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A Brief Guide to Representing Noncitizen Criminal Defendants in Illinois

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Disclaimer: This brief guide is intended as an introductory tool for criminal defense attorneys representing noncitizen defendants in Illinois. This guide does not purport to provide legal advice or to give an opinion as to the immigration consequences that might result from a criminal disposition in a particular case. Defense practitioners are advised to consult an attorney who specializes in this area of law and to conduct their own research on the possible immigration consequences in particular cases. In addition, this is a rapidly changing area of law, so practitioners are cautioned to keep abreast of changes in federal and state law since this guide was last revised.

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Introduction

The criminal justice and immigration enforcement systems are more intertwined than ever before. Whereas previously the two systems operated mostly in parallel, today federal immigration law imposes severe consequences on non-citizens with criminal histories. Even convictions for relatively minor offenses can lead to deportation, including for lawful permanent residents who have lived in the United States for decades. Although non-citizens can also face deportation after being convicted on federal charges, most non-citizens who are deported on criminal grounds, are deported because of state criminal convictions. Because of this, defense attorneys must have a basic knowledge of immigration law to advise their non-citizen clients of the immigration consequences of certain criminal convictions.

This manual is by no means a comprehensive overview of the complex and amorphous minefield that is immigration law. But it will provide Illinois defense attorneys with some of the tools they need to zealously advocate for their non-citizen clients in criminal court. It also serves as a guide for immigration attorneys who are representing non-citizen clients in removal proceedings. Referencing this manual should be the first, not the only, step that attorneys take when representing non-citizen clients in criminal or removal proceedings.

The first section will introduce the ethical and legal duties that defense attorneys have to non-citizen clients and detail best practices to ensure they are carrying out their professional obligations. The second section will introduce the categories of deportable offenses that defense attorneys must be aware of in order to identify offenses that could lead to deportation. The third section will explain the categorical and modified approach, which determine whether convictions for state offenses will render a non-citizen removable. The fourth section contains tips that defense attorneys should follow during criminal proceedings to mitigate immigration consequences. Finally, the fifth section contains charts of the most commonly charged Illinois offenses and analyzes whether those offenses fall within one or more categories of deportable crimes.

Padilla v. Kentucky

In 2010, the Supreme Court held that effective counsel includes advising non-citizen clients on potential immigration consequences of pleading guilty to criminal charges. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010). The Supreme Court clarified that there was no "distinction between direct and collateral consequences" when defining the scope of what is required under the Fifth and Sixth Amendments, and that effective counsel required for criminal defendants must include advising on potential immigration consequences because deportation is "intimately related to

the criminal process." *Id*. The Illinois Constitution requires a similar right to effective counsel. *People v. Correa*, 108 IL2d 541, 553 (IL 1985) (holding that constitutionally deficient immigration advice renders a guilty plea involuntary).

Padilla adopted the two-prong *Strickland* test for determining when counsel's immigration advice is deficient. *Strickland v. Washington*, 466 U.S. 669 (1984). Under the first prong, the court determines whether the counsel's representation "fell below an objective standard of reasonableness" *Id*. at 688. The Seventh Circuit has held that effective counsel under *Padilla* includes the attorney transparently sharing the potential immigration consequences and the likelihood of success of any applications for relief from deportation with their client. *United States v. Chezan*, 829 F.3d 785, 787 (7th Cir. 2016).

The second prong requires that the defendant show "there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. In the context of a guilty plea, *Strickland* requires that the defendant show that they would have proceeded to trial if they had received effective counsel. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985). A defendant can show prejudice if he shows he would have proceeded to trial had they known about the immigration consequences. *United States v. Delhorno*, 915 F.3d 449, 454 (7th Cir. 2019). In the context of deportation, the Supreme Court has held that deportation is such a serious consequence that a defendant may prove prejudice even if he would have probably lost at trial. "When those consequences [of a plea] are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive." *Lee v. United States*, 137 S. Ct. 1958, 1968-69 (2017).

However, *Padilla* does not apply retroactively and only applies to pleadings entered in 2010 or after. *Chaidez v. United States*, 568 U.S. 342, 344 (2013); *see also Chavarria v. United States*, 739 F.3d 360, 364 (7th Cir. 2014).

Categories of Removable Offenses

The Immigration and Nationality Act is a highly complex statute that, among other things, determines when a non-citizen is removable from the United States. There are two statutory provisions that determine removability. A non-citizen seeking admission to the United States, either at the border or when applying for immigration status form within the country, is subject to the inadmissibility grounds in 8 U.S.C. § 1182. A non-citizen who has already been admitted to the United States with lawful immigration status is subject to the deportability grounds in 8 U.S.C. § 1227. Removability is an umbrella term that refers to both inadmissibility and deportability. A non-citizen who is either

inadmissible or deportable is removable. Both Section 1182 and 1227 contains various distinct but overlapping criminal grounds of removability.

If a non-citizen is found removable, then the non-citizen may be able to apply for forms of relief from removal. Common forms of relief from removal include asylum and cancellation of removal. Each form of relief from removal includes eligibility criteria that often include bars for individuals convicted of certain criminal offenses. Thus, a criminal conviction can render a non-citizen removable and may also bar the non-citizen from applying for certain forms of relief. There are also other non-criminal removability grounds and bars to relief that are outside the scope of this guide.

Although all criminal conduct can result in immigration consequences, given the discretionary nature of immigration benefits like asylum and adjustment of status, convictions for certain types of crimes render an immigrant automatically removable or ineligible for relief. Convictions, whether or not they render a non-citizen removable, may also be relevant to determinations of "good moral character," which is one of the eligibility requirements for naturalization and some forms of relief such as cancellation of removal.

A "conviction" under the Immigration and Nationality Act is defined as "a formal judgment of guilt of the [non-citizen] entered by a court" or if no judgment was entered, where

> (i) a judge or jury has found the [non-citizen] guilty or the [non-citizen] 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 [non-citizen]'s liberty to be imposed.

8 U.S.C. § 1101(a)(48). Thus, some dispositions that are not considered convictions under state law may nevertheless be considered convictions for immigration purposes. For example, in *Gill v. Ashcroft*, 335 F.3d 574 (2003), the Seventh Circuit held that a disposition of probation under Illinois law, wherein if the offender successfully completes probation, the charge is dismissed, still counts as a conviction under the Immigration and Nationality Act.

With some exceptions, the categorical approach, discussed in Section Three, dictates how to determine whether a state offense falls within one of the categories of removable crimes. For now, it suffices that you understand that some convictions under state law trigger removability if their elements fall within the generic categories of deportable or inadmissible crimes.

Aggravated Felonies ("AF")

"Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). "Aggravated Felony" is a term of art that refers to a set list of offenses enumerated at 8 U.S.C. § 1101(a)(43). Because it is a term of art, convictions under state law need not be "aggravated" nor a "felony" under state law, to trigger an "aggravated felony" charge. Case law must be analyzed to determine whether a particular state offense is a categorical match for one of the aggravated felony offenses listed at Section 1101(a)(43).

Non-citizens convicted of aggravated felony offenses are ineligible for cancellation of removal and most other forms of relief. 8 U.S.C. § 1229b(a)(3). In addition, undocumented immigrants convicted of an aggravated felony can be issued a "Final Administrative Removal Order" (FARO) and removed without a hearing. 8 U.S.C. § 1228(b). Because of the severe consequences of aggravated felonies, defense attorneys should avoid a conviction for an aggravated felony wherever possible. Indeed, failure to counsel one's client on the immigration consequences of an aggravated felony is the clearest example of ineffective assistance of law under *Padilla*.

The most commonly charged AFs are as follows:

- Murder;
- Rape;
- Sexual assault of a minor;
- Illicit trafficking of a controlled substance;
- A "crime of violence" if the term of imprisonment is one year or more;
- A "theft offense" (including burglary and receipt of stolen property) if the term of imprisonment is one year or more;
- Illicit trafficking in firearms, destructive devices, or explosive materials;
- Fraud, money laundering, or tax evasion offenses where the amount in question exceeds $10,000;
- Certain firearms, prostitution, kidnapping, gambling, espionage, smuggling, and child pornography offenses;
- Attempt or conspiracy to commit any of the above offenses.

Importantly, some offenses can trigger multiple grounds of removability. For instance, certain types of firearm offenses may qualify as both an illicit trafficking of firearms aggravated felony, 8 U.S.C. § 1101(a)(43)(C), and a deportable firearm offense, 8 U.S.C. § 1227(a)(2)(C)(i).

Crimes Involving Moral Turpitude ("CIMT")

A non-citizen convicted of a crime involving moral turpitude that is punishable by a maximum sentence of at least one-year imprisonment is deportable. 8 U.S.C. § 1227(a)(2)(A)(i). However, the underlying crime must have been committed within five years of admission. *Id.* Alternatively, an immigrant convicted of more than one crime involving moral turpitude, regardless of associated sentence length or date of admission, is deportable so long as the crimes do not arise from a "single scheme of criminal misconduct." 8 U.S.C. § 1227(a)(2)(A)(ii).

A crime involving moral turpitude can also render a non-citizen inadmissible, unless the offense occurred when the non-citizen was a minor or if the offense qualifies as a petty offense. 8 U.S.C. § 1182(a)(2)(A)(ii). A petty offense is an offense for which the maximum sentence is one year or less and the non-citizen was sentenced to six months or less. 8 U.S.C. § 1182(a)(2)(A)(ii)(II). Multiple convictions for crimes involving moral turpitude with an aggregate sentence of five years or more render a non-citizen inadmissible without exception, regardless of whether the offenses arose from a single course of conduct. 8 U.S.C. § 1182(a)(2)(B).

Like "aggravated felony," "crime involving moral turpitude" is a term of art. However, where AFs are discrete and listed in statute, CIMTs are elastic and defined in case law. The Board of Immigration Appeals defines CIMT as acts that are "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 Danesh*, 19 I&N Dec. 669, 670 (BIA 1988). Courts often use one of two heuristics to decide whether a crime involves moral turpitude. First, the court may determine whether the crime was "*malum in se* (inherently wrong), as opposed to *malum prohibitum* (wrong only because prohibited). *Arias v. Lynch*, 834 F.3d 823, 827 (7th Cir. 2016). Second, other courts "focus[] on the presence of a 'vicious motive' or an 'evil intent' to find moral turpitude. *Id.*

Courts have attempted to define crimes involving moral turpitude for over a century, and this issue is still litigated extensively. However, the Seventh Circuit has found the following types of crimes to be CIMTS:

- Theft offenses, *see Hashish v. Gonzales*, 442 F.3d 572, 576 (7th Cir. 2006) ("This court, and other courts of appeals, repeatedly have held that 'theft' is a crime of moral turpitude."). However, theft offenses must have the requisite intent. "De minimis" takings are not theft offenses;

- Crimes involving fraud or intent to deceive, *see Lagunas-Salgado v. Holder*, 584 F.3d 707, 711 (7th Cir. 2009) ("Cases such as these led us to call it "settled" that crimes with fraud as an element involve moral turpitude."); *Padilla v. Gonzales*, 397 F.3d 1016, 1020 (7th Cir. 2005) (holding that obstruction of justice is a CIMT);
- Vehicular flight from a police officer, *see Cano-Oyarzabal v. Holder*, 774 F.3d 914, 919 (7th Cir. 2014) (holding that a Wisconsin statute criminalizing the knowing attempt to allude a police vehicle "categorically qualifies as a crime involving moral turpitude").
- For a complete list, *see Arias,* 834 F.3d at 833 (Posner, J., concurring).

The categorical approach is utilized to determine whether a state offense matches a CIMT according to existing case law. *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016). The case law attorneys should look to will depend on the jurisdiction they are in. The charts below will provide educated predictions of which Illinois convictions constitute crimes of moral turpitude.

Controlled Substance Offenses ("CSO")

A non-citizen who, "at any time after admission," is convicted of an offense "relating to a controlled substance" other than "a single offense involving possession for one's own use of 30 grams or less of marijuana" is deportable. 8 U.S.C. § 1227(a)(2)(B)(i). A non-citizen who commits a controlled substance offense is inadmissible. 8 U.S.C. § 1182(a)(2)(A)(i)(II). There is no inadmissibility exception for simple marijuana possession, though a waiver may be available.

"Controlled substance" is defined at Section 802(6) of Title 21 to the exclusion of certain liquors and tobacco. *See* 21 U.S.C. § 802(6). INA likewise precludes removal for "a single offense involving the possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. § 1227(a)(2)(B)(i). Beyond theses exemptions, "relating to a controlled substance" is far-reaching standard that sweeps in most federal drug offenses. However, there is ongoing litigation across the country on the issue of whether certain state drug laws categorically match the federal controlled substance definition, such that they should trigger deportability under this ground. Many state drug laws sweep more broadly than federal law. The categorical approach determines which state crimes are CSOs for immigration purposes.

Firearm Offenses ("FO")

Any post-admission conviction for "purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying," a firearm or destructive device, or conspiring or attempting to do so, renders a non-citizen

deportable. 8 U.S.C. § 1227(a)(2)(C)(i). As with CSOs, most federal firearm related offenses are FOs for immigration purposes due to the breadth of the statutory language.

"Firearm" and "destructive device" are defined at 18 U.S.C.A. § 921(a)(3–4). Notably, the definition of "firearm" at Section 921(a)(3) requires the expulsion of a projectile "by the action of an explosion." By contrast, Illinois' definition of "firearm" includes projectile expulsion by means of "expansion … or escape of gas" as well as explosion. 430 ILCS 65/1.1. The FO chart below will provide examples of how Illinois' overbroad definition of "firearm" prevents certain state offenses from rendering an immigrant deportable. The consequences of the asymmetric definitions will become clearer after learning about the categorical approach in the subsequent section.

Crimes of Domestic Violence ("CDV")

A non-citizen who is convicted of a crime of domestic violence after being admitted into the United States is deportable. 8 U.S.C. § 1227(a)(2)(E)(i). "Crime of domestic violence" is defined as any "crime of violence" against a protected class of personal relations. *Id*. For its part, a crime of violence[1] is defined at 18 U.S.C. § 16:

> (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.

However, the Court held that subsection (b), the residual clause of Section 16, was unconstitutionally vague as incorporated into the INA's definition of aggravated felony, *see Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018), so a court is unlikely to find a CDV unless the offense qualifies under Section 16(a).

It is also important to note that it is unlikely that a *mens rea* of recklessness suffices to establish a crime of violence. *See Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (holding negligent conduct could not constitute a crime of violence but not reaching the issue of reckless conduct). Recently, the Court held that reckless crimes could not be treated as "violent felonies," which the ACCA defines in "near-identical" language to "crimes of violence" under Section 16(a). *See Borden v. United States*, No. 19-5410, 2021 WL 2367312, at *5 (June 10, 2021) ("[W]e reach the

[1] Notably, a crime of violence is also an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) if and only if the term of imprisonment for a conviction is at least one year. CDVs do not have the same term length requirements.

question we reserved in [*Leocal*].”). Therefore, where an immigrant is convicted under an indivisible statute for which recklessness suffices, a conviction for this crime likely is not a categorical match to a crime of violence for the purposes of AFs and CDVs.

The class of relations that transform a crime of violence into a CDV is detailed at 8 U.S.C. § 1227(a)(2)(E)(i):

> [A crime of violence 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.

While the threshold issue of whether a crime of violence has occurred warrants the use of the categorical approach, the existence of the requisite domestic relationship is determined by circumstances of the case, requiring application of the so-called “circumstance-specific” approach, an exception to the categorical approach that allows adjudicators to consult the facts of the conviction. *See Matter of H. Estrada*, 26 I&N Dec. 749 (BIA 2016). For instance, the court will look at the record of conviction along with extrinsic evidence like police reports and sworn testimony for evidence of domestic relationship. In this way, the of relationship between the victim and perpetrator need not be charged as an element of the underlying state crime so long as there is probative evidence of such a relation. *See Id.* (holding that a conviction for simple battery constituted a CDV because the victim was protected against the offender by Georgia domestic violence law).

Crimes Against Children (“CAC”)

Any conviction for the crimes “of child abuse, child neglect, or child abandonment” renders a non-citizen deportable. 8 U.S.C. § 1227(a)(2)(E)(i). Although distinct on their face, courts treat abuse, neglect, and abandonment of a child as a “unitary concept,” stylized as “crimes against children” for the purposes of this manual. *Matter of Soram*, 25 I&N Dec. 378, 381 (BIA 2010). Examples of crimes against children include assault, reckless endangerment, and kidnapping when a minor is the victim.

Crimes against children are not defined by statute but have been interpreted broadly to mean "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." *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 503 (BIA 2008). The categorical approach is used to determine whether a state offense satisfies these elements and is a CAC for immigration purposes.

The definition of CAC remains controversial since it permits removal for crimes where a child suffered no injury. *Compare Soram*, 25 I&N Dec. at 381 ("[We] find no convincing reason to limit offenses under section 237(a)(2)(E) of the Act to those requiring proof of actual harm or injury to the child."), *with Ibarra v. Holder*, 736 F.3d 903 (10th Cir. 2013) (rejecting BIA's conclusion in *Soram* that "criminally negligent conduct with no resulting injury to a child" constitutes a CAC).

Defense attorneys may be able to avoid a CAC classification by pleading down to an age-neutral offense, or otherwise preventing a victim's minor status or actual injury from appearing on the record of conviction.

Prostitution Offenses ("PO")

Unlike the previous categories of deportable offenses, prostitution crimes are not addressed separately in Section 1227(a)(2) of Title 8. Instead, certain prostitution offenses may render an immigrant deportable as an AF or a CIMT. For the first two, the categorical approach is used to determine if a state offense matches the elements of generic federal POs.

A prostitution offense is an aggravated felony when the crime "relates to the owning, controlling, managing, or supervising of a prostitution business;" is "described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution);" and is undertaken for "commercial advantage." 8 U.S.C. § 1101(a)(43)(K). As previously mentioned, aggravated felonies yield harsher immigration consequences relative to the other categories of deportable offenses, so defense attorneys should try to avoid a record of conviction that satisfies the aforementioned elements as best they can.

A prostitution offense is a crime involving moral turpitude when it is "intrinsically wrong." *Mendoza v. Holder,* 623 F.3d 1299, 1302 (9th Cir.2010) (citing *Uppal v. Holder*, 605 F.3d 712, 716 n. 2 (9th Cir. 2010)). However, as with other CIMTs, this definition is too subjective and vague to provide any meaningful insight in the particular case. "Therefore, 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) (quoting *Mendoza,* 623 F.3d at 1302) (holding that solicitation of a prostitute, like the act of prostitution itself, is a CIMT). Note that the BIA has issued precedential decisions that have found the following offenses to be CIMTs: "any act of prostitution," *Matter of W-*, 4 I&N Dec. 401, 401–402, 404 (BIA 1951); renting a room with knowledge that it will be used for prostitution, *Matter of Lambert*, 11 I&N Dec. 340, 342 (BIA 1965); and "keeping a house of ill-fame resorted to for the purposes of prostitution," *In the Matter of P-----*, 3 I&N Dec. 20, 20 (BIA 1947). Reasoning from these cases is a good starting point, but further study of case law is required to ascertain whether a prostitution-related state crime constitutes a CIMT.

Importantly, many state crimes for prostitution do not meet the one-year term of imprisonment requirement to render a non-citizen deportable for a single CIMT, so removal for a prostitution CIMT is often based on repeat offenses pursuant to 8 U.S.C. § 1227(a)(2)(A)(ii). *See*, *e.g., Reyes v. Lynch*, 835 F.3d 556, 558, 561 (6th Cir. 2016) (holding that a non-citizen was deportable because of their conviction for the CIMTs of solicitation of prostitution and passing bad checks).

Violations of Protective Orders

A non-citizen who "at any time after admission … engage[s] in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury" is deportable. 8 U.S.C. § 1227(a)(2)(E)(ii). "Protection order" is defined as "any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions)." *Id.*

Because the language of (E)(ii) does not require a conviction and only entails a court determination that conduct violated a protective order, courts have held that the categorical approach does not apply. *See Rodriguez v. Sessions*, 876 F.3d 280, 284 (7th Cir. 2017) ("When a statute does not make itself contingent on a conviction, the categorical approach is unnecessary."). Therefore, courts will look to the immigrant's actual conduct in relation to the protective order and not an offense for which they were convicted in deciding deportability. *See Matter of Obshatko*, 27 I&N Dec. 173, 173 (BIA 2017) (holding that judges are not constrained by the categorical approach when determining whether there was a violation of a protection order, "even if a conviction underlies the charge").

Drug Abuse and Addiction

In addition to being rendered deportable for a CSO conviction, immigrants are deportable solely for being drug "abuser[s] or addict[s]." 8 U.S.C. § 1227(a)(2)(B)(ii). "Addict" is defined at Section 802(1) of Title 21 and covers those whose habitual narcotic use "endangers" the public or whose addiction has overcome their "power of self-control." 21 U.S.C. § 802(1). Therefore, defense attorneys are advised to avoid a specific admission or any other item on the record that characterizes their client as an addict according to this definition. Again, the categorical approach is not applicable here because a conviction is not necessary to be deportable on these grounds.

Human Trafficking Offenses

An immigrant is deportable if they would be inadmissible under Section 1182(a)(2)(H) of Title 8. 8 U.S.C. § 1227(a)(2)(F). The categories of deportable people under this statute are delineated below.

Section 1182(a)(2)(H)(i) contemplates non-citizens who "commits or conspires to commit human trafficking offenses in the United States or outside the United States" and those who "the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons." "Severe forms of trafficking in persons" is defined by statute at 22 U.S.C. 7102(9).

Section 1182(a)(2)(H)(ii) covers immigrants who "the Attorney General knows or has reason to believe is the spouse, son, or daughter of" a trafficker or collaborator as described in (H)(i), who has "benefited from the illicit activity" within the previous five years, "and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity." 8 U.S.C. § 1182(a)(2)(H). However, Section 1182(a)(2)(H)(iii) exempts a son or daughter "who was a child at the time he or she received the benefit" from this class of inadmissible and therefore deportable aliens.

Because no conviction is required for inadmissibility under Section 1182(a)(2)(H)(ii), the categorical approach does not apply. The court will look to the actual conduct of the non-citizen and their engagement or complicity in human trafficking.

Miscellaneous Offenses

Section 1227 also contains several miscellaneous deportability grounds that require a conviction under federal law (relating to treason and espionage, for example) and that state practitioners are unlikely to encounter in their representation of non-citizens.

Categorical and Modified Categorical Approach

Because immigration consequences are based on federal law, courts need a way to translate various state offenses to the federal definitions of crimes. That translation is done using something called the categorical approach. The approach requires attorneys to compare the state offense to the federal categories described in section two. Criminal defense attorneys and immigration attorneys both must learn how to navigate the categorical approach in order to represent their non-citizen clients effectively.

The stakes of these cases are high and in general, it is better to be conservative when using the approach and advising clients of their potential immigration consequences. Additionally, always be sure to check the most up-to-date case law. The three steps for applying the modified categorical approach are detailed below.

Step One: The Categorical Approach

For a state offense to be a ground of removability (i.e., be an offense that could lead to a client's deportation), the offense needs to be what is called "a categorical match" to the equivalent federal offense. The categorical approach helps attorneys assess whether the offense their client has been charged with is a categorical match to the federal offense. Within the categorical approach, there are three sub-steps.

When using the categorical approach, first ask: is the state statute a categorical match to the generic federal definition? Crucial to the categorical approach is that rather than focusing on the facts of the individual case, the court should look **only** at the conduct punishable by the state statute (how to do this is discussed later). This process focuses on the statutory elements of the state offense and what they require, and compares them to the elements of the federal generic offense.

The reason that courts look at the conduct punished under the statute rather than to the circumstances of individual cases is that the INA links immigration consequences to having certain *convictions* for generic categories, not on committing certain conduct, for many of the criminal grounds of removability.

The first sub-step of the categorical approach is simply to find the equivalent federal offense and establish its elements. Sometimes, federal immigration law defines a removable offense by reference to an offense in the U.S. code. In these cases, the process of determining the definition is usually straightforward because the elements of the federal crime are easily ascertainable. Sometimes, federal immigration law refers to a category of crime such as "burglary,"

"theft," or "crimes involving moral turpitude." The generic definition of these crimes is determined by case law and is referred to as the generic definition of the crime.

The second sub-step is to determine the minimum conduct punishable by the state statute. Remember that the categorical approach disregards particularized facts of individual cases so instead of focusing on the specificities of the client's conduct, consider what, at a base level, the state statute would penalize. There must be a "realistic probability" that the state would punish the minimum conduct, *Gonzales v. Duenas–Alvarez*, 549 U.S. 183 (2007), but there is a circuit split as to how courts determine whether a realistic probability exists. Some circuits have held that no additional showing of realistic probability is required where the statute of conviction expressly includes the minimum conduct. Other circuits have held that the non-citizen must find an actual case in which the state prosecuted the minimum conduct in order for there to be a realistic probability of the offense being interpreted to include the minimum conduct.

The Seventh Circuit has not clearly adopted either test. *United States v. Walker*, 931 F.3d 576, 579 (7th Cir. 2019); *Familia Rosario v. Holder*, 655 F.3d 739, 748-50 (7th Cir. 2011). The BIA, on the contrary, has adopted the "actual case" requirement, but does not apply the rule in circuits that have rejected it. *Matter of Navarro Guadarrama*, 27 I. & N. Dec. 560, 564 (BIA 2019). The safest bet is always to try to locate an actual case.

The third sub-step is to determine whether the minimum conduct punishable by the state statute and the generic definition of the federal offense are a match. To do this, the attorney should assess whether the elements of the state statute are narrower or broader than the federal offense. One way to judge whether the state statute is broader is seeing whether there is conduct that could be punished by the state statute that would not be punished by the federal offense. If that is the case, the state statute is overbroad and is not a categorical match.

Alternatively, if all the minimum conduct punishable by the state statute would be punished by the federal offense, the state statute is narrower (or as narrow) as the federal offense and is thus a match. Essentially, the attorney should determine if the generalized or abstracted conduct of any noncitizen client charged under the state statute would give rise to prosecution under the federal statute. If it could give rise to such prosecution, there is a match.

If the state statute is coterminous with or narrower than the federal statute, then the offense is a ground of removability. If state statute is broader than the generic federal offense, the attorney will then determine if the statute is divisible and if it is, will turn to the modified categorical approach (discussed later). However, if the state statute is

broader and is not divisible, it does not fit into the federal statute (it is not a "categorical match") and thus is not a ground of removability.

Note: if the entire state statute is a categorical match, it does not matter whether the statute is divisible.

Example:

Your client is convicted of theft under 720 ILCS 5/16-1 for obtaining control over property known to be stolen valued at $200.

Sub-step one: Find the federal definition of theft. There are three groups of removable offenses, and you should determine which group or groups the offense falls under. Offenses can be an aggravated felony, a crime involving moral turpitude (CIMT), and/or in a grouping of its own (a controlled substances offense, firearms offense, crime of domestic violence, or prostitution offense, among others). For details about how to determine what is an aggravated felony, see the section above on Categories of Removable Offenses.

Theft is not in a category of its own but can be both an aggravated felony and CIMT. The federal statute for aggravated felony includes a description of theft or burglary offense "for which the term of imprisonment is at least one year." *See* 8 U.S.C. § 1101(a)(43)(G). Here, the amount stolen is less than $500, which means the punishment cannot be more than 364 days and cannot be an aggravated felony. If the client is charged with an offense that is punishable by more than a year, defense attorneys should ensure that any sentence, including a suspended sentence, is less than one year.

If the conviction was for one year or greater, then you would need to determine whether the state offense was a categorical match for a "theft offense." You would also need to determine whether the offense is a CIMT. To determine whether your client's offense is a CIMT or a theft offense aggravated felony, you will look at case law. The Seventh Circuit has clarified for an offense to be a theft offense or a CIMT involving theft, the elements of the offense must include 1. "Exercise of control over property without the owner's consent" and 2. "Intent to deprive the owner permanently or temporarily of the use and enjoyment of property." *Vaca-Tellez v. Mukasey*, 540 F.3d 665, 670 (7th Cir. 2008).

Sub-step two: Find the conduct punishable by the state statute. The minimum conduct punishable would be found through case law or could be exemplified through your client's case. In this example, the state is punishing your

client for having $200 worth of property known to be stolen. There may be other cases in which the conduct punished is even more *de minimis*.

Sub-step three: Determine whether that conduct would be punishable under the generic definition of the offense. In this sub-step, assess whether the state statute is overbroad when compared to the federal definition. The Seventh Circuit has found conduct under 720 ILCS 5/16-1(a) to be a categorical match for a CIMT. *See Vaca-Tellez*, 540 F.3d at 670. The case law for theft is straightforward because the Seventh Circuit has found 720 ILCS 5/16-1(a) to be a complete categorical match with the generic federal definition. Unfortunately, this means your client will be in danger of deportation if they plead guilty to this offense, unless they were convicted of an offense punishable by less than a year or they are convicted more than five years after entry as a lawful permanent resident.

Note: For CIMT offenses, there is a *de minimis* exception for conduct such as "joyriding." *See Matter of Diaz-Lizarraga,* 26 I&N Dec. 847, 850 (BIA 2016*)*. For more details, see case law and theft chart below.

Step Two: Divisibility

If the state statute is broader than the federal statute there is a second question to ask: is the state statute divisible? A statute that is indivisible, which is to say that it cannot be divided into different charges or offenses, means that the whole statute is either a categorical match or it is not. This is determined by the categorical approach outlined in step one. For some clients, an overbroad statute that is indivisible means their offense is not a ground of deportability even if the particular conduct they were convicted of would be.

Divisibility adds an additional wrinkle to the question of whether a conviction has immigration consequences. If a statute is divisible, the part of the statute that is overbroad may not be the part of the statute that a client was convicted of. When a statute is divisible, the attorney will have to use the modified categorical approach to ascertain whether that part of the statute is a ground of removability, and will not be able to rely on the fact that the statute as a whole is overbroad.

There are a couple of steps to take in order to determine whether the statute is divisible. Divisibility is determined by whether the statute in question delineates different elements or different means. The focus of the attorney then is to ascertain whether the parts of the statute are elements or means (different ways of committing an offense). Offenses that have different elements are divisible, but a single offense that can be committed through different means is not. *See Mathis v. U.S.*, 136 S. Ct. 2243, 2248 (2016). Elements are the "constituent parts" of an offense that a

prosecutor will need to prove whereas means do not need to be agreed upon by the jury in order to sustain a conviction. *Id*. (quoting Black's Law Dictionary 634 (10th ed. 2014)).

To distinguish elements from means, an attorney should look to state law. First, the attorney should look directly at the state statute. A state statute may clearly state what must be charged (and thus must be proved by a prosecutor for a conviction) and what does not need to be charged. *Id*. at 2249. In that case, the parts that must be charged and unanimously agreed upon by the jury are essential elements whereas the parts that do not need to be charged are means. Statutes are not always that clear, so there are alternative ways of assessing whether something is an element or means through the state statute. For example, if the state statute gives "multiple, alternate versions of the crime." then those alternate versions are elements and the statute is divisible. *Descamps v. U.S.*, 133 S. Ct. 2276, 2284 (2013). Additionally, if subsections of the statute receive different punishments, those are elements and thus divisible. *Mathis*, 136 S. Ct. at 2256. Alternatively, if the state statute details illustrative examples, those examples are means and are not divisible. *Id*. Similarly, if there are simply multiple ways to accomplish the one offense, it is not divisible. *Id*. at 2249. If the statute is ambiguous, the attorney should also look to decisions of the Illinois Supreme Court and other case law to flesh out which parts of the statute are elements and which are means. *See Mathis*, 136 S. Ct. at 2256. *See also*, *Parzych v. Garland*, 2 F.4th 1013, 1016 (7th Cir. 2021).

Once in court, if neither the statute nor the case law can distinguish between elements and means, the court can look at the record of conviction to determine what the prosecutor does or does not have to show. *Mathis*, 136 S. Ct. at 2256. *See also Parzych*, 2 F.4th at 1016. The Supreme Court described this look at the record of conviction as a "peek" only to determine whether the statute is divisible. *Mathis*, 136 S. Ct 2257 (quoting *Rendon v. Holder*, 782 F.3d 466, 473). The record of conviction includes only the charging document, a plea agreement, and/or the colloquy between judge and defendant or other court record that establishes the truth of the factual basis of the conviction. *See Shepard v. U.S.*, 125 St. C. 1254, 1263 (2005). The fact that the look into the record of conviction is a "peek" and a final step demonstrates the ultimate value placed on the generic statute rather than the facts at hand. Still, the ability to look into the record of conviction highlights the importance of keeping clients' records of conviction clean.

Reminder: If the whole statute (despite being divisible) is a categorical match, it does not matter that it is divisible. (Consider the example under Step One: the theft statute is likely divisible, but the court has held that the entire statute is a match).

Example:

Your client is convicted of burglary under 720 ILCS 5/19-1(a).[2] The Seventh Circuit, after certification to the Illinois Supreme Court, has already found that this statute is not a burglary offense. *United States v. Glispie*, 978 F.3d 502, 503 (7th Cir. 2020). The question is whether the statute separately matches the generic definition of a "theft offense." The state burglary statute criminalizes entering with an intent to commit a "felony or theft." Entering with intent to commit a theft would be a theft offense, while entering with intent to commit a non-theft felony would not be. The question is whether the statute is divisible.

Elements are the parts of the statute that the prosecution has to prove for conviction. *Mathis*, 136 S. Ct. at 2248. First, you would look to the state law. For burglary, the Seventh Circuit has clarified that the punishment for the alternatives under 720 ILCS 5/19-1 are punished identically. *Parzych*, 2 F.4th at 1017. Illinois courts have held that intent to commit a felony or theft is not an element of a statute, but rather a means. *Id.* at 1018; *see also People v. Alexander*, 546 N.E.2d 1032, 1035 (Ill. App. Ct. 1989); *see also People v. Johnson*, 192 N.E.2d 864, 866 (Ill. 1963).

Because the prosecution only has to prove one element for conviction under the statute, the statute is not divisible as to felony or theft, and thus is overbroad. Your client cannot be removed on these grounds.

Step Three: Modified Categorical Approach

Courts only apply the modified categorical approach if the statute is divisible. It is essentially the same as the categorical approach; however, the comparison between the federal offense and state statute is done for each individual subsection of the statute rather than the entire statute. There is a match if the minimal conduct punishable of the offense under which the client is *charged* is punishable under the generic federal statute. In that case, the offense is deportable.

The modified categorical approach also limits what courts can look at to see what the client is charged with. The goal of the modified categorical approach is still to avoid the facts of the particular case, so the courts only look at the "record of conviction" (including the charging document, a plea agreement, and/or the colloquy between judge and defendant or other court record that establishes the truth of the factual basis of the conviction). *See Shepard*, 125 St. C. at 1263. Importantly, police reports are <u>not</u> included in the "record of conviction," and therefore cannot be considered by

[2] This example is stylized from *Parzych v. Garland*, 2 F.4th 1013 (7th Cir. 2021).

courts under the modified categorical approach. The purpose of limiting which documents the court can look at is to keep the focus on the abstracted conduct rather than on any particularity of the case at hand.

The attorney should use the same assessment of the breadth or narrowness of the subsection that is used for the whole statute under the categorical approach. Thus, if the subsection of the statute is broader than the definition of the generic federal offense, there is still no categorical match and the client is not in danger of deportation. If the subsection is coterminous with or narrower than the definition of the generic federal offense, then it is a match and the client could be deported.

Example:

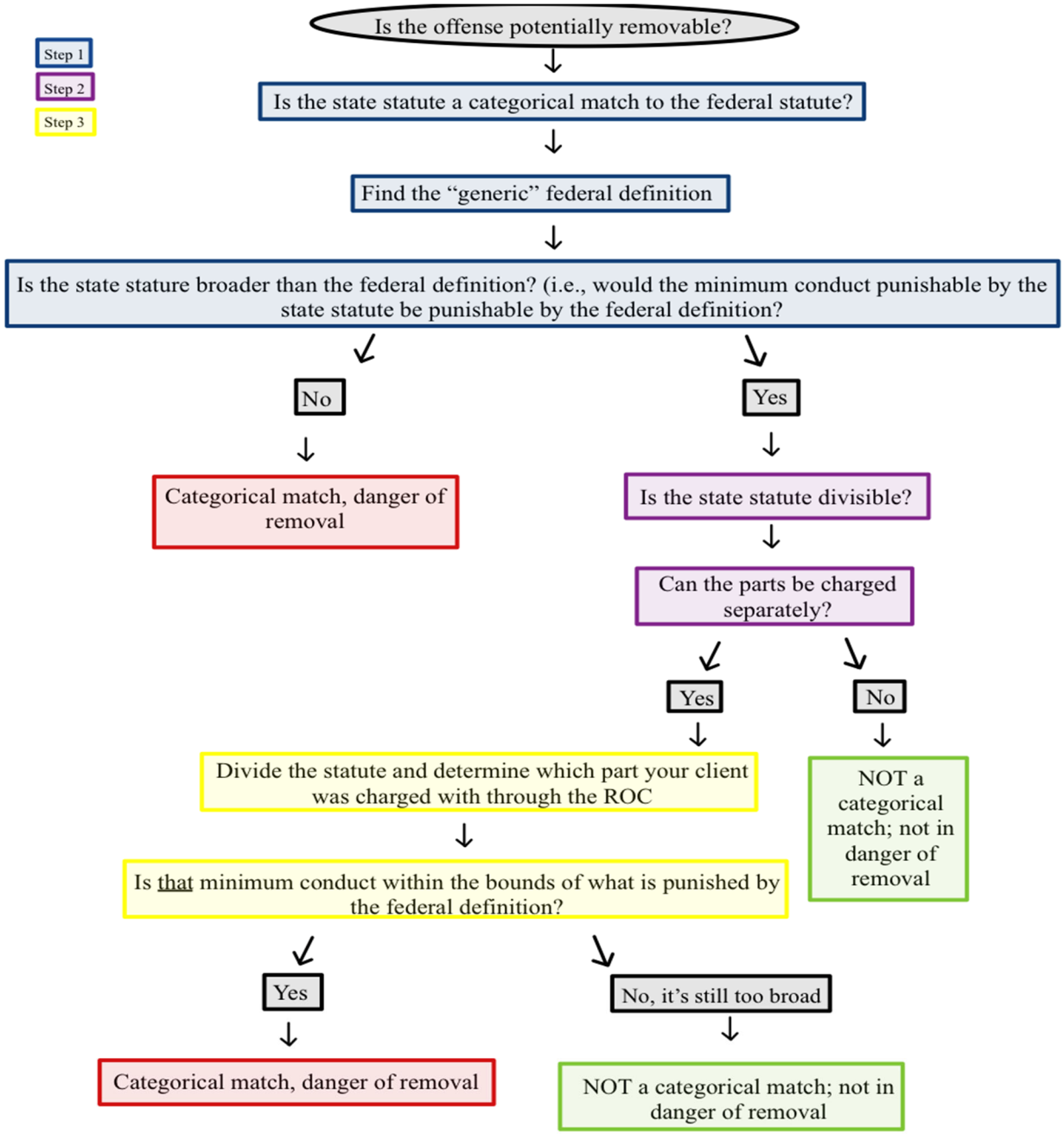
Your client is convicted for possession of a controlled substance under 720 ILCS 570/402(c) for possessing several pills of Xanax.[3] Question: is this a controlled substance offense under the INA? The Illinois state statute under 402 is divisible because the subsections are alternative offenses. There are four subsections ((a) – (d)) and the preamble to the statute actually specifies that each subsection can be charged as a separate offense. Once you have determined that the statute is divisible, you will need to look specifically at the subsection your client was charged under (looking solely at the "record of conviction") and apply the approach from the first step.

First, you need to identify the definition of the potential ground of removability. A state controlled substance offense is considered a controlled substance under the INA, if it is related to a federally controlled substance, as defined by 21 U.S.C. § 802. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II); 8 U.S.C. § 1227(a)(2)(B)(i). *See Mellouli v. Lynch*, 575 U.S. 798 (2015).

Next, you should find the minimum possible conduct punishable by the subsection of state statute that your client was charged under. The text of 720 ILCS 570/402(c) states "Any person who violates this Section with regard to an amount of a controlled substance other than methamphetamine or counterfeit substance not set forth in subsection (a) or (d) is guilty of a Class 4 felony." The statute in turn refers to controlled substances as defined by Schedules I and II. By reviewing the state schedules you determine that they include salvinorin A and salvia divinorum, substances not covered by the federal controlled substances schedules. Because the state statute covers controlled substances not covered by federal law, it is overbroad. Your client is not in danger of removal for having been convicted of a controlled substance offense unless the 402(c) is divisible by the particular substance in the schedules. If and only if the statute is divisible can the court review the record of conviction to determine that he was in fact convicted of possessing Xanax, a federally controlled substance.

[3] This example is stylized after *Najera-Rodriguez v. Barr*, 926 F.3d 343 (7th Cir. 2019).

In order to determine if 402(c) is further divisible you need to ask if the identity of the substance itself is an essential element of the offense or merely a means of committing the offense. Applying the divisibility analysis step by step as outlined in *Mathis*, you determine that neither the text of the statute, state court decisions, nor jury instructions clearly indicate that the particular substance is an element of the offense. *See Najera-Rodriguez v. Barr*, 926 F.3d 343 (7th Cir. 2019). Because the statute is not further divisible, the court cannot apply the modified categorical approach to review the record of conviction and thus cannot consider that your client was actually convicted of a federally controlled substance. Therefore, your client is not removable for a controlled substance offense.


Step 1
Step 2
Step 3
Is the offense potentially removable?
Is the state statute a categorical match to the federal statute?
Find the "generic" federal definition
Is the state stature broader than the federal definition? (i.e., would the minimum conduct punishable by the state statute be punishable by the federal definition?
No
Yes
Categorical match, danger of removal
Is the state statute divisible?
Can the parts be charged separately?
Yes
No
Divide the statute and determine which part your client was charged with through the ROC
NOT a categorical match; not in danger of removal
Is that minimum conduct within the bounds of what is punished by the federal definition?
Yes
No, it's still too broad
Categorical match, danger of removal
NOT a categorical match; not in danger of removal

Tips for Defense Attorneys

Attorneys should be prepared to advise clients on potential immigration consequences. Here are a few best practices that defense attorneys should follow:

1. **Know your client's immigration status and history**
   - Ask your client whether they are a non-citizen. Do not fall prey to stereotypes about who "appears" or "sounds" American. Many non-citizens have been living in the U.S. since they were small children and do not have obvious accents. Many non-citizens are white. Any person, regardless of race, ethnicity or accent, could be a non-citizen, and so attorneys should have a practice of asking every client about their citizenship.
   - If the client does not know their immigration status, ask the client to seek verification from relatives or from public records.
   - If the client is a non-citizen, ask for the client's immigration history to determine what kind of status they have (lawful permanent resident, another legal status, or undocumented). The legal advice may differ depending on the client's immigration status.
2. **Avoid a Conviction that Triggers Removability**
   - Consult the Categories of Removable Crimes Section to familiarize yourself with the types of offenses that may render your client deportable
   - Consult the charts that follow this section to determine if your client is at risk of a conviction under a state law that matches a deportable federal crime
   - After checking the chart, contact someone within your office who specializes in immigration or an outside immigration attorney to work out the specifics of the case at hand.
   - If your client is at risk to be convicted of a deportable crime, plead down to an offense that is not a categorical match. This is particularly important for lawful permanent residents because they may be able to avoid immigration consequences altogether with the right plea. Even if the client is not a lawful permanent resident, you should try to minimize the risk that a conviction will lead to deportation by utilizing the charts.
3. **Avoid Aggravated Felonies**

- Because non-citizens convicted of aggravated felony offenses are ineligible for cancellation of removal and most other forms of relief, defense attorneys should avoid a conviction for an aggravated felony wherever possible. U.S.C. § 1229b(a)(3).
- Many state offenses are only aggravated felonies if the court orders a term of imprisonment of at least one year, regardless of whether any portion of that sentence is suspended. Defense attorneys are advised to negotiate for a shorter sentence length to prevent their client from being rendered deportable on account of a conviction for an aggravated felony
- Even if you cannot avoid a conviction for a deportable offense, plead down to one that does not constitute an aggravated felony to preserve greater possibility of discretionary relief
- Failure to counsel one's client on the immigration consequences of an aggravated felony is likely ineffective assistance of law under *Padilla*.

4. Keep the Record of Conviction "Clean"

- "Record of conviction" (ROC) for immigration purposes is a term of art that signifies the materials courts may use to determine if a conviction "under a nongeneric statute necessarily admitted elements of the generic [deportable] offense." *Shepard v. United States*, 544 U.S. 13, 13 (2005). In other words, the ROC is the evidence courts may use when employing the modified categorical approach.
    - In cases where a defendant pled guilty, the ROC consists of "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." *Id.* at 26.
    - In cases where a defendant was found guilty at trial, the ROC also includes "findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms" as well. *Johnson v. United States*, 559 U.S. 133, 144 (2010).
- Keep facts out of these documents that may worsen the immigration consequences for your client
    - Examples of facts that should be avoided include the presence, possession, or use of a firearm; the identity of the controlled substance; the domestic relationship with the victim; the minor status of the victim; and any actual injury sustained by a minor.

5. Seek Alternative Dispositions

- Explore non-conviction dispositions like pretrial diversion programs, *nolle prosequi*, etc.

Reminder: *Guide contains only informed predictions; individualized analysis must be done in every case.*

- Remember that Alford and nolo *contendere* pleas, sealed and expunged convictions, and diversion programs where a finding of guilty is entered are considered convictions under immigration law.

Quick Reference Chart for Determining Immigration Consequences of Common Illinois Offenses

Homicide Offenses

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
First degree murder, 720 ILCS 5/9-1(a)	(a)(1): Yes (a)(2): Yes (a)(3) (felony murder): Possibly no	(a)(1): Yes (a)(2): Yes (a)(3): Possibly no	N/A	If the victim was a current or former spouse or similarly situated individual, conviction would likely be a CODV.	If client is facing felony murder charges under (a)(3), try to have the record of conviction fail to specify the underlying felony offense.	For clients convicted under (a)(3), it may be argued that felony murder is not a categorical match for any AF category. The statute criminalizes killing that occurs during the commission or attempt of a "forcible felony," defined by 720 ILCS 5/2-8. It almost certainly does not meet the standard for aggravated felony murder under *Matter of M-W-*, 25 I&N Dec. 748 (BIA 2012), which centers on *mens rea* with respect to the act that causes death. The test then is whether all of the enumerated offenses under that statute are matches an AF category. For most of them, the most likely category is "crime of violence" under 8 U.S.C. § 1101(a)(43)(F); *see Matter of Guzman-Polanco*, 26 I&N 713 (BIA 2016) (holding that 18 U.S.C. § 16(a) defines an AF crime of violence. However, the statute contains a catch-all that follows closely the federal definition of a crime of violence under 18 U.S.C. § 16. See elsewhere in this guide for analyses of some of these offenses.

Reminder: *Guide contains only informed predictions; individualized analysis must be done in every case.*

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
Second degree murder, 720 ILCS 5/9-2	(a)(1): Yes (a)(2): Yes	(a)(1): Yes (a)(2): Yes	N/A	If the victim was a current or former spouse or similarly situated individual, conviction would likely be a CODV.		There may be a viable argument that the mitigating factors of both portions of this statute diverge sufficiently from the generic murder offense defined by *M-W-* that they are not a categorical match. However, it is likely that even in this case they are both still an AF crimes of violence.
Involuntary manslaughter and reckless homicide, 720 ILCS 5/9-3(a)	Involuntary manslaughter: Likely yes Reckless homicide: Possibly no	Involuntary manslaughter: Likely yes Reckless homicide: Likely yes	N/A		Try to have the record of conviction state only that client is guilty of a homicide offense under 5/9-3(a) rather than involuntary manslaughter.	A challenge to the general vehicle-related provision of the reckless homicide statute should argue that this offense is distinct from the aggravated felony involving "extreme recklessness" described in *Matter of M-W-*, 25 I&N Dec. 748 (BIA 2012). Since *M-W-* itself involved a homicide involving a vehicle, this suggests the BIA intended for an AF to involve something more than recklessness driving that results in death.

Major Sex Offenses

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
Criminal sexual assault, 720 ILCS 5/11-1.20	(a)(1): Likely yes (a)(2): Possibly no (a)(3): Likely yes (a)(4): Possibly yes	(a)(1): Likely yes (a)(2): Likely yes (a)(3): Likely yes (a)(4): Likely yes	N/A	Since (a)(1) is likely a categorical crime of violence, it is likely a CODV if the victim was a current or former spouse or similarly situated individual. (a)(3)-(4): Likely CAC	For this and all offenses below, an offense that involves the use or threat of force is very likely an AF.	See comment below for § 11-1.50(a)(2).
Aggravated criminal sexual assault, 720 ILCS 5/11-1.30(a)	Underlying offense stems from 1.20(a)(1), (3): Likely yes Underlying offense stems from 1.20(a)(2) or (4), and aggravating factor stems from 1.30(a)(1)-(3), (9)-(10): Likely yes Underlying offense stems from 1.20(a)(2) or	Likely yes	Aggravating factor under 1.30(a)(7): not likely a controlled substance offense because of overbreadth of IL drug schedules. *See Najera-Rodriguez v. Barr*, 926F.3d 343 (7th Cir. 2019).	If the underlying offense stems from 1.20(a)(1), and/or the aggravating factor stems from 1.30(1)-(2), (9)-(10), and the victim was a current or former spouse or similarly situated individual, then this is likely a CODV.	Avoid specifying which subsection is at issue to avoid an AF, unless 1.20(a)(2) clearly applies to your client's case. In this case, aim to plead down to criminal sexual assault under 1.20(b).	See analysis below of aggravating factors for 11-1.60(a). If the underlying offense of 1.20(a)(2) or (4) is not an AF, the aggravating factor under 1.30(a)(8) does not likely make the offense an AF, since the fact of being "armed with a firearm" does not appear to make the offense a categorical crime of violence under 18 U.S.C. § 16(a).

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
	(4), and aggravating factor stems from 1.30(a)(4)-(7): Likely yes Underlying offense stems from 1.20(a)(2) or (4), and aggravating factor stems from 1.30(a)(8): Likely yes		Aggravating factors under 1.30(a)(8)-(10): not likely a firearms offense because IL firearms definition is overbroad. *See Rodriguez-Contreras v. Sessions*, 873 F.3d 579 (7th Cir. 2017).			
Aggravated criminal sexual assault, 720 ILCS 5/11-1.30(b)-(c)	(b): Likely yes (c): Likely no	(b): Likely yes (c): Possibly no	N/A	(b): Likely CAC (c): N/A	Try to have the record of conviction not specify which subsection is at issue if (b) is at issue.	
Predatory criminal sexual assault of a child, 720 ILCS 5/11-1.40	Likely yes	Likely yes	N/A	Likely CAC		The sexual contact and age range requirements are likely sufficient for the individual to be aware that the victim is a minor for purposes of a CIMT. *See*

Reminder: *Guide contains only informed predictions; individualized analysis must be done in every case.*

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
						Matter of Silva-Trevino, 26 I&N Dec. 826, 834-35 (BIA 2016).
Criminal sexual abuse, 720 ILCS 11-1.50(a)	(a)(1): Likely yes (a)(2): Likely no	(a)(1): Likely yes (a)(2): Likely yes	N/A	Since 11-1.50(a)(1) is likely a categorical crime of violence, it is likely a CODV if the victim was a current or former spouse or similarly situated individual.		11-1.50(a)(2)'s "knowing consent" element likely does not fall within the generic definition of "rape" because it departs from the traditional common-law understanding of consent. *See Keeley v. Whitaker*, 910 F.3d 878, 882-884 (6th Cir. 2018). Nor does it incorporate the traditional common-law element of "force or fear." *See Castro-Baez v. Reno*, 217 F.3d 1057, 1059 (9th Cir. 2000) (*quoting* Black's Law Dictionary (6th Ed. 1990)). For similar reasons, it most likely falls outside the statutory definition of a "crime of violence." *See* 18 U.S.C. § 16; *Matter of Guzman-Polanco*, 26 I&N 713 (BIA 2016) (holding that 18 U.S.C. § 16(a) defines an AF crime of violence); *Matter of Francisco-Alonzo*, 26 I&N Dec. 594 (BIA 2015). Similarly, the main issue to litigate in the case of 11-1.50(a)(2) is whether sexual conduct with a person the offender "knows … the victim is unable to understand the nature of the act or is unable to give knowing consent" is

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
						morally turpitudinous. Circuit law appears to follow the BIA's decision in *Matter in R-*, 6 I&N Dec. 444 (BIA 1954), which distinguished sexual crimes between consenting adults (e.g. adultery) from morally turpitudinous offenses that include the element of lack of consent or the use of force. *See Pinzon v. Gonzales*, 175 Fed.Appx. 911, 913-914 (9th Cir. 2006); *Maghsoudi v. I.N.S.*, 181 F.3d 8, 14-15 (1st Cir. 1999).
Criminal sexual abuse, 720 ILCS 11-1.50(b)-(c)	No. *See Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017).	Likely no	N/A	Likely CAC. *See Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 512-513 (BIA 2008); *Matter of Aguilar-Barajas*, 28 I&N Dec. 354 (BIA 2021).	If facing aggravated CSA charges in a case involving a minor victim, aim to plead down to CSA under these provisions to avoid an AF.	The Seventh Circuit does not have any case law discussing the BIA's standard in *Velazquez-Herrera*, but Courts of Appeals generally agree that sexual conduct with a child causes "harm" to a child under *Matter of Velazquez-Herrera*, and in fact consider many instances of less harmful conduct to meet this standard. *See, e.g. Garcia v. Barr*, 969 F.3d 129 (5th Cir. 2020) (rejecting argument that sexual conduct with a child is not harm under the INA); *see also Matthews v. Barr*, 927 F.3d 606 (2d Cir. 2019) (child endangerment statute criminalizing conduct "likely" to cause harm is a categorical match);

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
						Hackshaw v. Attorney General of U.S., 458 Fed.Appx 137 (3d Cir. 2012) (statute criminalizing exposure of genitals to a child is a categorical match). Because the minimum conduct punishable includes 16-year-old victim, and many states do not criminalize this conduct, there is no agreement as a society that this is morally reprehensible conduct/conduct that should be criminally punished. *See Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017).
Aggravated criminal sexual abuse, 720 ILCS 11-1.60(a)	CSA charge stems from 11-1.50(a)(1): Likely yes CSA charge stems from §§ 11-1.50(a)(2), (b)-(c) and aggravating factor stems from §§ 11-1.60(a)(1), (2), or (5): Likely yes	CSA charge stems from 11-1.50(a)(1): Likely yes Aggravating factor stems from 11-1.60(a)(1), (2), (7): Likely yes CSA charge stems from 11-1.50(a)(2), and aggravating factor	N/A	Likely a CODV if charge stems from 11-1.50(a)(1) and victim was a current or former spouse or similarly situated individual.	Try to have the record of conviction not specify which aggravating factor is at issue.	Aggravating factors 11-1.60(a)(3)-(4), like 11-1.60(e), likely fall outside the rape category of aggravated felonies because they are beyond the scope of the common-law notion of consent (see above). Aggravating factors 11-1.60(a)(6)-(7) are likely too broad to constitute the use or threat of force under the AF analysis. Aggravating factor 11-1.60(a)(5), is likely an AF crime of violence under 18 U.S.C. § 16(a). It may be necessary to argue that the risk of force against another

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
	CSA charge stems from 11-1.50(a)(2), (b)-(c), and aggravating factor stems from 11-1.60(a)(3)-(4), or (6)-(7): Likely no	stems from 11-1.60(a)(3), (4), (5), (6): Possibly no CSA charge stems from 11-1.50(b)-(c), and aggravating factor stems from 11-1.60(a)(3), (4), (5), (6): Possibly no				person is insufficiently substantial in the cases of 11-1.60(a)(6)-(7). In contrast, the CIMT analysis is arguably broader in scope, because it specifically includes the element of consent. 11-1.60(a)(7) likely qualifies as a CIMT. However, 11-1.60(a)(5) may not qualify as "force" under this analysis.

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
Aggravated criminal sexual abuse, 720 ILCS 11-1.60(b)-(f)	(b): Likely yes (c): Likely yes (d): No. *See Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017). (e): Likely no (f): Possibly yes	(b): Yes. *See United States v. Valenzuela*, 931 F.3d 605 (7th Cir. 2019) (c)(1)(i): Possibly no (c)(2)(i): Likely yes (c)(1)(ii), (2)(ii): Likely yes (d): No (e): Possibly no (f): Likely yes	N/A	(b)-(d), (f): Likely CAC. *See Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 512-513 (BIA 2008); *Matter of Aguilar-Barajas*, 28 I&N Dec. 354 (BIA 2021). (b), (f): Likely not CDV (e): N/A	Try to have the record of conviction not specify which subsection is at issue, except for subsections (d)-(e).	The Seventh Circuit has stated that it takes a "broad view" of the "sexual abuse of a minor" AF category when the age of the victim is not the only factor in the criminal statute. *See Gaiskov v. Holder*, 567 F.3d 832, 836 (7th Cir. 2009); *Correa-Diaz v. Sessions*, 881 F.3d 525, 529 (7th Cir. 2018). The court's interpretation of *In re Rodriguez-Rodriguez*, 22 I&N Dec 991, 993-996 (BIA 1999) likely includes § 11-1.60(b) because this provision likely encompasses "incest," but § 11-1.60(f) is a less clear-cut case. *Esquivel-Quintana* leaves open the possibility that some statutes that specify a particular age difference between offender and victim may be categorically not aggravated felonies. The Seventh Circuit in *Correa-Diaz*, however, suggested that it is not sympathetic to this argument.

Prostitution Offenses

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
Prostitution, 720 ILCS 5/11-14	No. *See* 8 U.S.C. § 1101(a)(43)(K)(i) (requires "owning, controlling, managing, or supervising of a prostitution business").	Yes	N/A	Prostitution: Likely no	Avoid this offense if possible. *See Matter of W-*, 4 I&N Dec. 401, 402 (BIA 1951) ("It is well established that the crime of practicing prostitution involves moral turpitude.").	To avoid inadmissibility for prostitution under section 212(a)(2)(D)(ii), argue that since 720 ILCS 5/11-14 covers acts in addition to "sexual intercourse" it is overbroad under *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549, 549 (BIA 2008). However, the BIA recently broadened the definition of "prostitution" under 101(a)(43)(K)(i). *See Matter of Ding*, 27 I&N Dec. 295, 299 (BIA 2018).
Solicitation of a sexual act, 720 ILCS 5/11-14.1	No. *See* 8 U.S.C. § 1101(a)(43)(K)(i) (requires "owning, controlling, managing, or supervising of a prostitution business").	Yes	N/A	Prostitution: Likely no	Avoid this offense if possible. *See In Re: Chun Ok Eifert A.K.A. Chun O. Crispino*, No. : AXXX XX6 958 - PHI, 2017 WL 4118941, at *3 (DCBABR June 16, 2017) ("Solicitation of prostitution categorically involves moral turpitude.").	*See* above. In addition to limiting the definition of prostitution to "sexual intercourse," *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549, 549 (BIA 2008) also held that "A single act of soliciting prostitution on one's own behalf does not fall within section 212(a)(2)(D)(ii))." *Id.*

Child Pornography, Public Indecency and Disorderly Conduct

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
Child pornography, 720 ILCS 5/11-20.1	Likely no	Yes (all)	No	CAC: Likely yes		Argue that this is not an aggravated felony under 8 U.S.C. §1101(a)(43)(A) because it does not involve performing acts upon a child. *See Mero v. Barr,* 957 F.3d 1021 (9th Cir 2020) and because Illinois defines a minor as someone as younger than 18. Additionally, ILCS 5/11-20.1 also applies to "any person with a severe or profound intellectual disability." Under the categorical approach, this likely renders it overbroad for both AF offenses relating to child pornography and crimes against children. *See In Re: Miguel Alexander Franco-Lara*, No. : AXXX XX8 474 - EL, 2016 WL 6137082, at *2 (DCBABR Aug. 4, 2016). ("An 'aggravated felony' under section 101(a)(43)(I) of the Act, is defined as 'an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography).' A conviction in violation of any of the referenced statutes of Title 18, necessarily includes an 'actual minor' as a required substantive element of the offense."); *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 516 (BIA 2008) (finding that because a Washington assault statute did not

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
						"contain any element requiring proof that an assault be committed against a person under 18 years old . . . the offense did not correspond categorically to the generic definition of a "crime of child abuse" that [the BIA] set forth").
Public Indecency, 720 ILCS 5/11-30	No	(a)(1): Likely no – subsection lacks a mens rea requirement (a)(2): Likely yes	No	No	Plead to (a)(1)	For (a)(1), argue that the subsection lacks the needed mens rea. *See Matter of Medina*, 26 I. & N. Dec. 79, 82 (BIA 2013) ("We have long held that indecent exposure is not inherently turpitudinous in the absence of lewd or lascivious intent").
Disorderly conduct, 720 ILCS 5/26-1	(a)(1): No – class C misdemeanor (max 30 days) (a)(2): Possibly yes, if loss to public authority exceeds $10,000 (a)(3): Possibly yes, if loss to public authority exceeds $10,000	(a)(1): Likely no (a) (2) Possibly yes; knowing false alarm to public authority (a) (3) Possibly yes; knowing false alarm to public authority	No	No	Plead to less than $10,000 in losses	For the false alarm/reporting offenses, argue that they are distinguished from *Matter of Jurado-Delgado,* 24 I&N Dec. 29 (BIA 2006) because they do not require intent to disrupt public duties and are therefore not CIMTs. *See Flores-Molina v. Sessions*, 850 F.3d 1150, 1171 (10th Cir. 2017) (holding that a similar false reporting crime in Colorado was not a CIMT, and noting similar decisions in several other circuits); *cf*. *Arias v. Lynch,* 834 F.3d 823, 829 (7th Cir. 2016) ("A rule that all

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
	(a)(3.5): Possibly yes, if loss to public authority exceeds $10,000 (a)(4): Possibly yes, if loss to public authority exceeds $10,000 (a)(5): No – class A misdemeanor (max 364 days) (a)(6): Possibly yes, if loss to public authority exceeds $10,000 (a)(7): Possibly yes, if loss to public authority exceeds $10,000 (a)(8) No; class B misdemeanor (max sentence 180 days) (a)(9) Possibly yes, if loss to	(a)(3.5): Possibly yes; knowing false alarm to public authority (a)(4): Possibly yes; knowing false alarm to public authority (a)(5): Possibly yes; knowing false alarm to public authority (a)(6): Possibly yes; knowing false alarm to public authority (a)(7); Possibly yes; knowing false report to public authority (a)(8) Possibly yes; knowing false alarm to public authority (a)(9) Possibly yes; knowing				crimes that involve any element of deception categorically involve moral turpitude would produce results at odds with the accepted definition of moral turpitude as conduct that is 'inherently base, vile, or depraved.' At the same time, there is significant precedent indicating that deceptive conduct is morally turpitudinous.”).

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	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
	public authority exceeds $10,000 (a)(10)) No, class B misdemeanor (max sentence 180 days) (a)(11): No, class A misdemeanor (max 364 days); unless third or subsequent offence, then possibly, if loss to public authority exceeds $10,000 (a)(12) First offense: No, "Business Offense"; subsequent offenses, possibly yes, if loss to public authority exceeds $10,000	false request to public authority (a)(10) Possibly yes; knowing false report to public authority (a)(11) Likely not (a)(12) No				

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Assault Offenses

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
Assault, 720 ILCS 5/12-1	No. *See Matter of Guzman-Polanco*, 26 I&N Dec. 713 (BIA 2016).	No. *See In re Sejas*, 24 I&N Dec. 236 (BIA 2007); *Garcia-Martinez v. Barr*, 921 F.3d 674, 676 (7th Cir. 2019) ("there is near universal agreement that simple assault is not [a CIMT].").	N/A	CODV: Likely no. However, assault based on (a)(1) battery could be a CODV	Plead down to simple assault under this provision if possible. Avoid references to threats of causing bodily harm in the record of conviction.	
Aggravated assault, 720 ILCS 5/12-2(a) (Offense based on location of conduct)	No	No	N/A	CODV: Likely no	Plead down to simple assault if possible. Avoid references to threats of causing bodily harm in the record of conviction. If client is charged under § 12-2(a), make sure this is stated in the record of conviction. Avoid sentences of more than 364 days imprisonment.	Sections of § 12-2 that are not categorical AF crimes of violence should not be subject to the CODV exception to the categorical approach. However, there is Seventh Circuit caselaw outside of the immigration context that classifies § 12-2 as a whole as a crime of violence under federal sentencing guidelines, U.S.S.G. § 4B1.2(a), which has an almost identical definition to crime of violence under 18 U.S.C. § 16. *See United States v. Vesey*, 966 F.3d 694 (7th Cir. 2020). If a client is charged as having

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
						committed a CODV based on the specific circumstances of the aggravated assault offense, practitioners should argue that *Vesey* does not apply in the immigration context, and that only divisible provisions of § 12-2 that are categorical AF crimes of violence are subject to case-specific CODV analysis.
Aggravated assault, 720 ILCS 5/12-2(b) (Offense based on status of victim)	(b)(1)-(4), (7)-(9): No (b)(5), (6), (10), and (4) with weapons enhancement: Likely yes	No, so long as battery is based on (a)(2). *See Garcia-Meza v. Mukasey*, 516 F.3d 535 (7th Cir. 2008).	No	CODV: Likely no	Plead down to simple assault if possible. Avoid sentences of more than 364 days imprisonment	*See* CODV advice above.
Aggravated assault, 720 ILCS 5/12-2(c) (Offense based on use of firearm, device, or motor vehicle)	(c)(1), (4), (9): No (c)(2), (5), (6), (7), (8): Likely yes. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 819, 824 (BIA 2016).	(c)(1)-(3), (6): Likely yes. *See Matter of Medina*, 15 I&N Dec. 611 (BIA 1976). (c)(4), (9): Likely no	No. Definition of "firearm" under Illinois law is overbroad and indivisible. *See Rodriguez Contreras v. Sessions*, 873	If the victim was a current or former spouse or similarly situated individual, conviction may be considered a CODV. If client is convicted under sections that	Plead down to simple assault if possible. Unless your client's case clearly fits the elements of (c)(4) or (9), try to have the record of conviction fail to specify which sub-section of (c) applies.	*See* CODV advice above. Absent arguments against *Vesey*, a felony aggravated assault is likely going to be considered a COV unless it is linked to the offensive touching subsection of IL battery. Otherwise, it's clear that the (a)(1) causes bodily harm subsection of battery is sufficient for a COV in other contexts. *See De Leon*

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
		(c)(5): Likely yes. *See Coquico v. Lynch*, 789 F.3d 1049 (9th Cir. 2015). (c)(7)-(8): Likely no	F.3d 579 (7th Cir. 2017)	qualify as an AF, then the conviction would likely be considered a CODV in this circumstance. All other sections: Likely no.	Avoid sentences of more than 364 days imprisonment.	*Castellanos v. Holder,* 652 F.3d 762 (7th Cir. 2016); *LaGuerre v. Mukasey*, 526 F.3d 1037 (7th Cir. 2008).

Battery Offenses

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
Battery, 720 ILCS 5/12-3	No	(a)(1): Yes (a)(2): No. *See Garcia-Meza v. Mukasey*, 516 F.3d 535, 537 (7th Cir. 2008)	N/A	N/A	Plead to (a)(2) instead (a)(1) to avoid a CIMT. Though neither provision of § 5/12-3(a) is an aggravated felony, if a client is facing charges of aggravated and/or domestic battery under the provisions below, it would be advantageous to plead to (a)(2).	The Seventh Circuit's interpretation of what constitutes a CIMT in this context differs slightly from the BIA's approach. It may be possible to argue that by including conduct that results in mere "bodily injury," the Seventh Circuit improperly stretches the CIMT category too far beyond the requirement that there be "*intentional* infliction of *serious* bodily injury." *In re Sejas*, 24 I&N Dec. 236, 237 (BIA 2007) (internal citation omitted).
Aggravated battery, 720 ILCS 5/12-3.05(a) (Offense based on injury)	(a)(1)-(5): Likely yes. S*ee De Leon Castellanos v. Holder*, 652 F.3d 762, 765-67 (7th Cir. 2011) (a)(5): Possibly no	(a)(1)-(5): Likely yes	N/A	If the victim was a current or former spouse or similarly situated individual, conviction may be considered a CODV.	Plead down to 5/12-3(a)(2).	*Guzman-Polanco* recognizes a circuit split on whether a statute that allows for conviction when bodily injury is caused by "indirect force" is categorically a crime of violence aggravated felony. *Matter of Guzman-Polanco*, 26 I&N Dec. 806, 807 (BIA 2016). The Seventh Circuit appears to take the position that any battery offense that causes bodily harm is a crime of violence. Practitioners should argue that §§ 5/12-3.05(a)(1)-(4) are not aggravated felonies under other circuits' approaches. *See Whyte v. Lynch*, 807 F.3d 463, 469 (1st Cir. 2015); *United States v. Torres-Miguel*, 701 F.3d 165, 168-69 (4th Cir. 2012); *United States v.*

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	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
						Cruz-Rodriguez, 625 F.3d 274, 276 (5th Cir. 2010).
Aggravated battery, 720 ILCS 5/12-3.05(b) (Offense based on injury to a child or person with an intellectual disability)	(b)(1)-(2): Likely yes	(b)(1)-(2): Likely yes	N/A	(b)(1)-(2): Likely CAC. *See Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 512-513 (BIA 2008).	Plead down to 5/12-3(a)(2). Avoid a 365-day sentence.	For cases involving charges under § 5/12-3.05(b)(2), see above considerations regarding the Seventh Circuit's treatment of battery involving mere "bodily harm," as well as the possibility of causing harm by "indirect" means.
Aggravated battery, 720 ILCS 5/12-3.05(c) (Offense based on location of conduct)	Underlying battery conduct stems from § 5/12-3(a)(1): Likely yes Underlying battery conduct stems from § 5/12-3(a)(2): Likely no	Underlying battery conduct stems from § 5/12-3(a)(1): Likely yes Underlying battery conduct stems from § 5/12-3(a)(2): Likely no	N/A	If the underlying battery conduct stems from § 5/12-3(a)(1), and the victim was a current or former spouse or similarly situated individual, conviction is likely a CODV.	Plead down to 5/12-3(a)(2). If underlying battery conduct arises under § 5/12-3(a)(1), have the record of conviction fail to state charge arises under § 5/12-3(a)(1) or (2). Avoid a 365-day sentence.	A case where a client was convicted of aggravated battery under § 5/12-3.05(c) would be a good opportunity to challenge Seventh Circuit case law characterizing any offense that requires inflicting "bodily harm," no matter how slight and by no matter what means, as both an AF and a CIMT.
Aggravated battery, 720 ILCS 5/12-3.05(d) (Offense based on status of victim)	(d)(1)-(12), where underlying battery conduct stems from § 5/12-3(a)(1): Likely yes (d)(1)-(12), where underlying battery conduct stems	(d)(1)-(12), where underlying battery conduct stems from § 5/12-3(a)(1): Likely yes (d)(1)-(12), where underlying battery conduct stems	N/A	If the underlying battery conduct stems from § 5/12-3(a)(1), and the victim was a current or former spouse or similarly situated individual, conviction may be	If underlying battery conduct arises under § 5/12-3(a)(1), have the record of conviction fail to state charge arises under § 5/12-3(a)(1) or (2).	

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	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
	from § 5/12-3(a)(2): Likely no	from § 5/12-3(a)(2): No. See Garcia-Meza v. Mukasey, 516 F.3d 535 (7th Cir. 2008)		considered a CODV.		
Aggravated battery, 720 ILCS 5/12-3.05(e) (Offense based on use of a firearm)	(e)(1)-(8): Likely yes	(e)(1)-(8): Likely yes	(e)(1)-(8): No Firearm Offense. *See Rodriguez-Contreras v. Sessions*, 873 F.3d 579 (7th Cir. 2017).	If the victim was a current or former spouse or similarly situated individual, conviction is likely a CODV.	Plead down to simple battery if possible. Avoid a 365-day sentence.	
Aggravated battery, 720 ILCS 5/12-3.05(f) (Offense based on use of a weapon or device)	(f)(1)-(4), where underlying battery stems from § 5/12-3(a)(1): Likely yes (f)(1), where underlying battery stems from § 5/12-3(a)(2): Likely yes (f)(2), (3), (4), where underlying battery stems from § 5/12-3(a)(2): Likely no	(f)(1)-(4), where underlying battery stems from § 5/12-3(a)(1): Likely yes (f)(1), where underlying battery stems from § 5/12-3(a)(2): Likely yes (f)(2), (3), (4), where underlying battery stems from § 5/12-3(a)(2): Likely no	N/A	If the victim was a current or former spouse or similarly situated individual, conviction may be considered a CODV, except in cases of (f)(2) or (4) where underlying battery stems from § 5/12-3(a)(2).	Have the record reflect that the charge arises out of 720 ILCS 5/12-3(a) (2).	

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	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
Aggravated battery, 720 ILCS 5/12-3.05(g) (Offense based on certain conduct)	(g)(1): Likely yes (g)(2)-(3), where underlying battery stems from § 5/12-3(a)(1): Likely yes (g)(2)-(3), where underlying battery stems from § 5/12-3(a)(2): Likely no	(g)(1): Likely yes (g)(2)-(3), where underlying battery stems from § 5/12-3(a)(1): Likely yes (g)(2)-(3), where underlying battery stems from § 5/12-3(a)(2): Likely no	(g)(1): Likely not Controlled Substance Offenses. *See Najera-Rodriguez v. Barr*, 926 F.3d 343 (7th Cir. 2019).	If the underlying battery conduct stems from § 5/12-3(a)(1), and the victim was a current or former spouse or similarly situated individual, conviction is likely a CODV.	Have the record reflect that the charge arises out of 720 ILCS 5/12-3(a)(2).	§ 5/12-3.05(g)(2) does not require that the victim experience bodily harm, only that the offender administer certain substances. For only some of the substances listed does the statute require that they be "intended to cause physical injury if eaten." This provision is likely not divisible between two distinct crimes, and therefore does not categorically require an intent to cause bodily harm. Even if the statute is divisible, it may be possible to prevail on the argument that even under Seventh Circuit case law, intent to cause bodily harm is not enough to constitute a crime of violence if there is no requirement that the harm actually occur.
Domestic battery, 720 ILCS 5/12-3.2	(a)(1): Yes, if sentence of a year or more. *See LaGuerre v. Mukasey*, 526 F.3d 1037 (7th Cir. 2008). (a)(2): No. *See De Leon Castellanos v. Holder*, 652 F.3d 762, 766 (7th Cir. 2011) ("Battery under section	(a)(1): Yes (a)(2): Likely no	N/A	(a)(1): Yes CODV (a)(2): No CODV Sentencing enhancement under (c): Likely not CAC (likely does not require the necessary	Plead down to 5/12-3.2(a)(2).	*LaGuerre* holds that § 5/12-3.2(a)(1) is an aggravated felony, but the defendant in that case had a prior domestic battery conviction and was sentenced to two years. If a client was convicted under § (a)(1) without any of the sentencing enhancements listed in § § 5/12-3.2(b), then the offense is a Class A Misdemeanor punishable by only up to 364 days, and therefore not an AF COV, but could still be a CODV.

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
	5/12-3.2(a)(2) may be offensive, but it does not require violent physical force as an element").			*mens rea* or harm to child under *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008))		
Aggravated domestic battery, 720 ILCS 5/12-3.3	(a): Likely yes (a-5): Likely yes	(a): Likely yes (a-5): Likely Yes	N/A	(a): Yes CODV (a-5): Yes CODV		

Violations of Protection Orders

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
Violation of an order of protection, 720 ILCS 5/12-3.4	(a)(1)(i)-(iii): Likely no	Likely no	N/A	Likely yes as violators of protection orders	For (a)(1)(i)-(ii), Have record of conviction specify if client's conviction stems from a violation of an order issued under 750 ILCS § 60/214(b)(2).	The Seventh Circuit held in *Garcia-Hernandez* that the categorical approach does not apply to the protective order category of deportability under 8 U.S.C. § 1227(a)(2)(E)(ii). This means that the relevant inquiry is whether "the court determin[ed]" the alien's conduct violated § 237(a)(2)(E)(ii). *Garcia Hernandez*, 847 F.3d at 872. To answer this question, the immigration court looks at the relevant portion of the protective order, not the statute, and asks whether that portion "involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued." 8 U.S.C. § 1227(a)(2)(E)(ii). *See also In re Strydom*, 25 I&N Dec. 507 (BIA 2011); *Matter of Obshatko*, 27 I&N Dec. 173 (BIA 2017).

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
Violation of a civil no contact order, 720 ILCS 5/12-3.8	(a)(1)(A)-(B): Likely no	(a)(1)(A)-(B): Likely no	N/A	Possibly yes a violators of protection orders, if the purpose of the order tis to protect against violence, harassment, or injury.	If the protective order was issued for a reason other than to prevent against violence, harassment, or injury, have this stated in the record of conviction.	See above.

Offenses Involving Harm to Children

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
Endangering the life or health of a child, 720 ILCS 5/12C-5	(a)(1): No, unless it is charged as a class 3 felony for causing the death of a child (a)(2) No	(a)(1): Yes (a)(2) Possibly yes	N/A	(a)(1): Yes as a CAC (a)(2) Possibly yes as CAC		(a)(2) Argue overbreadth: Leaving two children (ages 1 and 2) alone in a car with the engine running, windows up, and doors locked while going in a store for 3-6 minutes was sufficient for a conviction. *See People v. Gibson*, 2020 IL App (5th) 170287-U, ¶ 5.
Child abandonment, 720 ILCS 5/12C-10	No	Possibly yes	N/A	Likely no as a CAC		
Contributing to the dependency and neglect of a minor, 720 ILCS 5/12C-25	No (Class A misdemeanor)	(a)(1)-(a)(3): Possibly no	N/A	Possibly yes as a CAC	Attempt to leave the record vague if result to the child is more problematic. Attempt to specify (a)(3) if possible, otherwise do not specify.	Argue overbreadth: The statutory definition of "dependent and neglected minor" includes "any child who while under the age of 10 years is found . . . singing or playing any musical instrument for gain upon the street or giving any public entertainments or accompanies or is used in aid of any person so doing."

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
Contributing to the delinquency or criminal delinquency of a minor, 720 ILCS 5/12C-30	(a): No (Class A misdemeanor) (b): Possibly yes (if the predicate crime falls into a 8 U.S.C. § 1101(a)(43) aggravated felony category)	(a) & (b): Likely yes, if the predicate crime is a CIMT	(a): Likely no (b): Possibly yes, if the predicate crime is a controlled substance/ firearm offence	(a): Likely no (b): Possibly yes, if the predicate crime involves domestic violence/crime against children/ prostitution	Try to plead to a predicate offense that is not a CIMT or aggravated felony.	If the record is vague, argue overbreadth

Offenses Against Property

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
Theft, 720 ILCS 5/16-1	Yes (if sentence is a year or more)	(a)(1): Likely yes (a)(2): Likely yes (a)(3): Likely yes (a)(4): Possibly no (a)(5): Possibly no	N/A	N/A	Plead to (a)(4) as there are some arguments that it is neither an AF nor a CIMT.	The Seventh Circuit has indicated that it interprets all conduct under (a) to be a categorical match for the generic theft offense. See *Vaca-Tellez v. Mukasey*, 540 F.3d 665, 670 (7th Cir. 2008). However, the Seventh Circuit's definition may go too far by extending this category to cover acts done with intent to deprive the victim temporarily of their property. While the BIA has treated as aggravated felonies theft offenses where the offender intended to deprive the owner of property in a way that "is less than total or permanent," it also has clarified that this aggravated felony category is not meant to include takings that "entail a *de minimis* deprivation of ownership interests." *Matter of V-Z-S-*, 22 I&N Dec. 1338, 1346 (BIA 2000). Similarly, in the CIMT context, there is also a de minimis exception for statutes that include conduct such as "joyriding." *See Matter of Jurado–Delgado,* 24 I&N Dec. 29, 33 (BIA 2006); *Matter of Diaz-Lizarraga,* 26 I&N Dec. 847 (BIA 2016); *Matter of P,* 2 I&N Dec. 887 (BIA 1947).

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	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
						Both AF and CIMT standards also exclude conduct done with a mere "reason to believe" the property was stolen. *Matter of Deang*, 27 I&N Dec. 57, 62-3 (BIA 2017); *Matter of Silva-Trevino*, 26 I&N Dec. 826, 834 (BIA 2016). Practitioners should argue that these theft offenses include de minimis temporary takings of property. In cases involving (a)(4) or (5), argue that the practitioners should argue statutes are overbroad because they criminalize obtaining property with a mere "reason to believe" the property is stolen.
Theft of labor or services or use of property, 720 ILCS 5/16-3	(a): No (b): Possibly no (c): No (c): Possibly no	(a): Likely no (b): Possibly no (c): Likely no (c): Possibly no	N/A	N/A	Plead to a misdemeanor under (a) or (c), preferably with a sentence of no more than 180 days.	At first glance, (b) appears to meet the elements of the Seventh Circuit's generic definition of aggravated felony theft. *See Vaca-Tellez v. Mukasey*, 540 F.3d 665, 670 (7th Cir. 2008). However, there is an argument that this subsection includes de minimis temporary takings of property: i.e. the late return of rented property. The same argument applies to (c) where it is classified as a felony due to the value of library material at issue, as

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
						well as both offenses in the CIMT context.
Retail theft, 720 ILCS 5/16-25	(a)(1)-(8); (b): Yes, if sentence is more than 1 year	(a)(1)-(8); (b): Yes	N/A	N/A	Plead to a misdemeanor with a sentence of no more than 180 days.	Note that (a)(1) criminalizes certain conduct either "with the intention of *retaining* such merchandise" or "with the intention of *depriving* the merchant *permanently* of the possession, use or benefit of such merchandise." (emphasis added). "Retaining" does not appear to have a statutory definition. There may be arguments that it is overbroad for purposes of AF and CIMT as it may punish conduct that involves less than "depriving permanently" and does not appear to categorically require a substantial erosion of the owner's rights in the property. *See Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 853-53 (BIA 2016).
Burglary, 720 ILCS 5/19-1	No. *See Parzych v. Garland*, No. 20-2317, 2021 WL 2644221 (7th Cir. June 28, 2021) (holding that IL burglary is not divisible and	No. *See Parzych v. Garland*, No. 20-2317, 2021 WL 2644221 (7th Cir. June 28, 2021) (holding that IL burglary is not divisible and	N/A	N/A		The Seventh Circuit recently decided *Parzych v Garland* finding that IL burglary is neither an attempt theft aggravated felony nor a CIMT because the statute is not visible as to whether the defendant intended to commit a theft or any other felony. This case overruled prior Seventh Circuit

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
	thus not an AF under the categorical approach).	thus not a CIMT under the categorical approach).				precedent in *Solorzano-Patlan v. I.N.S.*, 207 F.3d 869, 875 (7th Cir. 2000) and *Dominguez-Pulido v. Lynch*, 821 F.3d 837, 843 (7th Cir. 2016), which had held respectively held that IL burglary was an attempt theft AF and CIMT, by assuming the statute was divisible and applying the modified categorical approach. Note that the Seventh Circuit has held this does not qualify as a burglary offense under 8 U.S.C. § 1101(a)(43)(G) because it includes unlawful entry into motor vehicles and is therefore overbroad as compared to "generic burglary." *Solorzano-Patlan v. I.N.S.*, 207 F.3d 869, 875 (7th Cir. 2000). Additionally, practitioners should argue that this is not an AF burglary offense because IL courts apply the "limited-authority doctrine." Under this doctrine, the courts do not strictly require an "unlawful entry," as required by the generic burglary definition. *See United States v. Glispie*, 943 F.3d 358, 359–60 (7th Cir. 2019); *see also Parzych v. Garland*, No. 20-2317, 2021 WL 2644221 (7th Cir. June 28, 2021).

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
Possession of burglary tools, 720 ILCS 5/19-2	No	Likely yes	N/A	N/A	Plead to an intent to commit a "felony" as it would likely not qualify a CIMT or aggravated felony.	Possession of burglary tools is a CIMT where the possession is with intent to commit a specific CIMT offense. *See Matter of S*, 6 I.&N. Dec. 769 (BIA 1955). If the intent was to commit a non-CIMT felony, then there is an argument that this may not as a CIMT.
Residential burglary, 720 ILSC 5/19-3	No. *See Parzych v. Garland*, No. 20-2317, 2021 WL 2644221 (7th Cir. June 28, 2021) (holding that IL burglary is not divisible and thus not an AF under the categorical approach).	Possibly no	N/A	N/A	Plead to 720 ILCS 5/19-1 as that statute is more definitely not a CIMT, in addition to not being an AF.	See above for analysis of Burglary, 720 ILCS 5/19-1, analysis supra. Additionally, under *Matter of J-G-D-F-*, 27 I&N Dec. 82 (BIA 2017) burglary of a dwelling is a CIMT provided that the dwelling is at least intermittently, occupied. However, there are arguments that this statute does not require that the dwelling be intermittently occupied. *See, e.g., People v. Benge*, 196 Ill. App. 3d 56, 58 (1990) (rejecting defendant's argument that he could not be convicted of residential burglary of a cabin in which the owner did not reside and spent only limited time there).

Interference with Public Officers

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
Offenses relating to motor vehicles and other vehicles, 625 ILCS 5/4-103	(a)(1): Likely yes, if sentence is a year or more. *See Hernandez-Mancilla v. I.N.S.*, 246 F.3d 1002 (7th Cir. 2001)). (a)(2): Possibly yes (a)(3): Likely yes, if offense involves a loss to a victim exceeding $10,000. *See Nijhawan v. Holder*, 557 U.S. 29 (2009) (holding that the $10,000 component of the fraud and deceit AF category under 8 U.S.C. § 1101(a)(43)(M) is subject to case-specific analysis rather than the	(a)(1): Likely yes (a)(2): Possibly yes (a)(3): Likely yes	N/A N/A	N/A N/A	Avoid a sentence of a year or more in order to avoid an AF. If client is facing charges that are likely to constitute an AF then plead to 720 ILCS 5/16-1(a)(4) as there are strong arguments that it is neither an AF nor a CIMT. If the client is facing charges under (a)(2) have them plead to removing, rather than altering, defacing, destroying, falsifying or forging a VIN.	There may be arguments that it is neither under *Matter of Deang*. 27 I&N Dec. 57, 62-3 (BIA 2017). The "inference" of knowledge detailed in (a)(1)(A) has been treated in Illinois courts as an alternate *mens rea* of "reason to believe" that the vehicle was stolen, which falls short of the *mens rea* of at least recklessness for AF and CIMT analysis. *See People v. Mijoskov*, 140 Ill. App. 3d 473, 478 (1986); *Matter of Deang*, 27 I&N Dec. at 62-3; *Matter of Silva- Trevino*, 26 I&N Dec. 826, 834 (BIA 2016). Additionally, AF and CIMT theft offenses require an intent to deprive the owner permanently or substantially of property, and this offense very likely incorporates *de minimis* conduct such as "joyriding." *See Matter of Jurado-Delgado,* 24 I&N Dec. 29, 33 (BIA 2006); *Matter of Diaz-Lizarraga,* 26 I&N Dec. 847, 854 (BIA 2016). This statute criminalizes possession of "converted" property, which includes property taken temporarily. *See People v. Gengler*, 620 N.E.2d 1368, 1374 (Ill. App. Ct. 1993).

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
	categorical approach)). (a)(4): Likely no (a)(5): Likely no (a)(6): Likely no	(a)(4): Likely no (a)(5): Likely no (a)(6): Likely yes				Similarly, practitioners should argue that the conduct element of (a)(2) is overbroad with respect to BIA decisions relating to the AF category relating to vehicles with altered identification numbers, as well as cases discussing trafficking in counterfeit goods. *See* 8 U.S.C. § 1101(a)(43)(R); *In re Kochlani*, 24 I&N Dec. 128 (BIA 2007). In both cases, conduct such as "removing" or "altering" an identification number does not fit categories such as "trafficking."
Driving while revoked, 625 ILCS 5/6-303	(a): No (a-3): No (a-5): No (a-7): No (b-5): No (c)(1), (2), (3): No (c-1): No (c-2): No (c-3): No (c-4): No	(a): No (a-3): No (a-5): No (a-7): No (b-5): No (c)(1), (2), (3): No (c-1): No (c-2): No (c-3): No (c-4): No	N/A	N/A	While a conviction under this statute does not constitute a removal offense, defense counsel should consider the effect of aggregate sentences and the sentence served, particularly for purposes of good moral character for relief such as cancellation of removal for nonlawful permanent residents and naturalization.	

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
	(c-5): Likely no (d): No (d-1): No (d-2): No (d-2.5): No (d-3): No (d-3.5): No (d-4): No (d-5): No (e): No	(c-5): No (d): No (d-1): No (d-2): No (d-2.5): No (d-3): No (d-3.5): No (d-4): No (d-5): No (e): No				
Driving under the influence of alcohol, 625 ILCS 5/11-501	(a) (all subsections): No (d)(1)(A), (B), (D), (G), (H), (I), (K), (L): No (d)(1)(C), (E), (F), (J): No. *See Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004)).	(a) (all subsections): No (*see In re Torres-Varela*, 23 I&N Dec. 78 (BIA 2001)) (d)(1)(A): No (d)(1)(B), (C), (E), (F), (J), (K), (L): Likely no	N/A	N/A	While not a removable offense in most cases, a DUI can have severe consequences for noncitizen, particularly for those who entered without inspection, including for immigration bond, showing good moral character and meriting relief as a discretionary matter. Notably, a DUI is also considered a "significant	Be prepared to argue that apart from (d)(1)(G) and (H), none of the aggravated DUI provisions of this statute are CIMT offenses. Under *In Re Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999) and *In re Torres-Varela*, 23 I&N Dec. 78 (BIA 2001), DUI offenses are not CIMT unless in addition to knowing that she is intoxicated, the defendant also knew she was ineligible for another reason such as having a suspended license. Past DUI

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
	(d)(2)(B), (C), (D), (E): No	(d)(1)(G), (H): Likely yes (*see In Re Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999); *Banuelos-Torres v. Holder*, 461 Fed.Appx. 509, 512 (7th Cir. 2012)) (d)(1)(D), (I): Possibly yes (d)(2)(B), (C), (D), (E): Likely no			misdemeanor" and a bar to DACA eligibility. In many of these cases defense counsel should try to plead to reckless driving instead of DUI. Finally, if client is charged under (d), have the record of conviction fail to specify this subsection.	convictions generally should not constitute such reasons.

Controlled Substance Offenses

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
Possession of cannabis, 720 ILCS 550/4	No	No	(a), (b): Yes under 8 U.S.C. § 1182(a)(2)(A)(i)(II); No under 8 U.S.C. § 1227(a)(2)(B) (c)-(g) Yes	N/A	Plea to 720 ILCS 570/402(c) instead. If not possible, try to keep record clear of amount if over 30 grams and of any evidence of remuneration or any facts that might go towards intent to distribute.	Emphasize the elements of this statute correspond to 21 U.S.C. § 844 "simple possession," a federal misdemeanor, and do not involve any elements of intent to distribute or sell.
Manufacture or delivery of cannabis, 720 ILCS 550/5	(a)-(c): No (d): No. *See Chen v. Sessions*, 864 F.3d 536, 537 (7th Cir. 2017) (e)-(g): Yes	(a): Possibly (a)-(c): Probably no (d): Probably no (e)-(g): Likely yes	Yes	N/A	Plea to 720 ILCS 570/402(c) instead. If not possible and over 30g, try to omit amount and any evidence of remuneration from record.	Distribution of a "small amount" without remuneration does not qualify as an aggravated felony, and the 7th Circuit has found that 720 ILCS 550/5(d) does not qualify as an aggravated felony. *Chen v. Sessions*, 864 F.3d 536, 537 (7th Cir. 2017). The BIA has held that the federal cocaine dealing offense is a CIMT. *See Matter of Khoum*, 21 I&N Dec. 1041 (BIA 1997). However, there are arguments against this given the legalization/decriminalization of marijuana in many states, and that controlled substance schedules

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	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
						change and therefore are not *malum in se*.
Manufacture or delivery, or possession with intent to manufacture or deliver, a controlled substance, a counterfeit substance, or controlled substance analog, 720 ILCS 570/401	Likely yes. Exceptions: (a)(2), (c)(2): No. *See United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020) (e): No. *See Najera-Rodriguez v. Barr*, 926 F.3d 343 (7th Cir. 2019); *see also Ruth.*	Likely yes	Likely yes. Exceptions: (a)(2), (c)(2): No. *See United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020) (e): No. *See Najera-Rodriguez v. Barr*, 926 F.3d 343 (7th Cir. 2019); *see also Ruth.*	N/A	Plea to overbroad schedules, including schedule I and II, or to 720 ILCS 570/402(c) instead.	The Seventh Circuit has found that some Illinois drug schedules are categorically overbroad and indivisible. *See Najera-Rodriguez v. Barr*, 926 F.3d 343 (7th Cir. 2019) (schedule I includes salvia, which is not federally controlled). The Illinois definition of "cocaine" is also overbroad because it includes more types of isomers than it does under federal law. *See United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020). The reasoning in *Ruth* may apply to other substances with overbroad isomers, including methamphetamine. *See United States v. De La Torre*, 940 F.3d 938 (7th Cir. 2019) (holding that "methamphetamine" under Indiana law includes more isomers than under federal law).
Possession unauthorized by	Likely yes. Exceptions:	No.	Likely yes. Exceptions:	N/A	Plea to 720 ILCS 570/402(c).	The Seventh Circuit has found that 402(c) is overbroad and indivisible as to controlled substance. *See Najera-*

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
this act, 720 ILCS 570/402	(a)(2), (c)(2): No. *See United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020) (c): No. *See Najera-Rodriguez v. Barr*, 926 F.3d 343 (7th Cir. 2019).		(a)(2), (c)(2): No. *See United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020). (c): No. *See Najera-Rodriguez v. Barr*, 926 F.3d 343 (7th Cir. 2019).			*Rodriguez v. Barr*, 926 F.3d 343 (7th Cir. 2019).
Look-alike substances; manufacture, distribution, advertisement or possession, 720 ILCS 570/404	(b) No (c) No	(b) Likely yes (c) No	Probably no.	N/A		The Seventh Circuit has held that look-alike are controlled substance offenses because the "related to" language in the INA sweeps broadly. *See Desai v. Mukasey*, 520 F.3d 762, 765 (7th Cir. 2008). However, this case is likely no longer good law given the look-alike definition applies to all controlled substances under IL law, which is broader than federal law. *See Najera-Rodriguez v. Barr*, 926 F.3d 343 (7th Cir. 2019). The Supreme Court has also since rejected similar arguments as to a broad interpretation of the "relating to" language. *See Mellouli v. Lynch*, 575 U.S. 798 (2015).

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Motor Vehicle and Driving Related Offenses

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
Offenses relating to motor vehicles and other vehicles, 625 ILCS 5/4-103	(a)(1): Likely yes, if sentence is a year or more. *See Hernandez-Mancilla v. I.N.S.*, 246 F.3d 1002 (7th Cir. 2001)). (a)(2): Possibly yes (a)(3): Likely yes, if offense involves a loss to a victim exceeding $10,000. *See Nijhawan v. Holder*, 557 U.S. 29 (2009) (holding that the $10,000 component of the "fraud and deceit "aggravated felony category under 8 U.S.C. § 1101(a)(43)(m) is subject to case-specific analysis rather than the	(a)(1): Likely yes (a)(2): Possibly yes (a)(3): Likely yes	N/A N/A	N/A N/A	Avoid a sentence of a year or more in order to avoid an AF. If client is facing charges that are likely to constitute an AF then plead to 720 ILCS 5/16-1(a)(4) as there are strong arguments that it is neither an AF nor a CIMT. If the client is facing charges under (a)(2) have them plead to removing, rather than altering, defacing, destroying, falsifying or forging a VIN.	There may be arguments that it is neither under *Matter of Deang*. 27 I&N Dec. 57, 62-3 (BIA 2017). The "inference" of knowledge detailed in (a)(1)(A) has been treated in Illinois courts as an alternate *mens rea* of "reason to believe" that the vehicle was stolen, which falls short of the *mens rea* of at least recklessness for AF and CIMT analysis. *See People v. Mijoskov*, 140 Ill. App. 3d 473, 478 (1986); *Matter of Deang*, 27 I&N Dec. at 62-3; *Matter of Silva- Trevino*, 26 I&N Dec. 826, 834 (BIA 2016). Additionally, AF and CIMT theft offenses require an intent to deprive the owner permanently or substantially of property, and this offense very likely incorporates *de minimis* conduct such as "joyriding." *See Matter of Jurado-Delgado,* 24 I&N Dec. 29, 33 (BIA 2006); *Matter of Diaz-Lizarraga,* 26 I&N Dec. 847, 854 (BIA 2016). This statute criminalizes possession of "converted" property, which includes property taken temporarily. *See People v. Gengler*, 620 N.E.2d 1368, 1374 (Ill. App. Ct. 1993). Similarly, practitioners should argue that the conduct element of (a)(2) is

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	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
	categorical approach)). (a)(4): Likely no (a)(5): Likely no (a)(6): Likely no	(a)(4): Likely no (a)(5): Likely no (a)(6): Likely yes				overbroad with respect to BIA decisions relating to the AF category relating to vehicles with altered identification numbers, as well as cases discussing trafficking in counterfeit goods. 8 U.S.C. § 1101(a)(43)(R); *In re Kochlani*, 24 I&N Dec. 128 (BIA 2007). In both cases, conduct such as "removing" or "altering" an identification number does not fit categories such as "trafficking."
Driving while revoked, 625 ILCS 5/6-303	(a): No (a-3): No (a-5): No (a-7): No (b-5): No (c)(1), (2), (3): No (c-1): No (c-2): No (c-3): No (c-4): No (c-5): Likely no (d): No	(a): No (a-3): No (a-5): No (a-7): No (b-5): No (c)(1), (2), (3): No (c-1): No (c-2): No (c-3): No (c-4): No (c-5): No (d): No	N/A	N/A	While a conviction under this statute does not constitute a removal offense, defense counsel should consider the effect of aggregate sentences and the sentence served, particularly for purposes of good moral character for relief such as cancellation of removal for non-lawful permanent residents and naturalization.	

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	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
	(d-1): No (d-2): No (d-2.5): No (d-3): No (d-3.5): No (d-4): No (d-5): No (e): No	(d-1): No (d-2): No (d-2.5): No (d-3): No (d-3.5): No (d-4): No (d-5): No (e): No				
Driving under the influence of alcohol, 625 ILCS 5/11-501	(a) (all subsections): No (d)(1)(A), (B), (D), (G), (H), (I), (K), (L): No (d)(1)(C), (E), (F), (J): No. *See Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004)). (d)(2)(B), (C), (D), (E): No	(a) (all subsections): No (*see In re Torres-Varela*, 23 I&N Dec. 78 (BIA 2001)) (d)(1)(A): No (d)(1)(B), (C), (E), (F), (J), (K), (L): Likely no (d)(1)(G), (H): Likely yes. *See In Re Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999);	N/A	N/A	While not a removable offense in most cases, a DUI can have severe consequences for noncitizen, particularly for those who entered without inspection, including for immigration bond, showing good moral character and meriting relief as a discretionary matter. Notably, a DUI is also considered a "significant misdemeanor" and a bar to DACA eligibility.	Be prepared to argue that apart from (d)(1)(G) and (H), none of the aggravated DUI provisions of this statute are CIMT offenses. Under *In Re Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999) and *In re Torres-Varela*, 23 I&N Dec. 78 (BIA 2001), DUI offenses are not CIMT unless in addition to knowing that she is intoxicated, the defendant also knew she was ineligible for another reason such as having a suspended license. Past DUI convictions generally should not constitute such reasons.

	Offense Analysis				Advice	
Offense	**Aggravated Felony**	**CIMT**	**Controlled Substance/ Firearm Offense**	**DV/Crime Against Children/ Prostitution**	**Criminal Defense Attorneys**	**Immigration Attorneys**
		Banuelos-Torres v. Holder, 461 Fed.Appx. 509, 512 (7th Cir. 2012)). (d)(1)(D), (I): Possibly yes (d)(2)(B), (C), (D), (E): Likely no			Defense counsel should try to plead to reckless driving instead of DUI. Finally, if client is charged under (d), have the record of conviction fail to specify this subsection.	