir. 2010).

"[D]rug trafficking crimes are generally crimes involving moral turpitude." *Romo v. Barr*, 933 F.3d 1191, 1195 (9th Cir. 2019). For example, solicitation to possess a large quantity of marijuana is a CIMT for purposes of removal pursuant to § 1227(a)(2)(A)(i)(I), *see Barragan-Lopez v. Mukasey*, 508 F.3d 899, 904 (9th Cir. 2007), and for purposes of inadmissibility under § 1182(a)(2)(A)(i)(I), *see Romo*, 933 F.3d at 1199 (holding that a conviction in Arizona for solicitation to possess at least four pounds of marijuana for sale constitutes a crime involving moral turpitude for purposes of § 1182(a)(2)(A)(i)(I)).

Misdemeanor false imprisonment under Cal. Penal Code § 236 is not categorically a CIMT because it "does not require the defendant to have had the intent to harm necessary for the crime to be 'base, vile, or depraved.'" *Saavedra-Figueroa*, 625 F.3d at 626. Similarly, "[s]imple kidnapping under [Cal. Penal Code § 207(a) also] does not require an intent to injure, actual injury, or a special class of victims." *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1213 (9th Cir. 2013), *overruled on other grounds by Ceron v. Holder*, 747 F.3d 773, 782 n.2 (9th Cir. 2014) (en banc). As such, simple kidnapping is not categorically a CIMT. *Castrijon-Garcia*, 704 F.3d. at 1214 (explaining that the court has held that "non-fraudulent crimes of moral turpitude almost always involve an intent to harm someone, the actual infliction of harm upon someone, or an action that affects a protected class of victim" and holding that simple kidnapping under Cal. Penal Code § 207(a) is not categorically a crime of moral turpitude).

Crime of making threats with intent to terrorize under Cal. Penal Code § 422 is categorically a CIMT. *Latter-Singh v. Holder*, 668 F.3d 1156, 1161–63 (9th Cir. 2012); *cf. Coquico v. Lynch*, 789 F.3d 1049, 1055 (9th Cir. 2015) (discussing

Latter-Singh, and concluding that a violation of Cal. Penal Code § 417.26, unlawful laser activity, is not categorically a crime involving moral turpitude). Also, in *Cervantes v. Holder*, 772 F.3d 583 (9th Cir. 2014), the court held that a conviction under California Penal Code § 422 for threatening to commit a crime resulting in death or great bodily injury categorically was a CIMT. *Id*. at 589.

This court held in *Hernandez-Gonzalez v. Holder*, 778 F.3d 793, 809 (9th Cir. 2015), that the gang sentencing enhancement under California law did not categorically elevate the petitioner's conviction for unlawful possession of a weapon to a crime involving moral turpitude.

A robbery conviction under Cal. Penal Code § 211 is a CIMT for the purposes of 8 U.S.C. § 1182(a)(2)(A)(i)(I). *See Mendoza v. Holder*, 623 F.3d 1299, 1303–04 (9th Cir. 2010).

"Petty theft is a crime involving moral turpitude under 8 U.S.C. § 1182(a)(2)(A)(i)(I)[,]" *Flores Juarez v. Mukasey*, 530 F.3d 1020, 1022 (9th Cir. 2008) (per curiam), as is a conviction for credit card fraud in violation of Cal. Penal Code § 532a(1), *see Tijani*, 628 F.3d at 1075–77 (conviction for using false statements to obtain credit cards in violation of California law were inherently fraudulent). *See also Silva v. Barr*, 965 F.3d 724, 729 (9th Cir. 2020) ("Under our precedent, petty theft under section 484(a) of the California Penal Code is a crime involving moral turpitude."). However, a conviction for receipt of stolen property under Cal. Penal Code § 496 is not categorically a CIMT. *See Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). Likewise, the court held *Lozano-Arredondo v. Sessions*, 866 F.3d 1082, 1093 (9th Cir. 2017), "that petit theft under Idaho law does not qualify categorically as a crime involving moral turpitude." *Id.* (also holding that under the modified categorical approach, the record of conviction was inconclusive, and remanding so the burden of proof question could be resolved, and for the BIA to determine whether Lozano-Arredondo's conviction qualifies as a crime involving moral turpitude under the modified categorical approach).

Cal. Vehicle Code § 10851(a), which criminalizes theft and unlawful driving or taking of a vehicle is not categorically a CIMT. *Almanza-Arenas v. Lynch*, 815 F.3d 469, 476 (9th Cir. 2016) (en banc) (as amended). Likewise, "California's Vehicle Code § 2800.2 is not categorically a crime of moral turpitude." *Ramirez-Contreras v. Sessions*, 858 F.3d 1298, 1307 (9th Cir. 2017).

Prior to the BIA's decision in *In re Diaz-Lizarraga*, 26 I. & N. Dec. 847, 849 (BIA 2016), the BIA had held that "a theft offense categorically involves moral turpitude if—and only if—it is committed with the intent to permanently deprive an owner of property." *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1294 (9th Cir. 2018) (citation omitted). However, as explained in *Garcia-Martinez*, the BIA changed the law in *Diaz-Lizarraga*, holding that "a theft offense is a crime involving moral turpitude if it involves an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded[,]" and overruling any prior decisions that required literal intent to permanently deprive an owner of property. *Garcia-Martinez*, 886 F.3d at 1294 (explaining change of law in *Diaz-Lizarraga*). The court in *Garcia-Martinez* held that the new rule expanding the CIMT definition of a theft offense, should not be applied retroactively to petitioner. 886 F.3d at 1294–96 (balancing of interests and basic fairness, indicated the BIA's new CIMT rule should not be applied to petitioner, where petitioner's theft offenses in Oregon were not CIMTs at the time petitioner committed them); *see also Barbosa v. Barr*, 926 F.3d 1053, 1058 (9th Cir. 2019) (as amended) (explaining that although "the BIA recently adopted a more expansive standard for determining whether a theft offense constitutes a CIMT … [b]ecause Petitioner pleaded no contest to the relevant charge before the BIA changed its interpretation, the new standard does not apply retroactively to his case.").

This court has held the BIA reasonably concluded that a noncitizen's conviction for knowingly sponsoring or exhibiting an animal in an animal fighting venture under 7 U.S.C. § 2156(a)(1) is a crime involving moral turpitude. *Ortega-Lopez v. Barr*, 978 F.3d 680, 681 (9th Cir. 2020).

In *Moran v. Barr*, 960 F.3d 1158, 1164 (9th Cir. 2020), *petition for cert. filed*, (U.S. Dec. 21, 2020) (No. 20-6664), the court held that a violation of California Vehicle Code § 2800.4 (felony vehicular flight from a pursuing police car while driving against traffic) is categorically a crime involving moral turpitude.

See also Barbosa, 926 F.3d at 1058–59 (holding that, although robbery under Oregon Revised Statutes § 164.395 involves a taking of property and the threatened or actual use of force, the minimal force required for conviction is insufficient to label the crime a CIMT); *Uppal v. Holder*, 605 F.3d 712 (9th Cir. 2010) (prior conviction in Canada for aggravated assault did not categorically qualify as CIMT); *Blanco*, 518 F.3d at 718–20 (holding that crime of false identification to a peace officer under Cal. Penal Code § 148.9(a) was not

categorically a CIMT); *Cerezo v. Mukasey*, 512 F.3d 1163, 1166–69 (9th Cir. 2008) (concluding that California conviction for leaving the scene of an accident resulting in bodily injury or death in violation of Cal. Vehicle Code § 20001(a) was not categorically a CIMT).

B. Controlled Substances Offenses

1. Deportation Ground – 8 U.S.C. § 1227(a)(2)(B)(i)

Noncitizens may be removable for drug offenses. *See* 8 U.S.C. § 1227(a)(2)(B)(i). *See also Ruiz-Vidal v. Lynch*, 803 F.3d 1049, 1052 (9th Cir. 2015) ("An alien is removable if the government proves by clear and convincing evidence that he's been convicted of certain offenses "relating to a controlled substance" covered by the Controlled Substances Act.") This section is broader than the aggravated felony deportation ground since it relates to all controlled substance offenses rather than just illicit trafficking offenses. *Compare* 8 U.S.C. § 1227(a)(2)(B)(i) *with* 8 U.S.C. § 1101(a)(43)(B). 8 U.S.C. § 1227(a)(2)(B)(i) provides:

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

See also Villavicencio v. Sessions, 904 F.3d 658, 664 (9th Cir. 2018) (as amended) ("In other words, (1) any alien (2) convicted of a conspiracy under state law (3) relating to a controlled substance as defined under 21 U.S.C. § 802, is deportable."); *Medina v. Ashcroft*, 393 F.3d 1063, 1065 (9th Cir. 2005) (Nevada conviction of attempting to be under the influence of THC-carboxylic acid, a controlled substance, was not a removable offense because it came within the statutory exception for possession of 30 grams or less of marijuana).

"[C]onstruction of § 1227(a)(2)(B)(i) must be faithful to the text, which limits the meaning of 'controlled substance,' for removal purposes, to the substances controlled under § 802." *Mellouli v. Lynch*, 575 U.S. 798, 135 S. Ct. 1980, 1990–91 (2015). The Supreme Court rejected "the argument that *any* drug offense renders an alien removable, without regard to the appearance of the drug on a § 802 schedule. Instead, to trigger removal under § 1227(a)(2)(B)(i), the

Government must connect an element of the conviction to a drug "defined in [§ 802]." 135 S. Ct. at 1991.

> The operative statutory phrase, 'relating to a controlled substance,' modifies 'law or regulation.' The ordinary meaning of the term 'relate' is 'to show or establish a logical or causal connection between.' Thus, [the court] look[s] to the language of the statute of conviction to determine whether it establishes a logical or causal connection to a controlled substance as defined in 21 U.S.C. § 802, section 102 of the Controlled Substances Act [].

Mielewczyk v. Holder, 575 F.3d 992, 994–95 (9th Cir. 2009) (internal citations omitted); *see also Mellouli*, 135 S. Ct. at 1990 ("The removal provision is thus satisfied when the elements that make up the state crime of conviction relate to a federally controlled substance."); *Villavicencio*, 904 F.3d at 665.

"[S]ection 1227(a)(2)(B)(i) exempts from removability solely those aliens who have (1) committed only one controlled substance offense, where (2) that offense is possession for personal use of less than 30 grams of marijuana." *Rodriguez v. Holder*, 619 F.3d 1077, 1079 (9th Cir. 2010) (per curiam) (discussing "personal use exception" of § 1227(a)(2)(B)(i) and holding that it does not apply to noncitizens who have more than one drug conviction). *see also Medina*, 393 F.3d at 1065 (Nevada conviction of attempting to be under the influence of THC-carboxylic acid, a controlled substance, was not a removable offense because it came within the statutory exception for possession of 30 grams or less of marijuana).

See also Lazo v. Wilkinson, No. 14-73182, 2021 WL 748482 (9th Cir. Feb. 26, 2021) (holding that Cal. Health and Safety Code § 11350, possession of a controlled substance, is divisible as to controlled substance, and that petitioner's conviction documents unambiguously established his conviction was a violation of law "relating to a controlled substance"); *Tejeda v. Barr*, 960 F.3d 1184, 1188 (9th Cir. 2020) (per curiam) ("Where, as here, the controlled-substance requirement of a state statute [– in this case Cal. Health and Safety Code § 11550(a) –] is divisible and where, as here, the relevant substance is shown by application of the modified categorical approach to be federally controlled, then there is a direct link between an alien's crime of conviction and a particular federally controlled drug such that 8 U.S.C. § 1227(a)(2)(B)(i) is satisfied."); *Marinelarena v. Barr*, 930 F.3d 1039, 1045–54 (9th Cir. 2019) (en banc) (concluding that California Penal Code

§ 182(a)(1) is overbroad, applying modified categorical approach, and determining that because record of conviction was ambiguous, petitioner was not barred from relief under 8 U.S.C. § 1229b(b)), *petition for cert. filed*, Nov. 15, 2019 (No. 19-632); *Villavicencio*, 904 F.3d at 667 (concluding that petitioner was not removable under 8 U.S.C. § 1227(a)(2)(B)(i) and that N.R.S. §§ 199.480 and 454.351 are overbroad and indivisible, and cannot be used as a predicate offense to support removal); *Ruiz-Vidal*, 803 F.3d at 1055 ("Because there is clear and convincing evidence in the documents permissible for review that Ruiz-Vidal pleaded to—and was convicted of—possession of methamphetamine, a controlled substance, he is removable."); *Padilla-Martinez v. Holder*, 770 F.3d 825, 831–32 n.3 (9th Cir. 2014) (conviction under Cal. Health & Safety Code § 11378 is an aggravated felony under modified categorical approach); *Alvarado v. Holder*, 759 F.3d 1121 (9th Cir. 2014) (conviction for attempted possession of dangerous drug constituted a violation of state law relating to a controlled substance); *Cabantac v. Holder*, 736 F.3d 787, 790 (9th Cir. 2013) (as amended) (conviction under Cal. Health & Safety Code § 11377(a) for possession of a controlled substance supported order of removal); *Pagayon v. Holder*, 675 F.3d 1182, 1189–90 (9th Cir. 2011) (per curiam) (state conviction for possessing methamphetamine constituted a controlled substance offense rendering petitioner removable, where petitioner made a pleading-stage admission to the conviction); *Cheuk Fung S-Yong v. Holder*, 600 F.3d 1028, 1034 (9th Cir. 2010) (explaining that a conviction under Cal. Health & Safety Code § 11379 does not necessarily entail a "controlled substance offense" under 8 U.S.C. § 1227 (a)(2)(B)(i)); *Retuta v. Holder*, 591 F.3d 1181, 1185–89 (9th Cir. 2010) (minute order sufficient to show petitioner pled guilty to charge of possession of a controlled substance, methamphetamine, in violation of Cal. Health & Safety Code § 11377(a), but government failed to prove petitioner was "convicted" because "the definition of 'conviction' does not include criminal judgments whose only consequence is a suspended non-incarceratory sanction").

In the removal context, the government bears the burden of proving that the substance underlying a state law conviction is one covered by § 802 of the Controlled Substances Act ("CSA"). *See Ragasa v. Holder*, 752 F.3d 1173, 1175 (9th Cir. 2014); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1076–77 (9th Cir. 2007) (conviction under California possession statute was not a categorical controlled substance offense because California regulates the possession and sale of many substances not covered by the CSA), *abrogated on other grounds by Kwong v. Holder*, 671 F.3d 872 (9th Cir. 2011). The government also must demonstrate that the conviction is one "relating to a controlled substance," although this requirement has been construed broadly. *See, e.g.*, *Johnson v. INS*, 971 F.2d 340,

342–43 (9th Cir. 1992) (conviction for violation of the Travel Act, 18 U.S.C. § 1952, was a violation of a law relating to a controlled substance); *but see Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1153 (9th Cir. 2003) (as amended) (Arizona money laundering offense is not a crime relating to a controlled substance); *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997) (Arizona solicitation conviction is not a violation of a law relating to a controlled substance, and is therefore not a deportable offense).

2. Inadmissibility Grounds – 8 U.S.C. § 1182(a)(2)(A)(i)(II) & 8 U.S.C. § 1182(a)(2)(C)

Additional grounds of inadmissibility bar the admission of noncitizens who are convicted of or admit the essential elements of a crime related to a controlled substance or who are controlled substance traffickers. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II) (controlled substance crime), § 1182(a)(2)(C) (controlled substance traffickers); *see also Coronado v. Holder*, 759 F.3d 977, 982 (9th Cir. 2014); *Hernandez-Aguilar v. Holder*, 594 F.3d 1069, 1073 (9th Cir. 2010) (holding "that a conviction under § 11379(a), irrespective of whether the underlying offense was solicitation, qualifies for removal under § 1182(a)(2)(A)(i)(II), so long as the substance involved in the conviction is determined to have been a controlled substance under the modified categorical approach.").

A noncitizen inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(II) may be granted a waiver of inadmissibility if his conviction was for simple possession of 30 grams or less of marijuana and he can establish that denial of his admission would result in extreme hardship to his United States citizen or lawful permanent resident spouse, parent, son or daughter. *See* 8 U.S.C. § 1182(h).

V. CATEGORIES OF CRIMINAL OFFENSES THAT ARE GROUNDS OF REMOVABILITY ONLY

A. Aggravated Felony

"Under the INA, any noncitizen who is convicted of an aggravated felony suffers several consequences, such as becoming deportable, inadmissible, and ineligible for cancellation of removal." *Cortes-Maldonado v. Barr*, 978 F.3d 643, 647 (9th Cir. 2020) (citing 8 U.S.C. § 1227(a)(2)(A)(iii), § 1182(a)(9)(A)(i)–(ii), and § 1229b(a)(3)).

Several dozen offenses are categorized as aggravated felonies under 8 U.S.C. § 1101(a)(43). Each crime enumerated in 8 U.S.C. § 1101(a)(43)is an aggravated felony irrespective of whether it violates federal, state, or foreign law. *Torres v. Lynch*, 136 S. Ct. 1619, 1626–27 (2016). *See also Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 (2018) ("The INA defines 'aggravated felony' by listing numerous offenses and types of offenses, often with cross-references to federal criminal statutes.").

An applicant is removable if convicted of an aggravated felony at any time after admission. *See Torres*, 136 S. Ct. at 1622 (noncitizen convicted of an aggravated felony after entering the United States is deportable, ineligible for certain discretionary relief, and subject to expedited removal); *see also Mero v. Barr*, 957 F.3d 1021, 1022 (9th Cir. 2020) ("The Immigration and Nationality Act authorizes the removal of any non-citizen who, after admission to the United States, is convicted of an aggravated felony[.]"); *Lopez v. Sessions*, 901 F.3d 1071, 1074 (9th Cir. 2018) ("Any alien who is 'convicted of an aggravated felony at any time after admission is deportable.'" (quoting 8 U.S.C. § 1227(a)(2)(A)(iii)); *Sales v. Sessions*, 868 F.3d 779, 784 (9th Cir. 2017) ("Sales' 1995 conviction of second degree murder as an aider and abettor was an aggravated felony for purposes of the removal proceedings."); *Habibi v. Holder*, 673 F.3d 1082, 1085 (9th Cir. 2011) ("Under 8 U.S.C. § 1229b(a)(3), an LPR convicted of an 'aggravated felony' is ineligible for cancellation of removal. 'Aggravated felony' is defined by 8 U.S.C. § 1101(a)(43)(F) as including a 'crime of violence ... for which the term of imprisonment [is] at least one year.'"); *Daas v. Holder*, 620 F.3d 1050, 1053 (9th Cir. 2010) ("'Any alien who is convicted of an aggravated felony at any time after admission is deportable.'" (quoting 8 U.S.C. § 1227(a)(2)(A)); *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011) ("An immigrant convicted of an aggravated felony after being admitted to this country is removable."); *Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1134 (9th Cir. 2001). Aggravated felons are also disqualified from many forms of relief including asylum, voluntary departure, and cancellation of removal (although some noncitizens may remain eligible for § 212(c) relief). *See Torres*, 136 S. Ct. at 1622. Additionally, "[a] person who has been convicted of an aggravated felony, as defined by 8 U.S.C. § 1101(a)(43), is permanently ineligible for naturalization." *Elmakhzoumi v. Sessions*, 883 F.3d 1170, 1172 (9th Cir. 2018). Although a noncitizen previously removed for having been convicted of an aggravated felony is permanently inadmissible under 8 U.S.C. § 1182(a)(9)(A)(i), absent consent of the Attorney General, there is no independent ground of inadmissibility for having been convicted of an aggravated felony.

The aggravated felony provisions in the INA were first introduced by the Anti-Drug Abuse Act of 1988 and included murder, drug trafficking, arms trafficking, and any attempt or conspiracy to commit such acts. *See Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 915–16 (9th Cir. 2004). Subsequent legislation expanded the definition incrementally, until § 321 of IIRIRA added new offenses to the definition and dramatically broadened the definition's reach by expanding the terms of many offenses. *See, e.g*., *INS v. St. Cyr*, 533 U.S. 289, 296 n.4 (2001); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1044–45 & n.3 (9th Cir. 2004). 8 U.S.C. § 1227(a)(2)(A)(iii) does not apply to convictions that occurred prior to enactment of the Anti-Drug Abuse Act of 1988. *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011); *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1080 (9th Cir. 2010).

The expanded definition of aggravated felony applies to all "actions taken" by the Attorney General on or after September 30, 1996, regardless of the date of conviction. *See* IIRIRA § 321(b) and (c); *Aragon-Ayon v. INS*, 206 F.3d 847, 852 (9th Cir. 2000) (citing *Valderrama-Fonseca v. INS*, 116 F.3d 853 (9th Cir. 1997)). The Ninth Circuit court has upheld the retroactive application of IIRIRA's expanded definition of aggravated felony. *See Aragon-Ayon*, 206 F.3d at 853; *see also Becker v. Gonzales*, 473 F.3d 1000, 1002 (9th Cir. 2007); *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 852 (9th Cir. 2006); *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1054 (9th Cir. 2005).

"When the Government alleges that a state conviction qualifies as an 'aggravated felony' under the INA, we generally employ a "categorical approach" to determine whether the state offense is comparable to an offense listed in the INA." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). The reason is that the INA asks what offense the noncitizen was "convicted" of, 8 U.S.C. § 1227(a)(2)(A)(iii), not what acts he committed. "[C]onviction" is the relevant statutory hook." *Id*. at 191. A state offense will count as a § 1101(a)(43) aggravated felony even if it lacks an interstate commerce element, but corresponds to a federal offense in all other ways. *Torres*, 136 S. Ct. at 1622 ("[T]he absence of such a jurisdictional element is immaterial: A state crime of that kind is an aggravated felony.").

Note the Ninth Circuit found in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), that the INA definition of "aggravated felony" was unconstitutionally vague. The court explained that

> section 16(b) (as incorporated in 8 U.S.C. § 1101(a)(43)(F)) requires courts to 1) measure the risk by an indeterminate standard of a "judicially imagined 'ordinary case,' " not by real world-facts or statutory elements and 2) determine by vague and uncertain standards when a risk is sufficiently substantial. Together, under *Johnson [v. United States*, 135 S. Ct. 2551 (2015)], these uncertainties render the INA provision unconstitutionally vague.

Dimaya v. Lynch, 803 F.3d 1110, 1120 (9th Cir. 2015), *affirmed by*, 138 S. Ct. 1204 (2018). *See also Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1131 (9th Cir. 2016). Affirming the Ninth Circuit decision that § 16(b) as incorporated into the INA is unconstitutional, the Supreme Court held "§ 16(b) 'produces more unpredictability and arbitrariness than the Due Process Clause tolerates.'" *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2558 (2015)).

Cross-reference: Cancellation of Removal, Suspension of Deportation, and Former 212(c) Relief, Section 212(c) Relief, Application of Retroactivity Analysis.

1. Murder, Rape or Sexual Abuse of a Minor – 8 U.S.C. § 1101(a)(43)(A)

a. Rape

"In ordinary usage, rape is understood to include the act of engaging in non-consensual sexual intercourse with a person whose ability to resist has been substantially impaired by drugs or other intoxicants." *Castro-Baez v. Reno*, 217 F.3d 1057, 1059 (9th Cir. 2000); *see also United States v. Yanez-Saucedo*, 295 F.3d 991, 996 (9th Cir. 2002) (third-degree rape under Washington law meets the definition of rape even though it does not necessarily include an element of physical force).

In *Elmakhzoumi v. Sessions*, 883 F.3d 1170, 1173 (9th Cir. 2018), the court concluded that petitioner's conviction under Cal. Penal Code § 286(i) qualified as a rape offense under the INA. 883 F.3d at 1173 (California sodomy conviction where victim cannot consent in violation of Cal. Penal Code § 286(i) is an aggravated felony).

b. Sexual Abuse of a Minor

The court has "developed two definitions specifying the elements of the federal generic offense of sexual abuse of a minor." *Quintero-Cisneros v. Sessions*, 891 F.3d 1197, 1200 (9th Cir. 2018). *See also Mero v. Barr*, 957 F.3d 1021, 1023 (9th Cir. 2020) (citing *Quintero-Cisneros*, 891 F.3d at 1200). The first applies mainly to statutory rape offenses. *Id.* (citing *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1150, 1152 (9th Cir. 2008) (en banc) and *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017)). The second definition applies to all other offenses and "requires proof of three elements: (1) sexual conduct, (2) with a minor, (3) that constitutes abuse." *Quintero-Cisneros*, 891 F.3d at 1200. *See also Mero*, 957 F.3d at 1023; *Sanchez-Avalos v. Holder*, 693 F.3d 1011, 1016 (9th Cir. 2012) ("A state crime may qualify as the federal generic offense of 'sexual abuse of a minor' if: (1) the conduct prohibited by the criminal statute is sexual, (2) *the statute protects a minor*, and (3) the statute requires abuse."), *abrogated in part by Descamps v. United States*, 570 U.S. 254 (2013). "Participation in some form of sexual conduct with a minor is a requirement of every state offense [the court has] held to qualify as 'sexual abuse of a minor.'" *Mero*, 957 F.3d at 1023. In *Mero v. Barr*, the court held that a conviction under Nevada Revised Statute § 200.730 for possession of visual presentation depicting sexual conduct of a minor, did not qualify as "sexual abuse of a minor" because it did not require the offender himself to have participated in any form of sexual conduct with the minor depicted in the image. 957 F.3d at 1023–24.

A criminal statute includes the element of "abuse" if it expressly prohibits conduct that causes "physical or psychological harm in light of the age of the victim in question." *Sanchez-Avalos*, 693 F.3d at 1016 (citation omitted) (conviction of noncitizen on charge of sexual battery under California law did not qualify as sexual abuse of minor and thus did not qualify as aggravated felony that prevented noncitizen from being eligible for waiver of inadmissibility); *Rivera-Cuartas v. Holder*, 605 F.3d 699, 702 (9th Cir. 2010) (Arizona Revised Statute § 13-1405, which criminalizes sexual conduct with a minor under the age of 18, did not constitute an aggravated felony); *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1012–16 (9th Cir. 2009) (holding that California offense of unlawful sexual intercourse with a minor did not meet the definition of sexual abuse of a minor under removal statute and therefore was not categorically an aggravated felony under § 1101(a)(43)(A)); *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1160 (9th Cir. 2008) (en banc) (concluding that California convictions under §§ 261.5(c), 286(b)(1), 288a(b)(1), or 289(h) do not categorically constitute "sexual abuse of a

minor"), *abrogated on other grounds by United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc), *overruled on other grounds by Descamps v. United States*, 570 U.S. 254 (2013); *Rebilas v. Mukasey*, 527 F.3d 783, 786–87 (9th Cir. 2008) (Arizona conviction for attempted public sexual indecency to a minor is not a categorical aggravated felony because the statute does not require actual touching, the minor does not need to be aware of the perpetrator's conduct, and Arizona's definition of attempt is broader than the federal definition); *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 996–97 (9th Cir. 2008) (conduct under Cal Penal Code § 647.6(a), which prohibits annoying or molesting a child under age 18, does not constitute sexual abuse of a minor), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc); *Parrilla v. Gonzales*, 414 F.3d 1038, 1043–44 (9th Cir. 2005) (conviction for communicating with a minor for immoral purposes under Wash. Rev. Code § 9.68A.090 did not categorically qualify as sexual abuse of a minor, but under the modified categorical approach, the information and the Certification for Determination of Probable Cause incorporated by reference into the guilty plea demonstrated that applicant was convicted of sexual abuse of a minor); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066 (9th Cir. 2003) (Nevada conviction for lewdness with a child under 14 constitutes sexual abuse of a minor).

The Supreme Court has held "in the context of statutory rape offenses focused solely on the age of the participants, the generic federal definition of 'sexual abuse of a minor' under § 1101(a)(43)(A) requires the age of the victim to be less than 16." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572–73 (2017).

See also Flores v. Barr, 930 F.3d 1082, 1087 (9th Cir. 2019) (per curiam) (stating that the court has "repeatedly held that California Penal Code § 288(a) categorically involves 'sexual abuse of a minor' under 8 U.S.C. § 1101(a)(43)(A)."); *Quintero-Cisneros*, 891 F.3d at 1202 (holding that assault of a child in the third degree with sexual motivation under Washington law is a categorical match for the federal generic offense of sexual abuse of a minor, an aggravated felony that bars the relief from removal petitioner requested); *Diego v. Sessions*, 857 F.3d 1005, 1015 (9th Cir. 2017) ("We hold that paragraph 163.427(1)(a) of the Oregon Revised Statutes is divisible, and a conviction under subparagraph 163.427(1)(a)(A) is sexual abuse of a minor within the generic federal definition and therefore an aggravated felony for purposes of 8 U.S.C. § 1101(a)(43).") *United States v. Martinez*, 786 F.3d 1227, 1233 (9th Cir. 2015) ("A conviction premised on a violation of Wash. Rev. Code § 9A.44.089 (2001) does not categorically meet the generic definition of sexual abuse of a minor due to

the missing elements in the statutory provision."); *United States v. Gomez*, 757 F.3d 885, 900 (9th Cir. 2014) (prior state conviction for attempted sexual conduct with a minor categorically qualified as "sexual abuse of a minor"); *United States v. Baza-Martinez*, 464 F.3d 1010, 1012 (9th Cir. 2006) (North Carolina conviction for taking indecent liberties with a child is not categorically sexual abuse of a minor because statute prohibits conduct that is not necessarily physically or psychologically harmful); *United States v. Alvarez-Gutierrez*, 394 F.3d 1241, 1244 (9th Cir. 2005) (Nevada conviction for statutory sexual seduction constituted sexual abuse of a minor for sentencing purposes); *United States v. Pallares-Galan*, 359 F.3d 1088, 1100–03 (9th Cir. 2004) (misdemeanor California conviction for annoying or molesting child under age 18 does not categorically constitute sexual abuse of minor for immigration purposes); *United States v. Marin-Navarette*, 244 F.3d 1284, 1287 (9th Cir. 2001) (Washington conviction for third-degree attempted child molestation was an aggravated felony for sentencing purposes); *United States v. Mendoza-Iribe*, 198 F.3d 742, 744–45 (9th Cir. 1999) (per curiam) (California conviction for penetrating genital or anal openings of child under 14 with foreign object constituted sexual abuse of a minor for sentencing purposes); *United States v. Baron-Medina*, 187 F.3d 1144, 1146–47 (9th Cir. 1999) (California conviction for lewd conduct with a child under 14 constituted sexual abuse of a minor for sentencing enhancement purposes).

c. Murder

This court has held "that the federal generic definition of murder in the INA's aggravated felony provision means the unlawful killing of a 'human being,' a term which federal law defines to exclude an unborn fetus. *Gomez Fernandez v. Barr*, 969 F.3d 1077, 1091 (9th Cir. 2020). In *Gomez Fernandez*, the court concluded that Cal. Penal Code § 187(a) is broader than the federal generic definition of murder because it includes an unborn fetus. The court further determined the statute was divisible, and in applying the modified categorical approach, Gomez's § 187(a) conviction was an aggravated felony. *Id.* at 1090–91 (looking to the conviction documents in the record to determine if Gomez's particular conviction met the federal definition of murder).

"There is no dispute that a California conviction for second degree murder is an aggravated felony under federal law." *Sales v. Sessions*, 868 F.3d 779, 780 (9th Cir. 2017).

2. Illicit Trafficking in a Controlled Substance – 8 U.S.C. § 1101(a)(43)(B)

"Congress defined the term 'aggravated felony' to include, among other offenses, 'illicit trafficking in a controlled substance.' § 1101(a)(43)(B)." *Cortes-Maldonado v. Barr*, 978 F.3d 643, 647 (9th Cir. 2020). "The INA does not define the phrase 'illicit trafficking.'" *Id*. at 649. The BIA "has understood that the term essentially involves a 'business or merchant nature' or 'the trading or dealing of goods,' [and has also held that] 'illicit trafficking' means 'a commercial transaction, or passing of goods from one person to another for money or other consideration.'" *Id.* (stating that the BIA's interpretation matches closely with how federal courts have interpreted the term).

"[I]llicit trafficking in a controlled substance is a 'generic crime.'" *Moncrieffe v. Holder*, 569 U.S. 184, 192 (2013) (internal quotation marks and citation omitted). The aggravated felony provision is narrower than the controlled substances offense provision of 8 U.S.C. § 1227(a)(2)(B)(i) because the aggravated felony provision only covers drug trafficking offenses. A controlled substances offense is an aggravated felony if it (1) includes an element of illicit trafficking or (2) would be a felony drug trafficking crime under federal law. *See* 8 U.S.C. § 1101(a)(43)(B); *Lopez-Jacuinde v. Holder*, 600 F.3d 1215, 1217 (9th Cir. 2010); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004). "Any state crime that is a categorical match to an offense under the Controlled Substances Act ('CSA') constitutes an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(B); 18 U.S.C. § 924(c)(2)." *Lopez v. Sessions*, 901 F.3d 1071, 1074 (9th Cir. 2018).

If the noncitizen was actually convicted of a drug trafficking crime under federal law, then the analysis is straightforward. If, however, the noncitizen is convicted of a state crime, then the court must determine whether the crime would be punishable as a felony drug trafficking crime under federal law. First, the offense must be punishable as a felony under federal law; the state's designation of the crime as a felony is not sufficient to render it an aggravated felony. *See Lopez v. Gonzales*, 549 U.S. 47, 60 (2006) (state felony possession offense was not an aggravated felony because the federal Controlled Substances Act punishes simple possession as a misdemeanor). Alternatively, the substantive crime can be analogous to a federal drug trafficking felony. *See Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1128 (9th Cir. 2007) (California transportation of controlled substances offense was not a categorical aggravated felony because statute punishes solicitation which is not mentioned in the federal Controlled Substances Act),

overruled on other grounds by Young v. Holder, 697 F.3d 976 (9th Cir. 2012) (en banc), *abrogated in part by Moncrieffe v. Holder*, 569 U.S. 184 (2013); *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063, 1067–68 (9th Cir. 2006) (California conviction under Health & Safety Code § 11366 for opening or maintaining a place for the purpose of selling, giving away, or using a controlled substance was an aggravated felony because it was analogous to a federal offense); *Olivera-Garcia v. INS*, 328 F.3d 1083, 1086–87 (9th Cir. 2003) (conviction for being an accessory after the fact to the manufacture of methamphetamine was an aggravated felony because petitioner was convicted under substantive federal drug statute); *Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999) (conviction under generic solicitation statute rather than substantive drug statute was not aggravated felony because not analogous to federal drug offense).

If the state crime is not a categorical match to the generic federal offense, and the state statute is divisible, the court may apply the modified categorical approach to determine if the elements of the underlying offense of conviction are a match to the generic federal offense. *Dominguez v. Barr*, 975 F.3d 725, 734–35 (9th Cir. 2020) (as amended). In *Dominguez v. Barr*, the court held that the Oregon statute prohibiting manufacture of a controlled substance, Or. Rev. Stat. § 475.992(1)(a), did not qualify as an aggravated felony under the categorical approach. However, the statute was divisible, and thus the modified categorical approach applied. Looking to the charging documents, the court held that the "Oregon conviction for manufacture of a controlled substance under § 475.992(1)(a) [was] a categorical match with the generic drug trafficking offense, meaning Dominguez was convicted of an aggravated felony." *Dominguez*, 975 F.3d at 740.

"'[I]llicit trafficking' does not include solicitation offenses." *Cortes-Maldonado v. Barr*, 978 F.3d 643, 653 (9th Cir. 2020) (holding that Oregon's former crime of marijuana delivery for consideration, Or. Rev. Stat. § 475.860(2)(a), does not qualify as an aggravated felony under § 1101(a)(43)(B)).

See also Lopez v. Sessions, 901 F.3d 1071, 1075 (9th Cir. 2018) ("Because Lopez's [conviction for possession for sale of cocaine salt in] violation of Cal. Health & Safety Code § 11351 encompasses all of the elements of a felony punishable under the CSA, it qualifies as an aggravated felony."); *Sandoval v. Sessions*, 866 F.3d 986, 989 (9th Cir. 2017) (holding that conviction for delivery of heroin under O.R.S. § 475.992(1)(a) does not qualify as an aggravated felony under the categorical approach); *Roman-Suaste v. Holder*, 766 F.3d 1035, 1038–40

(9th Cir. 2014) (California offense of possession of marijuana for sale constituted an aggravated felony); *Daas v. Holder*, 620 F.3d 1050, 1053–54 (9th Cir. 2010) (conviction for distributing ephedrine and pseudoephedrine with reasonable cause to believe they would be used to manufacture methamphetamine qualified as a "drug trafficking crime" and thus was an aggravated felony); *Rendon v. Mukasey*, 520 F.3d 967, 976 (9th Cir. 2008) (holding that possession of a controlled substance with the intent to sell contains a trafficking element and is an aggravated felony).

Although "recidivist simple possession" can be a felony under the Controlled Substances Act, the Supreme Court held in *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 566 (2010), that "second or subsequent simple possession offenses are not aggravated felonies under § 1101(a)(43), when, … , the state conviction is not based on the fact of a prior conviction."

3. Illicit Trafficking in Firearms – 8 U.S.C. § 1101(a)(43)(C)

An aggravated felony includes "illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title)." 8 U.S.C. § 1101(a)(43)(C).

A federal conviction for importing, manufacturing, or dealing in firearms without a license, in violation of 18 U.S.C. § 922(a)(1)(A) qualifies as an "aggravated felony" under the INA because it categorically fits within the generic definition of "illicit trafficking in firearms," 8 U.S.C. § 1101(a)(43)(C). *Chacon v. Wilkinson*, No. 18-71515, 2021 WL 628280, at *5 (9th Cir. Feb. 18, 2021).

4. Money Laundering – 8 U.S.C. § 1101(a)(43)(D)

An aggravated felony includes "an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000." 8 U.S.C. § 1101(a)(43)(D). In order for a conviction for money laundering to constitute an aggravated felony under this section, the amount of funds laundered must be over $10,000. *See Fuentes v. Lynch*, 788 F.3d 1177, 1180 (9th Cir. 2015) (per curiam); *Chowdhury v. INS*, 249 F.3d 970, 973–75 (9th Cir. 2001) (conviction for money laundering was not an aggravated felony because amount of funds laundered was less than $10,000).

5. Explosives, Firearms and Arson – 8 U.S.C. § 1101(a)(43)(E)

An aggravated felony includes:

an offense described in –

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

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

(iii) section 5861 of Title 26 (relating to firearms offenses).

8 U.S.C. § 1101(a)(43)(E); *see also Torres v. Lynch*, 136 S. Ct. 1619 (2016) (conviction for arson under New York law qualified as an aggravated felony under the INA); *United States v. Mendoza-Reyes*, 331 F.3d 1119, 1122 (9th Cir. 2003) (Washington conviction for first-degree unlawful possession of a firearm is an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii) for sentencing purposes); *United States v. Castillo-Rivera*, 244 F.3d 1020, 1024 (9th Cir. 2001) (California conviction for being a felon in possession of a firearm qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(E) for sentencing purposes); *United States v. Sandoval-Barajas*, 206 F.3d 853, 856–57 (9th Cir. 2000) (Washington conviction for possession of firearm by non-citizen was not an aggravated felony for sentencing purposes).

6. Crimes of Violence ("COV") – 8 U.S.C. § 1101(a)(43)(F)

[A]n aggravated felony includes "a crime of violence (as defined in section 16 of title 18 ...) for which the term of imprisonment [is] at least one year." [8 U.S.C.] § 1101(a)(43)(F). The specified statute, 18 U.S.C. § 16, provides the federal criminal code's definition of "crime of violence." Its two parts, often known as the elements clause and the residual clause, cover:

"(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

> "(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Sessions v. Dimaya, 138 S. Ct. 1204, 1211 (2018). *See also* 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16.

Section 16(b), as incorporated into the definition of "crime of violence" in the INA, is unconstitutionally vague and cannot be the basis for an aggravated felony. *See Sessions*, 138 S. Ct. at 1216, *affirming Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015); *Dent v. Sessions*, 900 F.3d 1075, 1085 (9th Cir. 2018). Note in *Dimaya v. Lynch*, the Ninth Circuit did "not reach the constitutionality of applications of 18 U.S.C. § 16(b) outside of 8 U.S.C. § 1101(a)(43)(F) or cast any doubt on the constitutionality of 18 U.S.C. § 16(a)'s definition of a crime of violence." *Dimaya v. Lynch*, 803 F.3d at 1120 n.17.

The "language [of the statute] requires [the court] to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Leocal v. Ashcroft*, 543 U.S. 1, 6–7 (2004) (concluding that Florida DUI offenses were not COVs under either § 16(a) or §16(b)); *see also Dent*, 900 F.3d at 1084 ("[W]e examine what the state conviction necessarily involved, not the facts underlying the case, and so must presume that the conviction rested upon nothing more than the least of the acts criminalized." (citation omitted)); *Camacho-Cruz v. Holder*, 621 F.3d 941, 942 (9th Cir. 2010) (stating that "[t]o determine whether a state law conviction is categorically a 'crime of violence,' we compare the elements of the state law crime to the elements of a 'crime of violence,' as defined in 18 U.S.C. § 16" and holding that conviction for assault with use of deadly weapon under Nevada law was a crime of violence under 18 U.S.C. § 16(a)). The court has "squarely held that the force necessary to constitute a crime of violence must actually be violent in nature." *Singh v. Ashcroft*, 386 F.3d 1228, 1233 (9th Cir. 2004) (internal quotation marks and alteration omitted) (Oregon conviction for harassment was not COV under § 16(a)).

"In 2010, the United States Supreme Court issued *Johnson v. United States*, [559 U.S. 133, 140 (2010)], which held that the physical force that a crime of violence entails must be '*violent* force—that is, force capable of causing physical pain or injury to another person.'" *Solorio-Ruiz v. Sessions*, 881 F.3d 733, 736

(9th Cir. 2018), *abrogation recognized by United States v. Baldon*, 956 F.3d 1115, 1121 (9th Cir. 2020). As explained by *Solorio-Ruiz*, "*Johnson* altered [the court's] understanding of *how violent* a crime must be to qualify as a crime of violence." *Solorio-Ruiz*, 881 F.3d 736. The court explained that to determine whether a crime constitutes a crime of violence, it considers "whether *every* violation of the statute *necessarily* involves violent force." *Id*. at 737 (emphasis in original) (citing *Moncrieffe v. Holder*, 569 U.S. 184, 190–91, (2013)). Applying *Johnson*, the court held that California carjacking is not a crime of violence under 8 U.S.C. § 1101(a)(43)(F). *Solorio-Ruiz*, 881 F.3d at 738. The court stated that prior cases holding otherwise were no longer good law because they did not consider whether the statute at issue required the use of *violent* force as required by *Johnson. Solorio-Ruiz*, 881 F.3d at 736–37.

However, in 2019 the Supreme Court revisited *Johnson* in *Stokeling v. United States*, 139 S. Ct. 544 (2019), *abrogating Solorio-Ruiz*, 881 F.3d 733. *See United States v. Baldon*, 956 F.3d 1115, 1121 (9th Cir. 2020). In *Baldon*, the court held that the Supreme Court's decision in *Stokeling* was clearly irreconcilable with *Solorio-Ruiz*.

> The [Supreme] Court explained that at common law the terms "violence" and "force" were used interchangeably, and that "[t]he common law also did not distinguish between gradations of 'violence.' If an act physically overcame a victim's resistance, 'however slight' that resistance might be, it necessarily constituted violence." *Stokeling*, 139 S. Ct. at 550. This understanding of "physical force" aligns with *Johnson* because "the force necessary to overcome a victim's physical resistance is inherently 'violent' in the sense contemplated by *Johnson*, and 'suggest[s] a degree of power that would not be satisfied by the merest touching.' " *Id.* at 552–53 (quoting *Johnson*, 559 U.S. at 139, 130 S. Ct. 1265).
>
> This clarification of "violent force" (any force sufficient to overcome a victim's physical resistance) is "clearly irreconcilable" with our reasoning in *Solorio-Ruiz*. Our opinion rested on the analytical distinction between substantial and minimal force. This distinction no longer exists. *See Ward v. United States*, 936 F.3d 914, 919 (9th Cir. 2019). As a result, *Solorio-Ruiz*'s holding is no longer good law.

Baldon, 956 F.3d at 1121.

a. Negligent and Reckless Conduct Insufficient

"The critical aspect of § 16(a) is that a crime of violence is one involving the use ... of physical force against the person or property of another." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (emphasis and internal quotation marks omitted). "[U]se requires active employment," and "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id. (*internal quotation marks omitted).

> In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.' The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes.

Id. at 11; *Lara-Cazares v. Gonzales*, 408 F.3d 1217, 1221 (9th Cir. 2005) (explaining that gross negligence "does not constitute the kind of *active* employment of force against another that *Leocal* requires for a crime of violence"). *See also Bolanos v. Holder*, 734 F.3d 875, 878 (9th Cir. 2013) (holding that conviction for brandishing firearm in presence of occupant of motor vehicle under Cal. Penal Code § 417.3 qualified categorically as a crime of violence under 18 U.S.C. § 16(a) and rendered petitioner ineligible for cancellation of removal).

Likewise, "the reckless use of force is 'accidental' and crimes of recklessness cannot be crimes of violence" under 18 U.S.C. § 16(a) or 16(b). *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc) (holding that the offense underlying petitioner's misdemeanor domestic violence conviction was not a categorical crime of violence under 18 U.S.C. § 16(a)). The court has stated: "Neither gross negligence in failing to perceive, nor conscious disregard of a substantial and unjustifiable risk of injury implies that physical force is instrumental to carrying out the crime, such as the plain meaning of the word 'use' denotes." *Id.* (internal quotation marks and citations omitted); *see also Malta-Espinoza v. Gonzales*, 478 F.3d 1080, 1084 (9th Cir. 2007) (focusing on § 16(b) and concluding that Cal. Penal Code § 646.9 is not a COV because it penalizes reckless conduct).

State driving under the influence offenses that either do not have a *mens rea* component, or require only a showing of negligence in the operation of a vehicle, do not qualify as crimes of violence. *See Leocal*, 543 U.S. at 8–10 (2004) (Florida

conviction for felony DUI causing injury); *see also Lara-Cazares*, 408 F.3d at 1221–22 (California conviction for gross vehicular manslaughter while intoxicated) (overruling *Park v. INS*, 252 F.3d 1018, 1023–25 (9th Cir. 2001), and its progeny to the extent inconsistent with *Leocal*); *Montiel-Barraza v. INS*, 275 F.3d 1178, 1180 (9th Cir. 2002) (per curiam) (California felony conviction of DUI with multiple prior convictions).

b. Force Against Another

18 U.S.C. § 16 defines a crime of violence as one involving the use of force against another person or another's property, and thus a crime that could involve the use of force against oneself or one's own property does not meet the definition. "Section 16(a) does not require an actual application of force or an injury to the victim. Rather, the threatened use of force is sufficient for a crime to constitute a crime of violence." *Camacho-Cruz v. Holder*, 621 F.3d 941, 943 (9th Cir. 2010) (explaining that whether the defendant actually intends to harm the victim or whether any harm results is irrelevant). *See also United States v. Flores-Cordero*, 723 F.3d 1085, 1086 (9th Cir. 2013) (stating that in "all of the federal contexts, the definitions require application of "physical force" for a prior crime to be considered violent" and concluding that resisting arrest under Arizona law not categorically a crime of violence).

"Section 16(b) does not require actual violence, but rather only a substantial risk of violence." *United States v. Sandoval Orellana*, 714 F.3d 1174, 1179 (9th Cir. 2013) (conviction for sexual penetration by foreign object categorically a COV); *see also Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1127–33 (9th Cir. 2012) (per curiam) (ordinary kidnapping under Cal. Penal Code § 207(a) is a crime of violence because it results in a substantial risk of force, thereby categorically triggering § 16(b)). However, the Supreme Court recently determined that § 16(b), as incorporated into the INA's definition of "aggravated felony" is impermissibly vague in violation of the Due Process Clause of the Fifth Amendment. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

c. Specific Crimes Considered

Examples of cases finding an offense to be a COV include: *Flores-Vega v. Barr*, 932 F.3d 878, 884 (9th Cir. 2019) (determining that strangulation, as defined at O.R.S. § 163.187(1), is "an offense that has as an element the use ... of physical force" and is a crime of violence within the meaning of § 16(a)); *United States v. Vasquez-Gonzalez*, 901 F.3d 1060, 1068 (9th Cir. 2018) (holding that from its

enactment in 1993 to its amendment in 2011, Cal. Penal Code § 245(a)(1) was categorically a crime of violence as defined in 18 U.S.C. § 16(a)); *United States v. Guizar-Rodriguez*, 900 F.3d 1044, 1046 (9th Cir. 2018) (holding battery committed with the use of a deadly weapon under Nevada Revised Statute § 200.481(2)(e)(1) is a crime of violence as defined in 18 U.S.C. § 16(a)); *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1130–32 (9th Cir. 2016) (a conviction under Cal. Penal Code §§ 422 and 644 is categorically a crime of violence as defined under 18 U.S.C. § 16(a)); *United States v. Jimenez-Arzate*, 781 F.3d 1062, 1064–65 (9th Cir. 2015) (per curiam) (as amended) (conviction for assault with a deadly weapon, Cal. Penal Code § 245(a)(1) was categorically a crime of violence, relying on *United States v. Grajeda*, 581 F.3d 1186, 1190 (9th Cir. 2009), which considered crime of violence definition in § 16(a)); *United States v. Colon-Arreola*, 753 F.3d 841 (9th Cir. 2014) (violation of Cal. Penal Code § 243(c)(2), categorical crime of violence under USSG § 2L1.2, for purposes of sentencing enhancement); *United States v. Cabrera-Perez*, 751 F.3d 1000 (9th Cir. 2014) (under modified categorical approach Arizona conviction under Arizona Revised Statutes § 13-1203(A)(2) and § 13-1204(A)(2) for aggravated assault constituted crime of violence under the modified categorical approach for purposes of § 16(a)); *United States v. Gomez*, 757 F.3d 885 (9th Cir. 2014) (conviction for sexual conduct with a minor under Arizona Revised Statutes § 13-1405 did not constitute a crime of violence under USSG § 2L1.2(b)(1)(A)(ii), for purposes of sentencing enhancement);*Camacho-Cruz v. Holder*, 621 F.3d 941, 942–43 (9th Cir. 2010) (holding that conviction for assault with use of a deadly weapon under Nev. Rev. Stat. § 200.471 was a crime of violence under § 16(a)); *Reyes-Alcaraz v. Ashcroft*, 363 F.3d 937, 941 (9th Cir. 2004) (conviction for exhibiting deadly weapon with intent to evade arrest under California Penal Code § 417.8 is a COV, citing § 16(a)); *Rosales-Rosales v. Ashcroft*, 347 F.3d 714, 717 (9th Cir. 2003) (conviction for making terrorist threats under California Penal Code § 422 is a COV under § 16(a)); *Matsuk v. INS*, 247 F.3d 999, 1001 n.10 (9th Cir. 2001) (petitioner's convictions for assaulting his wife and children were COV's under 18 U.S.C. § 16(a)), *overruled on other grounds by Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011) (en banc).

Examples of cases finding that an offense is *not* a COV include: *United States v. Martinez-Hernandez*, 932 F.3d 1198 (9th Cir. 2019) (as amended) (holding that although California robbery conviction under Cal. Penal Code § 211 does not qualify categorically as a crime of violence, it met the definition of "theft offense" and thus qualified as a removable aggravated felony); *Dent v. Sessions*, 900 F.3d 1075, 1085 (9th Cir. 2018) (holding third-degree escape under Arizona

Revised Statutes § 13-2502 is not a crime of violence, nor an aggravated felony; it does not necessarily involve the physical force required by § 16(a), and after *Dimaya*, § 16(b) cannot be the basis for an aggravated felony because it is unconstitutional); *United States v. Garcia-Lopez*, 903 F.3d 887, 893 (9th Cir. 2018) (holding that the court's recent decisions and the Supreme Court's decision in *Dimaya* firmly establish that California robbery (Cal. Penal Code § 211) is not a "crime of violence" under § 16(a) or § 16(b) for removal purposes); *Solorio-Ruiz v. Sessions*, 881 F.3d 733, 735 (9th Cir. 2018) (holding that a California conviction for carjacking under section 215(a) does not qualify as a crime of violence, but not reaching the question whether it qualifies as a theft offense); *Ramirez v. Lynch*, 810 F.3d 1127, 1134 (9th Cir. 2016) (conviction under Cal. Penal Code § 273a(a) for felony child abuse is not categorically a crime of violence); *Quijada-Aguilar v. Lynch*, 799 F.3d 1303, 1306 (9th Cir. 2015) (Cal. Penal Code § 192(a) is not categorically a crime of violence because it encompasses a broader range of criminal intent than the federal definition of a crime of violence in 18 U.S.C. § 16); *Flores-Lopez v. Holder*, 685 F.3d 857, 862–65 (9th Cir. 2012) (Cal. Penal Code § 69 not a categorical COV under § 16(a) or § 16(b)); *Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1055 (9th Cir. 2011) (California conviction for shooting at an inhabited dwelling or vehicle was not categorically a COV under § 16(b)); *Cortez-Guillen v. Holder*, 623 F.3d 933, 935–36 (9th Cir. 2010) (Alaska conviction for coercion not categorically a COV because it criminalized conduct outside the contours of the federal definition of a crime of violence); *Suazo Perez v. Mukasey*, 512 F.3d 1222, 1227 (9th Cir. 2008) (comparing elements of statute to definition in § 16(a) and concluding "Washington fourth degree assault statute is categorically overbroad, and the modified categorical approach does not establish Suazo was convicted of a 'crime of violence'"); *Singh v. Ashcroft*, 386 F.3d 1228, 1233 (9th Cir. 2004) (Oregon harassment offense did not require sufficient force to constitute a COV under § 16(a)).

Section 16(b) is unconstitutionally vague as incorporated into the INA's definition of "crime of violence" and cannot be the basis for an aggravated felony. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018); *Dent v. Sessions*, 900 F.3d 1075, 1085 (9th Cir. 2018). Examples of cases that found an offense was a COV under § 16(b) **prior** to *Dimaya* finding that section unconstitutional include: *Rodriguez-Castellon v. Holder*, 733 F.3d 847 (9th Cir. 2013) (holding that a conviction under Cal. Penal Code § 288(c)(1) was a crime of violence under § 16(b) and thus an aggravated felony);*Barragan-Lopez v. Holder*, 705 F.3d 1112, 1115–17 (9th Cir. 2013) (conviction for false imprisonment under Cal. Penal Code § 210.5 was categorically a crime of violence under § 16(b), making the petitioner

removable as an aggravated felon); *Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1133 (9th Cir. 2012) (per curiam) (ordinary kidnapping under Cal. Penal Code § 207(a) constitutes a "crime of violence" under § 16(b)); *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1111–12 (9th Cir. 2011) (holding that conviction for residential burglary under Cal. Penal Code § 459 constitutes a COV under § 16(b) because it is a felony that involves a substantial risk that physical force against the person or property of another may be used in committing the offense); *Prakash v. Holder*, 579 F.3d 1033, 1034 (9th Cir. 2009) (holding that convictions for solicitation to commit rape by force, in violation of Cal. Penal Code § 653f(c), and solicitation to commit assault by means of force likely to produce great bodily injury, in violation of Cal. Penal Code § 653f(a), constitute crimes of violence under § 16(b)); *Estrada-Rodriguez v. Mukasey*, 512 F.3d 517, 520–21 (9th Cir. 2007) (conviction for resisting arrest under Arizona Revised Statutes § 13-2508 is a COV under § 16(b)); *Lisbey v. Gonzales*, 420 F.3d 930, 932–34 (9th Cir. 2005) (conviction for sexual battery under Cal. Penal Code § 243.4(a) is a COV for purposes of § 16(b)); *Ruiz-Morales v. Ashcroft*, 361 F.3d 1219, 1222 (9th Cir. 2004) (conviction for mayhem under California Penal Code § 203 is a COV under § 16(b)).

Cross-reference: Domestic Violence Crimes.

7. Theft or Burglary – 8 U.S.C. § 1101(a)(43)(G)

The definition of aggravated felony includes "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G); *see also Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1149 (9th Cir. 2020) (holding that Or. Rev. Stat. § 164.395 is facially overbroad and indivisible, and thus does not qualify as a categorical theft offense under § 1101(a)(43)(G)); *United States v. Martinez-Hernandez*, 932 F.3d 1198 (9th Cir. 2019) (as amended) (holding that a robbery conviction in violation of Cal. Penal Code § 211 qualifies as a generic theft offense under 8 U.S.C. § 1101(a)(43)(G), and is an aggravated felony); *United States v. Flores*, 901 F.3d 1150, 1161 (9th Cir. 2018) (conviction for receipt of stolen property, along with a sentence of more than one year of imprisonment, is categorically an aggravated felony); *United States v. Alvarado-Pineda*, 774 F.3d 1198, 1202 (9th Cir. 2014) (Washington conviction for second-degree robbery was an aggravated felony); *Duenas-Alvarez v. Holder*, 733 F.3d 812, 814–15 (9th Cir. 2013) (petitioner was convicted of a felony theft offense and subject to removal where he pled guilty to taking vehicle without owner's consent); *Alvarez-Reynaga v. Holder*, 596 F.3d

534, 536 (9th Cir. 2010) (conviction under Cal. Penal Code § 496d(a) constitutes a conviction for an aggravated felony); *Verdugo-Gonzales v. Holder*, 581 F.3d 1059, 1060 (9th Cir. 2009) (conviction for receipt of stolen property under Cal. Penal Code § 496(a) categorically qualified as an aggravated felony conviction); *Carrillo-Jaime v. Holder*, 572 F.3d 747, 750–54 (9th Cir. 2009) (conviction for owning and operating a chop shop under Cal. Veh. Code § 10801 did not constitute an aggravated felony of theft), *overruled in part as stated in Lopez-Valencia v. Lynch*, 798 F.3d 863, 872 n.6 (9th Cir. 2015); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002); *Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000).

The Supreme Court in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) recognized that several circuits and the BIA have adopted a generic definition of a theft offense as: "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." *Id*. at 184 (internal quotation marks and citation omitted); *see also Arteaga v. Mukasey*, 511 F.3d 940, 947 (9th Cir. 2007) ("Arteaga cites to no authority to support his assertion that a theft offense requires an intent to permanently deprive another of property."). However, the Supreme Court rejected the Ninth Circuit's ruling in *Penuliar v. Gonzales*, 435 F.3d 961 (9th Cir. 2006), that Cal. Vehicle Code § 10851 is broader than the generic theft definition because it includes aiding and abetting liability. *See Duenas-Alvarez*, 549 U.S. at 184. While not directly overruling them, the Supreme Court's decision calls into question the rule of *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), *superseded on other grounds by* U.S.S.G. § 2L1.2 cmt. n.4, and *Martinez-Perez v. Gonzales*, 417 F.3d 1022 (9th Cir. 2005), *abrogated on other grounds by United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (en banc), in which the Ninth Circuit had found other California theft offenses to be broader than the generic definition of theft due to the inclusion of aiding and abetting liability. In *United States v. Vidal*, 504 F.3d 1072, 1090 (9th Cir. 2007) (en banc), *abrogated on other grounds as recognized by United States v. Bautista*, 982 F.3d 563, 568 (9th Cir. 2020), this court held that a conviction under California Vehicle Code § 10851(a) is not categorically an aggravated felony because it includes accessory after the fact liability. *See also Penuliar v. Mukasey*, 528 F.3d 603, 611–12 (9th Cir. 2008) (unlawful driving or taking of a vehicle under Cal. Vehicle Code § 10851(a) does not categorically qualify as a theft offense because it extends liability to accessories after the fact), *abrogated on other grounds as recognized by United States v. Martinez*, 771 F.3d 672 (9th Cir. 2014), *cert. granted, judgment vacated*. 576 U.S. 1080 (2015).

In order to qualify as an aggravated felony theft offense, the term of imprisonment actually imposed by the trial judge must be at least one year. *See Alberto-Gonzalez v. INS*, 215 F.3d 906, 910 (9th Cir. 2000) (rejecting government's contention that "term of imprisonment" refers to the potential sentence that the judge could have imposed).

See also Lopez-Aguilar v. Barr, 948 F.3d 1143, 1149 (9th Cir. 2020) (holding that Oregon Revised Statutes § 164.395 is facially overbroad and indivisible, and thus does not qualify as a categorical theft offence under § 1101(a)(43)(G)); *Lopez-Valencia v. Lynch*, 798 F.3d 863, 866–67 (9th Cir. 2015) (a conviction under California's theft statute is not an aggravated felony because it is not a "theft offense" as defined by 8 U.S.C. § 1101(a)(43)(G); "conviction for 'theft' in California is categorically not a 'generic theft offense' because it is both 'overbroad' and 'indivisible,' and thus not susceptible to the 'modified categorical approach'"); *Duenas-Alvarez v. Holder*, 733 F.3d 812, 814–15 (9th Cir. 2013) (petitioner was convicted of a felony theft offense and subject to removal where he pled guilty to taking vehicle without owner's consent); *Ramirez-Villalpando v. Holder*, 645 F.3d 1035, 1041 n.1 (9th Cir. 2011) (California conviction for grand theft under Cal. Penal Code § 487(a) did not categorically qualify as an aggravated felony; however, under the modified categorical approach, the conviction was one of personal property that qualified it as an aggravated felony); *Mandujano-Real v. Mukasey*, 526 F.3d 585, 589–91 (9th Cir. 2008) (Oregon identity theft conviction was not categorically an aggravated felony theft offense); *Nevarez-Martinez v. INS*, 326 F.3d 1053, 1055 (9th Cir. 2003) (Arizona conviction for theft of a means of transportation is not categorically an aggravated felony); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003) (Arizona conviction for possession of a stolen vehicle is not categorically an aggravated felony); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002) (federal conviction for possession of stolen mail qualifies as an aggravated felony); *United States v. Perez-Corona*, 295 F.3d 996, 1001 (9th Cir. 2002) (Arizona conviction for unlawful use of means of transportation is not a theft offense for sentencing purposes).

8. Ransom Offenses – 8 U.S.C. § 1101(a)(43)(H)

The definition of aggravated felony includes "an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom)." 8 U.S.C. § 1101(a)(43)(H).

9. Child Pornography Offenses – 8 U.S.C. § 1101(a)(43)(I)

The definition of aggravated felony includes "an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography)." 8 U.S.C. § 1101(a)(43)(I).

In *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1012–14 (9th Cir. 2015), the court held that a conviction under California Penal Code § 311.11(a), for possessing child pornography, did not qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43)(I). The court held that the state statute was broader than the generic federal definition, and thus did not categorically qualify as an "aggravated felony" conviction. *Chavez-Solis*, 803 F.3d at 1012. The court also held that the modified categorical approach did not apply because the statute was not divisible. *Id.* at 1013. *See also United States v. Reinhart*, 893 F.3d 606, 617 n.8 (9th Cir. 2018) (applying the analysis in *Chavez-Solis*, in a sentencing case).

In *Aguilar-Turcios v. Holder*, 740 F.3d 1294 (9th Cir. 2014), applying *Descamps v. United States*, 570 U.S. 254 (2013), the court held that petitioner's Article 92 conviction for violating a Department of Defense directive prohibiting the use of government computers except for official use and authorized purposes, did not qualify as an aggravated felony, even though a violation of the directive could have involved pornography. *See Aguilar-Turcios*, 740 F.3d 1300–01.

10. RICO Offenses – 8 U.S.C. § 1101(a)(43)(J)

The definition of aggravated felony includes:

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

8 U.S.C. § 1101(a)(43)(J). In *Murillo-Prado v. Holder*, 735 F.3d 1152, 1156 (9th Cir. 2013) (per curiam), applying the modified categorical approach, the court held that the indictment, plea agreement, and sentencing order provided clear and convincing evidence that petitioner was convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43)(J).

11. Prostitution and Slavery Offenses – 8 U.S.C. § 1101(a)(43)(K)

The definition of aggravated felony includes:

an offense that –

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

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

(iii) is described in any of sections 1581–1585 or 1588–1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons).

8 U.S.C. § 1101(a)(43)(K).

12. National Defense Offenses – 8 U.S.C. § 1101(a)(43)(L)

The definition of aggravated felony includes:

an offense described in–

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

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents).

8 U.S.C. § 1101(a)(43)(L).

13. Fraud or Deceit Offenses – 8 U.S.C. § 1101(a)(43)(M)

The definition of aggravated felony includes:

an offense that–

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

8 U.S.C. § 1101(a)(43)(M).

In order to establish that a noncitizen has been convicted of a fraud offense, the offense must involve fraud and the loss must be more than $10,000. The court has applied the categorical and modified categorical approach to find these elements. *See Carlos-Blaza v. Holder*, 611 F.3d 583, 590 (9th Cir. 2010) (applying the modified categorical approach and concluding that conviction for misapplication of funds was one that involved "fraud or deceit" and was therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i)); *Kharana v. Gonzales*, 487 F.3d 1280, 1283–85 (9th Cir. 2007) (amount of loss determined under the modified categorical approach); *Ferreira v. Ashcroft*, 390 F.3d 1091, 1098–1100 (9th Cir. 2004) (same), *abrogated on other grounds by Nijhawan v. Holder*, 557 U.S. 29 (2009).

The Supreme Court held in *Nijhawan v. Holder*, 557 U.S. 29 (2009), that the monetary threshold in 8 U.S.C. § 1101(a)(43)(M)(i) "applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion," rather than to an element of the fraud or deceit crime. *Nijhawan*, 557 U.S. at 40 (concluding that where defendant's own stipulation, produced for sentencing purposes, involved losses considerably greater than $10,000, and the court's restitution order showed the same, clear and convincing evidence supported conclusion that conviction fell within the scope of 8 U.S.C. § 1101(a)(43)(M)(i)); *Wang*, 830 F.3d at 961 ("We use a "circumstance-specific" approach to assess whether the loss to the victim exceeded $10,000."). In determining the amount of loss, the court is not limited to the record of conviction used for the modified categorical approach. *See Nijhawan*, 557 U.S. at 40–42.

"The scope of [8 U.S.C. § 1101(a)(43)(M)(i)] is not limited to offenses that include fraud or deceit as formal elements. Rather, Clause (i) refers more broadly to offenses that 'involv[e]' fraud or deceit – meaning offenses with elements that necessarily entail fraudulent or deceitful conduct." *Kawashima v. Holder*, 565 U.S. 478, 483–84 (2012) (holding that petitioner's tax crimes qualified as an aggravated felony involving fraud or deceit). *See also Wang v. Rodriguez*, 830 F.3d 958, 961 (9th Cir. 2016) ("[A]n individual has been convicted of an aggravated felony under subsection (M)(i) only if the elements of the offense for which she was convicted necessarily entail fraudulent or deceitful conduct.").

14. "Alien Smuggling" – 8 U.S.C. § 1101(a)(43)(N)

The definition of aggravated felony includes:

> an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter.

8 U.S.C. § 1101(a)(43)(N).

The "offense of harboring illegal aliens under section 1324(a)(1)(A)(iii) is an aggravated felony pursuant to section 1101(a)(43)(N)." *Castro-Espinosa v. Ashcroft*, 257 F.3d 1130, 1132 (9th Cir. 2001) *see also United States v. Galindo-Gallegos*, 244 F.3d 728, 734 (9th Cir.), *amended by* 255 F.3d 1154 (9th Cir. 2001) ("transporting aliens [already in the United States] under 8 U.S.C. § 1324(a)(1)(A)(ii) is an aggravated felony under 8 U.S.C. § 1101(a)(43)(N)" for sentence enhancement purposes).

Note that the aggravated felony provision requires that a noncitizen be convicted of a criminal offense relating to "alien smuggling", whereas the smuggling inadmissibility ground under 8 U.S.C. § 1182(a)(6)(E) and deportability ground under 8 U.S.C. § 1227(a)(1)(E) require no such conviction.

15. Illegal Reentry after Deportation for Aggravated Felony – 8 U.S.C. § 1101(a)(43)(O)

The definition of aggravated felony includes "an offense described in section 1325(a) [Improper entry by alien] or 1326 [Reentry of removed aliens] of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph." 8 U.S.C. § 1101(a)(43)(O).

Note that an independent section provides that a noncitizen previously removed for having been convicted of an aggravated felony is permanently inadmissible. *See* 8 U.S.C. § 1182(a)(9)(A)(i). This bar to admission applies unless "the Attorney General has consented to the alien's reapplying for admission." *Id.* § 1182(a)(9)(A)(iii).

16. Passport Forgery – 8 U.S.C. § 1101(a)(43)(P)

The definition of aggravated felony includes:

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

8 U.S.C. § 1101(a)(43)(P).

In *Jauregui-Cardenas v. Barr*, the court held that a conviction under California Penal Code § 114, for using false documents to conceal citizenship, did "not constitute an aggravated felony for purposes of eligibility for cancellation of removal." 946 F.3d 1116, 1120–21 (9th Cir. 2020) (holding that conviction for using false document to conceal citizenship in violation of CPC § 114 did not qualify as an aggravated felony, where it was overbroad and not divisible, and also holding that it did not qualify as a CIMT because it did not require fraudulent intent).

17. Failure to Appear for Service of Sentence – 8 U.S.C. § 1101(a)(43)(Q)

The definition of aggravated felony includes "an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more." 8 U.S.C. § 1101(a)(43)(Q).

18. Commercial Bribery and Counterfeiting – 8 U.S.C. § 1101(a)(43)(R)

The definition of aggravated felony includes "an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered, for which the term of imprisonment is at least one year." 8 U.S.C. § 1101(a)(43)(R). A federal conviction for possession of counterfeit obligations is an aggravated felony under this section. *See Albillo-Figueroa v. INS*, 221 F.3d 1070, 1073–74 (9th Cir. 2000).

The court has adopted a generic core definition of forgery that requires intent to defraud and includes a mental state requirement of knowledge of the fictitious nature of the instrument. *See Morales-Algeria v. Gonzales*, 449 F.3d 1051, 1056 (9th Cir. 2006) (California conviction for forgery of a check, in violation of Cal. Penal Code § 476(a), categorically qualifies as an aggravated felony because it requires knowledge of the fictitious nature of the instrument).

See also Vizcarra-Ayala v. Mukasey, 514 F.3d 870, 877 (9th Cir. 2008) (California conviction for offense of forgery in violation of Cal. Penal Code § 475(c) is not categorically an offense "relating to ... forgery" within the meaning of 8 U.S.C. § 1101(a)(43)(R)).

19. Obstruction of Justice – 8 U.S.C. § 1101(a)(43)(S)

The definition of aggravated felony includes "an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year." 8 U.S.C. § 1101(a)(43)(S).

See Renteria-Morales v. Mukasey, 551 F.3d 1076, 1079 (9th Cir. 2008) (conviction under 18 U.S.C. § 3146 qualifies as generic crime of "obstruction of justice" under 8 U.S.C. § 1101(a)(43)(S)); *see also Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 824 (9th Cir. 2016) (remanding to agency so that it could offer either

offer a new construction of INA § 101(a)(43)(S) or apply the previous, plausible construction as set forth in *Matter of Espinoza-Gonzalez*, 22 I. & N. Dec. 889 (BIA 1999) (en banc)).

20. Failure to Appear before a Court – 8 U.S.C. § 1101(a)(43)(T)

The definition of aggravated felony includes "an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed." 8 U.S.C. § 1101(a)(43)(T).

See Renteria-Morales v. Mukasey, 551 F.3d 1076, 1079 (9th Cir. 2008) (conviction under 18 U.S.C. § 3146 for failing to appear in court, or "bail jumping," was not categorically an aggravated felony as defined by 8 U.S.C. § 1101(a)(43)(T)).

21. Attempt or Conspiracy to Commit an Aggravated Felony – 8 U.S.C. § 1101(a)(43)(U)

The definition of aggravated felony includes "an attempt or conspiracy to commit an offense described in this paragraph." 8 U.S.C. § 1101(a)(43)(U); *see also Villavicencio v. Sessions*, 904 F.3d 658, 665 (9th Cir. 2018) (as amended); *Rendon v. Holder*, 764 F.3d 1077, 1084 (9th Cir. 2014) (violation of Cal. Penal Code § 459 not a categorical match to the federal generic attempted theft offense); *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1100 (9th Cir. 2011); *Ngaeth v. Mukasey*, 545 F.3d 796, 800–01 (9th Cir. 2008) (per curiam) (discussing definition of "attempt"). Conspiracy under 8 U.S.C. § 1101(a)(43)(U) "requires proof of an overt act … ." *United States v. Garcia-Santana*, 774 F.3d 528, 543 (9th Cir. 2014), *superseded on other grounds as recognized by Yim v. Barr*, 972 F.3d 1069, 1078 n.2 (9th Cir. 2020); *see also Villavicencio*, 904 F.3d at 665 (holding that Nevada conspiracy statute was overbroad and was not divisible, and thus could not be a basis for petitioner's removal).

"[T]he definition of aggravated felony includes "an attempt or conspiracy to commit an offense," but does not include solicitation." *Cortes-Maldonado v. Barr*, 978 F.3d 643, 650 (9th Cir. 2020).

22. Particularly Serious Crimes

> Section 1231(b)(3)(A)(ii) provides that an alien may not be removed to a nation in which his life or freedom would be threatened on a protected ground unless 'the Attorney General decides ... the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States.'

Blandino-Medina v. Holder, 712 F.3d 1338, 1343 (9th Cir. 2013) (quoting 8 U.S.C. § 1231(b)(3)(A)). "Aggravated felonies for which an alien receives a sentence of imprisonment of five years or more are particularly serious crimes." *Blandino-Medina*, 712 F.3d at 1345. However, "Section 1231(b)(3)(B)(iv) establishes [only] one category of 'per se' particularly serious crimes, and requires the agency to conduct a case-by-case analysis of convictions falling outside the category established by Congress." *Blandino-Medina*, 712 F.3d at 1345.

> For asylum purposes, an aggravated felony is *per se* a particularly serious crime. *Id.* (citing 8 U.S.C. § 1158(b)(2)(B)(i)). However, for withholding of removal claims, aggravated felonies are only *per se* particularly serious crimes when punished by a term of incarceration of at least five years. *Id.* (citing 8 U.S.C. § 1231(b)(3)(B)). When the petitioner is sentenced to fewer than five years in prison, …, there is a discretionary inquiry into whether the crime of conviction was a particularly serious one.

Dominguez v. Barr, 975 F.3d 725, 740 (9th Cir. 2020) (as amended).

The court has jurisdiction to review the agency's particularly serious crime determination. *Delgado v. Holder*, 648 F.3d 1095, 1099–1100 (9th Cir. 2011) (en banc). While the court cannot reweigh the evidence to determine if the crime was particularly serious, it does have jurisdiction to determine whether the agency applied the correct legal standard. *See Blandino-Medina*, 712 F.3d at 1343; *see also Dominguez*, 975 F.3d at 740 ("We have jurisdiction only to determine whether the BIA correctly applied the proper legal standard."); *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 990 (9th Cir. 2018) (the court cannot reweigh the evidence, but can determine if BIA applied the correct legal standard); *Pechenkov v. Holder*, 705 F.3d 444, 448–49 (9th Cir. 2012) (the court lacked jurisdiction to review particularly serious crime determination where the petitioner asked only for a "re-weighing of the factors involved in that discretionary determination"). The BIA's determination that a noncitizen was convicted of a particularly serious crime is a

discretionary decision, reviewed for abuse of discretion. *See Bare v. Barr*, 975 F.3d 952, 961 (9th Cir. 2020); *Alphonsus v. Holder*, 705 F.3d 1031, 1043 (9th Cir. 2013), *abrogated on other grounds by Guerrero v. Whitaker*, 908 F.3d 541 (9th Cir. 2018); *Arbid v. Holder*, 700 F.3d 379, 383 (9th Cir. 2012) (per curiam) ("[D]etermining whether a crime is particularly serious is an inherently discretionary decision, and we will review such decisions for abuse of discretion."). The court's review is limited to ensuring that the agency relied on the appropriate factors and proper evidence in making the particularly serious crime determination. *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1077 (9th Cir. 2015); *see also Bare*, 975 F.3d at 961.

The standard for determining whether the noncitizen committed a particularly serious crime is articulated in *Matter of Frentescu*, 18 I. &N. Dec. 244, 247 (BIA 1982). *See Avendano-Hernandez*, 800 F.3d at 1077; *Konou v. Holder*, 750 F.3d 1120, 1127 (9th Cir. 2014) (determining that BIA did not abuse discretion in determining petitioner's assault-and-battery convictions were particularly serious crimes). Under *Matter of Frentescu*, the seriousness of a crime is judged by looking at such factors "'as the nature of conviction, the circumstances underlying the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community.'" *Konou*, 750 F.3d at 1127 (quoting *Matter of Frentescu*, 18 I. & N. Dec. at 247); *see also Bare*, 975 F.3d at 961; *Avendano-Hernandez*, 800 F.3d at 1077. Additionally, crimes against persons are more likely to be considered particularly serious. *See Konou*, 750 F.3d at 1127. "In considering the elements of an offense, the BIA is to 'place the alien's conviction along a spectrum of seriousness.'" *Bare*, 975 F.3d at 963 (9th Cir. 2020) (quoting *Guerrero v. Whitaker*, 908 F.3d 541, 544 (9th Cir. 2018)).

"All aggravated felonies are categorically particularly serious crimes for the purposes of asylum, but only aggravated felonies for which the alien was sentenced to at least five years' imprisonment are categorically particularly serious for the purposes of withholding of removal." *Blandino-Medina*, 712 F.3d at 1346; *see also Flores-Vega v. Barr*, 932 F.3d 878, 884 (9th Cir. 2019) ("For purposes of asylum, an aggravated felony is *per se* a particularly serious crime. … [However, for withholding of removal an] aggravated felony is *per se* a particularly serious crime if the withholding applicant was sentenced to a term of imprisonment of at least five years."). As noted in *Delgado v. Holder*, the Attorney General is permitted "by *regulation*, to make particular crimes particularly serious even though they are not aggravated felonies." 648 F.3d 1095, 1106 (9th Cir. 2011) (en

banc) (referencing 8 U.S.C. § 1158(b)(2)(B)). In contrast, "the withholding of removal statute is missing an analogue provision permitting the Attorney General to designate crimes as categorically particularly serious even if they are not aggravated felonies for which the defendant has received a sentence of at least five years." *Blandino-Medina*, 712 F.3d at 1346. As such, in "the withholding-of-removal context, this determination must be made on a case-by-case basis … ." *Konou*, 750 F.3d at 1128; *see also Avendano-Hernandez*, 800 F.3d at 1077.

Sentence enhancements may be considered in the particular serious crime analysis. *Konou*, 750 F.3d at 1128; *see also Mairena v. Barr*, 917 F.3d 1119, 1124 (9th Cir. 2019) (per curiam). It is appropriate for the BIA to consider sentencing enhancements when it determines that a petitioner is convicted of a particularly serious crime on a case-by-case basis, as well as when the BIA determines that a petitioner was convicted of a per se particularly serious crime. *See Mairena*, 917 F.3d at 1124; *Konou*, 750 F.3d at 1128. However, "a sentence imposed for violating probation is not a sentence enhancement." *Avendano-Hernandez*, 800 F.3d at 1078.

> It is irrebuttably presumed that once a crime is determined to be particularly serious, the individual who committed that crime presents a danger to the community such that he or she is not entitled to protection by this country from persecution in another country. Given this narrow focus and in light of this severe consequence, the Agency must take all reliable, relevant information into consideration when making its determination, including the defendant's mental condition at the time of the crime, whether it was considered during the criminal proceedings or not.

Gomez-Sanchez v. Sessions, 892 F.3d 985, 996 (9th Cir. 2018).

"The 'particularly serious crime' provision is not unconstitutionally vague on its face." *Guerrero v. Whitaker*, 908 F.3d 541, 545 (9th Cir. 2018).

See also Bare, 975 F.3d at 964 (holding that the agency did not abuse its discretion in concluding that "the crime of being a felon in possession of a firearm can potentially be particularly serious"); *Dominguez*, 975 F.3d at 740–41 (holding that the BIA did not err in concluding that Dominguez's conviction was a particularly serious crime that made him ineligible for withholding of removal); *Mairena*, 917 F.3d at 1125 (BIA applied correct legal standard when it determined that Mairena was convicted of a per se particularly serious crime and was therefore

ineligible for withholding of removal); *Avendano-Hernandez*, 800 F.3d at 1077–78 (DUI offense was a particularly serious crime rendering petitioner ineligible for withholding of removal); *Quijada-Aguilar v. Lynch*, 799 F.3d 1303 (9th Cir. 2015) (petitioner was not ineligible for withholding of removal based on having been convicted of an aggravated felony particularly serious crime); did not qualify as a "particularly serious felony"); *Maldonado v. Lynch*, 786 F.3d 1155, 1162 n.7 (9th Cir. 2015) (Maldonado is only eligible for deferral of removal because his 1991 first degree burglary conviction qualified as a particularly serious crime); *Perez-Palafox v. Holder*, 744 F.3d 1138, 1141 (9th Cir. 2014) (all reliable information may be considered, including information outside the confines of the record of conviction, in the particularly serious crime determination); *Anaya-Ortiz v. Holder*, 594 F.3d 673, 678 (9th Cir. 2010) (deferring "to the BIA's reasonable conclusion that all reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction" (internal quotation marks and citation omitted)).

B. Domestic Violence and Child Abuse Offenses

1. General Definition

In 1996, IIRIRA added a ground of removability for state or federal convictions of crimes of domestic violence. *See* 8 U.S.C. § 1227(a)(2)(E). There is no such ground of inadmissibility. *See Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649, 650 (9th Cir. 2004). The ground of removability applies to convictions or violations of protective orders occurring after September 30, 1996. *See* IIRIRA § 350(b).

The statute covers "[a]ny 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." 8 U.S.C. § 1227(a)(2)(E)(i); *see also Alvarez-Cerriteno v. Sessions*, 899 F.3d 774, 778 (9th Cir. 2018); *Tokatly v. Ashcroft*, 371 F.3d 613, 619 (9th Cir. 2004). The act also covers violators of protective orders. *See* 8 U.S.C. § 1227(a)(2)(E)(ii); *Diaz-Quirazco v. Barr*, 931 F.3d 830, 846 (9th Cir. 2019) (Quirazco's violation of protection order qualified as removable conduct as described under § 1227(a)(2)(E)(ii)).

A "crime of domestic violence" means:

> any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

8 U.S.C. § 1227(a)(2)(E)(i).

> A crime of violence ("COV") is:
>
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16; *see also Singh v. Ashcroft*, 386 F.3d 1228, 1231 n.2 (9th Cir. 2004). This is the same definition of crime of violence used in the aggravated felony context. *See* 8 U.S.C. § 1101(a)(43)(F). Note § 16(b) is unconstitutionally vague as incorporated into the INA's definition of "crime of violence." *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018); *Dent v. Sessions*, 900 F.3d 1075, 1085 (9th Cir. 2018).

"In order to determine that [a petitioner] was convicted of a 'crime of domestic violence' under section 237(a)(2)(E)(i), we would have to conclude that his crime was not only one of 'violence,' but also that the violence was 'domestic' within the meaning of that section." *Tokatly*, 371 F.3d at 619; *see also Cisneros-Perez v. Gonzales*, 465 F.3d 386, 393–94 (9th Cir. 2006). To ascertain whether a conviction constitutes a crime of domestic violence, the adjudicating authority may not go beyond the record of conviction. *See Cisneros-Perez*, 465 F.3d at 393 (inferences and admissions in the administrative record could not be used to determine whether a conviction was for domestic violence).

The court defers "to the BIA's definition of 'crime of child abuse,' as set out in *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503 (BIA 2008) and *Matter of*

Soram, 25 I. & N. Dec. 378 (BIA 2010). *Menendez v. Whitaker*, 908 F.3d 467, 474 (9th Cir. 2018).

> The BIA defines "crime of child abuse, child neglect, or child abandonment" as a "unitary concept" that encompasses "any offense involving an intentional, knowing, reckless, or criminally 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." … The "maltreatment" element requires either proof of actual injury or proof of a "sufficiently high risk of harm to a child." … *Soram* left for future case-by-case analysis the precise formulation of what constitutes a sufficiently high risk of harm. … Read together, *Velazquez-Herrera* and *Soram* require (1) a mens rea that rises at least to the level of criminal negligence; and (2) "maltreatment" that results in either actual injury to a child, or a "sufficiently high risk of harm" to a child.

Menendez, 908 F.3d at 474 (holding that Cal. Penal Code § 288(c)(1) is not categorically a "crime of child abuse" under 8 U.S.C. § 1227(a)(2)(E)(i)).

In *Diaz-Quirazco v. Barr*, the court held that the BIA reasonably interpreted §§ 1227(a)(2)(E)(ii) and 1229b(b)(1)(C), and thus deferred to the BIA's framework set forth in *Matter of Medina-Jimenez*, 27 I. & N. Dec. 399, 401 (BIA 2018), for analyzing whether a noncitizen is ineligible for cancellation of removal under § 1229b for an offense of violating a protection order. 931 F.3d 830, 838–43 (9th Cir. 2019). Under *Matter of Medina-Jimenez*, the "categorical approach does not apply in assessing whether an alien is ineligible for cancellation of removal under § 1229b(b)(1)(C) based on an offense of violating a protection order under § 1227(a)(2)(E)(ii)." *Diaz-Quirazco*, 931 F.3d at, 838.

> The BIA articulated a two-step approach [in *Matter of Medina-Jimenez*, 27 I. & N. Dec. 399 (BIA 2018)] for analyzing whether an alien is ineligible for cancellation of removal under § 1229b(b) for an offense of violating a protection order under § 1227(a)(2)(E)(ii): (1) "whether the offense at issue resulted in a 'conviction' within the statutory definition set forth at section [1101](a)(48)(A) of the [INA]"; and (2) "whether the State court has found that the alien 'engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated

> harassment, or bodily injury to the person or persons for whom the protection ordered was issued,' as directed by section [1227](a)(2)(E)(ii)." *Id.* at 401–02 (footnote omitted). In analyzing the second step, IJs must "follow the analysis provided in *Matter of Obshatko*—that is, they should review the probative and reliable evidence regarding whether the State court's findings that a protection order has been violated meet the requirements of section [1227](a)(2)(E)(ii)." *Id.* at 402.

Diaz-Quirazco, 931 F.3d at 841 (deferring to the BIA's framework in *Matter of Medina-Jimenez* and its interpretation of §§ 1227(a)(2)(E)(ii) and 1229b(b)(1)(C)).

2. Cases Considering Domestic Violence Convictions

Carrillo v. Holder, 781 F.3d 1155, 1159–60 (9th Cir. 2015) (holding that conviction under Cal. Penal Code § 273.5(a), which criminalizes willful infliction of corporal injury upon a spouse or cohabitant is categorically crime of domestic violence); *Habibi v. Holder*, 673 F.3d 1082, 1085 (9th Cir. 2011) (conviction under Cal. Penal Code § 243(e)(i)); *Banuelos-Ayon v. Holder*, 611 F.3d 1080, 1083–86 (9th Cir. 2010) (holding that a conviction under Cal. Penal Code § 273.5(a) is categorically a crime of domestic violence); *Alanis-Alvarado v. Holder*, 558 F.3d 833, 839–40 (9th Cir. 2009) (California conviction under Cal. Fam. Code § 6320 categorically qualified as conviction of violating a "protection order" under 8 U.S.C. § 1227(a)(2)(E)(ii)); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc) (Arizona domestic violence/assault statute penalizing reckless conduct was not a COV and thus not a crime of domestic violence); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1014–15 (9th Cir. 2006) (California battery conviction under Penal Code § 242 is not categorically a COV and thus not a crime of domestic violence); *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 393–94 (9th Cir. 2006) (California battery conviction under Penal Code § 242 is not categorically a crime of domestic violence because it encompasses violence against strangers); *Tokatly v. Ashcroft*, 371 F.3d 613, 623 (9th Cir. 2004) (Oregon convictions for burglary and attempted kidnaping are not crimes of domestic violence under categorical and modified categorical approaches); *Singh v. Ashcroft*, 386 F.3d 1228, 1230 (9th Cir. 2004) (Oregon's harassment law, "which outlaws intentionally harassing or annoying another person by subjecting that person to offensive physical contact," was not COV and thus not a crime of domestic violence).

3. Cases Considering Child Abuse Convictions

Menendez v. Whitaker, 908 F.3d 467, 474 (9th Cir. 2018) (holding that Cal. Penal Code § 288(c)(1) is not categorically a "crime of child abuse" under 8 U.S.C. § 1227(a)(2)(E)(i)); *Alvarez-Cerriteno v. Sessions*, 899 F.3d 774, 777 (9th Cir. 2018) (concluding that because Nevada statute was broader than generic federal crime of child abuse it was not categorically a "crime of child abuse," and remanding for BIA to determine if conviction was a "crime of child abuse" under the modified categorical approach); *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 863 (9th Cir. 2013) (concluding that "section 288(c)(1) is a felony that raises a substantial risk of physical force in the ordinary case" and "[a]ccordingly, Rodriguez's state crime of conviction constitutes a categorical 'crime of violence,' for purposes of § 16(b). As such, it is an 'aggravated felony' for purposes of § 1101(a)(43)(F), and the BIA did not err in upholding this basis for removal."); *Jimenez-Juarez v. Holder*, 635 F.3d 1169, 1170–71 (9th Cir. 2011) (distinguishing *Fregozo*, and holding that conviction for child molestation in the third degree under Wash. Rev. Code § 9A.44.089 constitutes a categorical crime of child abuse within the meaning of 8 U.S.C. § 1227(a)(2)(E)(i)); *Fregozo v. Holder*, 576 F.3d 1030, 1038 (9th Cir. 2009) (concluding that "a conviction under Cal. Penal Code [§] 273a(b) is not categorically a 'crime of child abuse' within the meaning of [§] 237(a)(2)(E)(i) of the INA"); *Velazquez-Herrera v. Gonzales*, 466 F.3d 781, 783 (9th Cir. 2006) (per curiam) (remanding for the BIA to consider in the first instance statutory interpretation of the term "child abuse" in 8 U.S.C. § 1227(a)(2)(E)(i)). *Compare United States v. Martinez*, 786 F.3d 1227, 1233 (9th Cir. 2015) (holding a "conviction premised on a violation of Wash. Rev. Code § 9A.44.089 (2001) does not categorically meet the generic definition of sexual abuse of a minor due to the missing elements in the statutory provision" and distinguishing between "sexual abuse of a minor" and "child abuse", explaining the latter is less stringent).

4. Cases Considering Violators of Protection Orders

Diaz-Quirazco v. Barr, 931 F.3d 830, 841 (9th Cir. 2019) (deferring to the BIA and concluding that judgment for contempt of court for violating a protection order qualified as a conviction, and that violation of the protection order qualified as a removable offense); *Szalai v. Holder*, 572 F.3d 975 (9th Cir. 2009) (using the categorical/modified approach and holding that judgment holding noncitizen in contempt for disobeying the stay away portion of a restraining order issued

pursuant to Oregon's Family Abuse Prevention Act qualified as a violation of a protection order under the INA).

C. Firearms Offenses

8 U.S.C. § 1227(a)(2)(C) provides:

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

See also United States v. Aguilera-Rios, 769 F.3d 626, 633 (9th Cir. 2014) (holding that California firearms statute was not a categorical match for federal aggravated felony firearms offense). This provision has been read broadly, to include the "entire panoply of firearms offenses." *See Valeria-Ochoa v. INS*, 241 F.3d 1092, 1095 (9th Cir. 2001) (holding that California conviction for willfully discharging firearm in grossly negligent manner under California Penal Code § 246.3 was removable firearms offense); *see also Bolanos v. Holder*, 734 F.3d 875 (9th Cir. 2013) (holding that conviction for brandishing firearm in presence of occupant of motor vehicle under Cal. Penal Code § 417.3 qualified categorically as a crime of violence under 18 U.S.C. 16(a) and rendered noncitizen ineligible for cancellation of removal); *Malilia v. Holder*, 632 F.3d 598, 602–04 (9th Cir. 2011) (discussing how § 1227 was intended to apply broadly, and concluding that conviction for knowingly delivering a firearm without first providing written notice to the carrier rendered petitioner removable).

Note that "the INA expressly excludes 'antique firearms' from the generic definition of a 'firearm.'" *Medina-Lara v. Holder*, 771 F.3d 1106, 1115 (9th Cir. 2014) (holding as a matter of law that Medina's California conviction Cal. Penal Code §12022 for carrying a firearm during a felony offense is not a predicate for removal under8 U.S.C. § 1227(a)(2)(C)).

D. Miscellaneous Removable Offenses

The statute lists several other miscellaneous removable offenses. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(iv) (conviction for high speed flight); 8 U.S.C.

§ 1227(a)(2)(A)(v) (conviction for failure to register as sex offender); 8 U.S.C. § 1227(a)(2)(D) (convictions for espionage, treason, violations of the Military Selective Service Act or the Trading with the Enemy Act).

VI. ELIGIBILITY FOR RELIEF DESPITE CRIMINAL CONVICTIONS

Some types of relief remain available to individuals in removal proceedings despite their criminal convictions, although criminal convictions or conduct can create bars to relief eligibility even if they are not charged as grounds of removability or inadmissibility. In addition to references to relief contained in this section, the effects of criminal convictions on relief eligibility are discussed in some other sections of this outline addressing particular forms of relief that may be available. Examples of potential relief include: Cancellation of Removal, including VAWA Relief under 8 U.S.C. § 1229b(5); Suspension of Deportation; NACARA Suspension or Cancellation Relief; Cuban Adjustment Act Relief; Former 212(c) Relief; Section 212(h) Relief; Adjustment of Status; Registry; Asylum; Withholding of Removal; CAT Relief; Naturalization.