

# Washington Defender Association’s Immigration Project

## Practice Advisory: The Dukes of Hazard Meet the Border Patrol - Representing Noncitizens Accused of Driving-Related Offenses under RCW Title 46

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## Acknowledgements

WDA's Immigration Project gratefully acknowledges the work of Kathy Brady, senior staff attorney, and Angie Junck, staff attorney, with the Immigrant Legal Resource Center. Aspects of their writings and analysis on these issues are incorporated herein and used with permission. Kathy Brady and Angie Junck have most recently authored *Defending Immigrants in the Ninth Circuit* (2007). Information on ILRC publications is available at [www.ilrc.org](http://www.ilrc.org).

## Introduction

Driving-related convictions under the RCW Title 46 can trigger removal (a.k.a. deportation) for a non-citizen under several different provisions of the immigration statute. Such a conviction can also prevent otherwise eligible noncitizens from obtaining immigration benefits such as lawful status (e.g. greencards), U.S. citizenship, asylum and relief from removal known as "cancellation of removal." However under current case law from the Ninth Circuit and the Board of Immigration Appeals (BIA), many of these negative immigration consequences, particularly deportation, can be avoided with careful pretrial analysis, clear plea negotiations and, most importantly, carefully crafted plea statements.

This advisory provides defense counsel with strategies to avoid triggering removal (deportation) for noncitizen defendants charged under selected provisions of RCW Title 46.

## Summary of Best Practices

- **Identify your client's immigration status, and, if she has status, for how long. This is essential to devise a strategy to minimize immigration consequences.**
- **Advocate for a sentence imposed (regardless of time suspended) of less than 365 days. Remember that numerous misdemeanors can be deemed "aggravated felonies" under immigration law, a classification that triggers the harshest immigration consequences.**
- **Keep specific acts involving the use of force *out* of the "record of conviction" - the criminal complaint, judgment & sentence, plea agreement and statement - whenever possible.**

- **Alford pleas are bad and should never be used in noncitizen defendant cases (unless advised otherwise by competent immigration counsel).**
- **Keep in mind, and advise clients, that a conviction (or deferred prosecution) for *any* offense will be a significant negative factor in any application for immigration benefits such as lawful status (a greencard) or citizenship. Immigration authorities will consider all convictions and arrests in adjudicating applications for immigration benefits. So even where an arrest results in something less than a conviction, or a conviction does not directly trigger deportation, immigration authorities can use it as a basis to deny immigration benefits.**

## I. The First Step – Determining your Client’s Immigration Status

### **PRACTICE POINT:**

**Identifying that your client is a noncitizen and determining his/her immigration status are the critical first steps to effective representation of a noncitizen client.<sup>1</sup> You and any immigration practitioner that you consult with will need to know the person’s immigration status to fully understand potential immigration consequences and develop appropriate strategies.**

- Whether a driving offense conviction will trigger removal (a.k.a. deportation), or render your client ineligible for immigration benefits, depends upon your client’s current immigration status. A person’s immigration status is often the most important aspect of determining what immigration consequences she will face due to a criminal conviction.
- Defense counsel should ascertain the whether the client is undocumented or has lawful status, such as a lawful permanent residency (a.k.a. a greencard), refugee or asylum status, or was lawfully admitted with some other status (e.g. a student or tourist visa).
- If your client has no lawful immigration status and is, therefore undocumented, defense counsel should determine whether s/he is undocumented because they entered the U.S. illegally or because they entered lawfully on some type of status that is no longer valid (e.g. overstayed a tourist visa).
- Criminal convictions, dispositions and arrests can violate immigration law provisions and trigger deportation. They can also render a noncitizen ineligible for immigration benefits such as lawful permanent resident status (a greencard), asylum and citizenship. All arrests and convictions will constitute negative discretionary factors that will impact any application for immigration benefits even if they do not trigger deportation.

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<sup>1</sup> Pages 4-8 of Immigration and Washington State Criminal Law (2005) contain a short guide to divining a person’s immigration status. The WDA Immigration Project is also available to help you figure it out. Immigration and Washington State Criminal Law is available on the WDA’s website at [www.defensenet.org](http://www.defensenet.org).

## II. Carefully Crafting the “Record Of Conviction”

### **PRACTICE POINT:**

**In analyzing whether a conviction will trigger removal, the courts and immigration authorities will first look to the language of the statute (not the conduct of the defendant). If the statute is unclear, or includes both offenses which do and offenses which do not fall under the immigration provision(s) at issue then the reviewing authority will consult the “record of conviction” to determine the elements of the offense this defendant was convicted of to see whether they fall within the immigration statute provision.**

**Consequently, the documents contained in the “record of conviction” (ROC), particularly the plea statement, will often determine whether or not the conviction will trigger removal or bar a noncitizen from immigration benefits. Defense counsel should keep the ROC as vague/generic as possible. In particular, keep the ROC free of information that an offense involved violence (e.g., went beyond harm or infliction of damage, to specify the use of force).**

### **A. Understanding How Criminal Convictions Are Analyzed Under Immigration Law: The Categorical & Modified Categorical Analysis**

When the courts and the immigration authorities are reviewing a conviction to determine whether it triggers grounds of removal or statutory bars to obtaining immigration benefits (e.g. greencard, asylum, citizenship), they will engage in what is called the “categorical” and “modified categorical” analysis. Understanding the basics of this analysis is important in order to effectively represent a noncitizen defendant since it often determines when a conviction will trigger deportation/removal.

The key aspects of the categorical/modified categorical analysis are:

- **Under the categorical analysis the elements of the offense as defined by statute and case law, *not the actual or alleged conduct of the defendant*, are used to evaluate whether an offense falls within the relevant provisions of immigration law, i.e. whether the offense is an aggravated felony, a crime of domestic violence or crime involving moral turpitude, or some other immigration violation.**
- In theory, the “pure” categorical analysis test requires that the minimum conduct that could violate the statute must fit within the definition of the immigration provision at issue (e.g. the aggravated felony definition’s crime of violence provision). If it does not, then a criminal conviction under this statute cannot trigger this immigration provision.
- In practice, most immigration courts and federal circuit courts often bypass the “pure” categorical test and find that the statute (or caselaw defining it) is broad enough to include various offenses (or various ways of committing the offense), some of which fall within the scope of the crime-related immigration provisions while others do not (referred to in immigration proceedings as a “divisible” statute). This determination allows the court to engage in the “modified categorical” analysis.

- **Under the modified categorical analysis, to determine whether a conviction triggers a particular immigration provision (e.g. the crime of moral turpitude ground of deportation) the immigration judge or other reviewing authority may look to a strictly limited official set of documents known as the “record of conviction” to determine the elements of the offense of conviction and whether they trigger the crime-related immigration provisions.<sup>2</sup>**
- If the ROC does not clearly establish that the elements of the offense fall within the immigration provision at issue, then the noncitizen cannot be penalized under this provision, i.e. cannot be deported/removed or be held statutorily ineligible for an immigration benefit.
- In many cases, the BOP is on the government to establish through the ROC documents that the conviction falls within the scope of the immigration provision(s) at issue (e.g. an assault fourth degree is an aggravated felony under 8 USC 1101(a)(43)(F)). **Thus, carefully crafting an ROC is a crucial defense strategy for avoiding the immigration consequences of a conviction.**

#### **B. Criminal Documents that Constitute the “Record of Conviction”**

The documents that a court, or other immigration authority, is permitted to review as part of the record of conviction are a limited set of documents. The information contained in these documents is often the key to whether or not a conviction will trigger removal for a noncitizen defendant.

The record of conviction INCLUDES the following documents:

- Information in the charging papers (however, only the count that has been pled to or proved, not original charges that have been amended or dismissed charges);
- The judgment of conviction;
- Jury instructions;
- A signed guilty plea or a written plea agreement;
- The transcript from the plea proceedings; and
- The sentence and transcript from sentence hearing.

The record of conviction DOES NOT INCLUDE:

- Prosecutor’s remarks during the hearing;
- Police reports;

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<sup>2</sup> *United States v. Rivera-Sanchez*, 247 F.3d at 908 (9<sup>th</sup> Cir. 2001) (en banc), quoting from *Taylor v. United States*, 495 U.S. 575 (1990). See also, e.g., *Chang v. INS*, 307 F.3d 1185 (9<sup>th</sup> Cir. 2002); *Matter of Sweetser*, Int. Dec. 3390 (BIA 1999); *Matter of Short*, 20 I&N Dec. 136 (BIA 1989).

- The affidavit of probable cause;
- Probation or “pre-sentence” reports;
- Statements by the noncitizen outside of the judgment and sentence transcript (e.g., to police or immigration authorities or the immigration judge)<sup>3</sup>;
- A court docket summary prepared by clerical staff<sup>4</sup>;
- Information from a co-defendant’s case.<sup>5</sup>

***WARNING! The police report and/or affidavit of probable cause WILL BE INCLUDED in the ROC if it is incorporated into the plea statement as the factual basis for the plea. Consequently, DO NOT do Alford pleas or any other agreement that incorporates these documents as the factual basis for the plea or sentence (e.g. stipulations to “real facts”).***

### C. Carefully Crafting the Plea Statement and Other Documents

One of defense counsel’s most important goals is to keep the record of conviction as clean as possible of damaging information that will trigger grounds of removal (or other negative consequences). In particular, it is imperative that defense counsel maintain control of the content used as the factual basis for a plea.

This task often presents defenders with two potentially conflicting mandates: to make a sparse or vague record for immigration purposes, and to state a factual basis for the plea under criminal law requirements. Because the government often bears the burden of proving deportability based on a conviction record, a crucial criminal defense strategy to avoid immigration consequences is first, to direct a plea to a divisible statute that covers at least one offense that would not trigger the feared immigration consequence, and second, to keep the record of conviction vague enough so that it does not preclude the possibility that this offense was the offense of conviction.

While the law here is conflicted, there is some clear advice for criminal defense counsel:

**Counsel should try to provide a minimal factual basis, should retain as much control as possible over the contents of the factual basis, and should assume conservatively that if the defense stipulates to a police report or some other document as providing a factual basis, its contents will become part of the record of conviction for immigration purposes.**

<sup>3</sup> See, e.g., *Taylor v. U.S.*, *infra* n. 247. This doctrine applies across the board in immigration cases and has been upheld regarding moral turpitude (see e.g., *Matter of Mena*, 7 I&N Dec. 38 (BIA 1979); *Matter of Short*, 20 I&N Dec. 136 (BIA 1989)(co-defendant’s conviction is not included in reviewable record of conviction); *Matter of Y*, 1 I&N Dec. 137 (BIA 1941) (report of a probation officer is not included); *Matter of Cassisi*, 120 I&N Dec. 136 (BIA 1963) (statement of state’ attorney at sentencing is not included); firearms (see e.g., *Matter of Madrigal*, 21 I&N Dec. 323 (BIA 1996)(transcript of plea and sentence hearing *is* included); *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996)(police report is not included); *Matter of Pichardo*, 21 I&N Dec. 330 (BIA 1996)(admission by respondent in immigration court is not included)). See also *Abreu-Reyes v. INS*, 350 F.3d 966 (9th Cir. 2003)(withdrawing and reversing *Abreu-Reyes v. I.N.S.*, 292 F.3d 1029 (9th Cir. 2002) to reaffirm that probation report is not part of the record of conviction for this purpose, in accord with *US v. Corona-Sanchez*, 291 F.3d 1201 (9<sup>th</sup> Cir. 2002)(*en banc*).

<sup>4</sup> *U.S. v. Navidad-Marcos*, 367 F.3d 903 (9th Cir. 2004).

<sup>5</sup> *Matter of Short*, 20 I&N Dec. 136 (BIA 1989).

Therefore, if the police report contains factual details that would establish that the client was convicted of, e.g., an aggravated felony, do not stipulate to it – or at least warn the defendant of the likely consequences.

#### **D. Analytical Conjunctivitis - “And” vs. “Or”**

The use of these words tiny words can make all the difference in the life of your noncitizen client. Statutes often set forth numerous possible ways to commit a criminal violation in the disjunctive (“or”). Often in practice, prosecutors charge defendants in the conjunctive (“and”) to allege all of the offenses contained in the statute.

Where a statute uses disjunctive language (“or”) to incorporate multiple offenses, some which trigger removal and some which do not, the government will only be able to establish removability (e.g. deportation) for a conviction under the statute where the defendant’s plea of guilty clearly establishes that she was convicted under the portion of the criminal statute that triggers removal/deportation. Where the statute contains separate ways of committing an offense but the defendant’s plea does not make clear which of the offenses he committed, the government cannot prove that defendant violated the portion of the statute that triggers removal/deportation.

Consequently, where a statute (or caselaw interpreting it) disjunctively lists multiple ways to violate the provision, it will matter a great deal how the language of the statute is incorporated into the defendant’s plea statement. In order to avoid or minimize immigration consequences when dealing with these types of statutes, defense counsel must do one of the following to things when crafting a plea:

- **First, plead specifically to a portion of the statute that you KNOW will not trigger—or is least likely to trigger-- immigration penalties.** Using RCW 46.61.020, Refusal to give Information, as an example: a plea statement that specifically outlined only a plea to having “refuse[d] when requested by a police officer to give ....the name and address of the owner of such vehicle, or ... to produce his or her certificate of license registration of such vehicle, his or her insurance identification card, or his or her vehicle driver's license” would be the least damaging way to plead
- **Second, if this is not possible, plead in the disjunctive (using “or”).** Using the above example, plea language for a violation of RCW 46.61.020 might state “On November 10, 2006, I, Jean Miro, refused to give the name of the owner of the vehicle at issue, provided false information, or refused to stop when signaled.”

**Example:** Refusal to give information under RCW 46.61.020, indicates disjunctively that you can violate this law by either refusing to give information to an officer OR refusing to stop OR giving false information to an officer. Refusing to give information to an officer and refusal to stop are not a deportable offense under the immigration laws. Giving false information, on the other hand, has been held (sometimes) to be a crime of moral turpitude under immigration law and, thus, a conviction under that portion of RCW 46.61.020 could trigger deportation/removal.

In order to avoid triggering the bad immigration consequences that could flow from a conviction under this statute, a plea statement should:

- Specifically contain plea language indicating that the defendant is admitting to either the portion of the statute that involves a failure to stop or a refusal of information (not the portion of the statute that involves giving false information);
- Where the plea will unavoidably involve the portion(s) of a statute that trigger removal/deportation, whenever possible, defense counsel should construct a plea statement in the disjunctive to also include innocuous portions of the statute, such as plea language that articulates a failure to stop or providing false information.

#### **E. General Rules for Crafting Noncitizen Defendant’s Plea Statement**

- Do not incorporate the police report or affidavit of probable cause into the plea statement as the factual basis for the plea, which means **DO NOT DO ALFORD PLEAS FOR NONCITIZEN DEFENDANTS OR ANY OTHER AGREEMENT THAT REQUIRES A STIPULATION TO FACTS CONTAINED IN A POLICE REPORT OR AFFIDAVIT OF PROBABLE CAUSE.**<sup>6</sup>
- Deferred prosecution agreements under RCW 10.05 in DUI cases require that the defendant admit guilt. This admission of guilt will become part of the record of conviction for immigration purposes. Consequently, these agreements constitute a conviction in perpetuity under immigration law. See §§ IV; V.C, and VI.H, *infra*, for more detailed information on DUI offenses and deferred prosecutions.
- Avoid having the defendant provide the factual basis, because it surrenders control of the record of conviction. Defense counsel should always provide the factual basis, and should try to negotiate a factual basis for a plea that minimizes or avoids the adverse immigration consequences of a conviction.
- Defendant’s statement should (unless advised otherwise by competent immigration counsel):
  - Be as vague/generic as possible;
  - Recite the language of the statute (not specifics of defendant’s conduct);

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<sup>6</sup> Sometimes a defendant can accept conviction without admitting having committed the crime, by pleading “nolo contendere” to a charge, or offering a plea patterned after *North Carolina v. Alford*, 400 U.S. 25 (1970). This disposition is a “conviction” for immigration purposes. The statutory definition of conviction in the immigration statute specifically includes a conviction based on a “plea of guilty or nolo contendere.” See 8 USC 1101(a)(43)(A). At present there is a conflict in the Ninth Circuit as to whether the factual basis used in a nolo contendere or Alford plea will be included in the ROC. See *United States v. Dalvan Nguyen*, 465 F.3d 1128 (9th Cir. October 18, 2006); *United States v. Guerrero-Velasquez*, 434 F.3d 1193 (9th Cir. January 19, 2006). This opinion was modified and reprinted at 2006 U.S. App. LEXIS 2900 (9th Cir. February 7, 2006). Until the issue is definitively resolved, counsel must conservatively assume that it will be included and avoid such pleas in favor of straight pleas where counsel can exercise greater control over the factual basis for the plea.

- Reflect a plea to only the portions of a statute that do not trigger immigration consequences, or, if not possible, disjunctively (using “or”) include both the problematic offense (e.g. giving false information to an officer) with innocuous portions of conduct listed in the statute (e.g. refusal to stop).
- Omit any reference to the age or relationship of any alleged victims;
- Omit any reference to the use/threatened use of force.

## F. Charging Documents

- Information alleged in a Count is not part of the record of conviction absent proof that the defendant specifically pled guilty to that Count. A charge coupled with only general proof of conviction under the statute is not sufficient. There must be proof not only that the person pled to the specific charge, but also proof of the specific allegations contained in the charge *at the time of plea*.
- Information from dismissed charges should never be considered in a modified categorical analysis. Where defendant is pleading to an amended charge, make as clear a record as possible to reflect that the plea is to the amended charge, not the original or other charges.

## III. Brief Overview of Sentences Under Immigration Law<sup>7</sup>

**PRACTICE POINT: For immigration purposes the sentence that matters is the amount of time imposed by the court, regardless of time suspended. So if a sentence of 364 days is imposed, with 363 suspended, the sentence for immigration purposes will be 364 days.**

The Immigration and Naturalization Act defines a “sentence” as:

Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.<sup>8</sup>

This statutory definition was provided by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and applies to “sentences entered before, on, or after the date of enactment” of IIRIRA.<sup>9</sup>

- This language refers to **the sentence actually imposed**, not to a potential sentence. It governs almost all provisions of the immigration statute that deal with sentences. There are several important exceptions, the most relevant being the deportability and inadmissibility provisions dealing with crimes involving moral turpitude;

<sup>7</sup> For a more detailed analysis of sentences under Washington State law and how they relate to immigration law and representing noncitizen defendants, see Chapter Three of *Immigration and Washington State Criminal Law*, Benson, Brady, Moore (2005).

<sup>8</sup> 8 USC § 1101(a)(48)(B); INA § 101(a)(48)(B).

<sup>9</sup> IIRIRA Pub.L. 104-208, 110 Stat. 3009, Div. C, §§ 322(c), 304(a)(3) (Sept. 30, 1996).

- It does not include the period of probation or parole;
- It includes the entire sentence imposed even if all or part of the *execution* of the sentence has been suspended. Where *imposition* of suspension is suspended, **it includes any period of jail time ordered by a judge** as a condition of probation;
- Time imposed by recidivist sentence enhancements (e.g., Felony Harassment under RCW 9A.46.020(2)(b)(i) for “previously [having] been convicted in this or any other state of any crime of harassment”) is not counted as part of the sentence imposed;<sup>10</sup>
- The time served after a probation or parole violation is included within the “sentence imposed.”<sup>11</sup>

**Example:** The judge suspends imposition of sentence (a.k.a. deferred sentence), orders two years probation, and requires jail time of six months as a condition of probation. The defendant is released from jail after three months with time off for good behavior. For immigration purposes the “sentence imposed” was six months. However, if this defendant then violates probation and an additional 6 months is added to the sentence, she will have a total “sentence imposed” of 12 months. If this offense would become an aggravated felony by having a one-year sentence imposed, the defendant would do better to take a new conviction instead of the probation violation and have the time imposed for that.

**Example:** The judge imposes a sentence of 365 days but suspends execution of 363 days and gives credit for two days served (a.k.a. suspended sentence). For immigration purposes the “sentence imposed” was 365 days (1 year). To ensure that the offense does not trigger any of the aggravated felony provisions involving sentences of one year or more, defense counsel should always request a sentence of 364 days or less, regardless of time suspended.<sup>12</sup>

#### IV. Deferred Prosecutions and Other Types of Deferred Adjudication Agreement

##### A. The Immigration Statute’s Definition of “Conviction”

The immigration statute contains a specific definition of what constitutes a conviction under immigration law. That definition states:

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

- A judge or jury has found the alien [noncitizen] guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

<sup>10</sup> United States v. Corona-Sanchez, 291 F.3d 1201 (9<sup>th</sup> Cir. 2002)(en banc).

<sup>11</sup> See, e.g., *United States v. Jimenez*, 258 F.3d 1120 (9<sup>th</sup> Cir. 2001) (a defendant sentenced to 365 days probation who then violated the terms of his probation and was sentenced to two years imprisonment had been sentenced to more than one year for purposes of the definition of an aggravated felony).

<sup>12</sup> “‘And if you take one from three hundred and sixty-five, what remains?’ ‘Three hundred and sixty-four, of course.’ Humpty Dumpty looked doubtful. ‘I’d rather see that done on paper,’ he said’--- *Through the Looking Glass*, by Lewis Carroll.

- The judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.<sup>13</sup>

The crux of the issue here is what constitutes a conviction for immigration purposes. In short, even though the deferral scheme may allow for a dismissal under Washington state law of the offense(s), *any deferral scheme which requires the defendant, at the time of the deferral, to agree to admissibility of the police report, and/or stipulate to facts and/or enter a guilty plea puts a non-citizen at risk that the deferral scheme will be a conviction for immigration purposes regardless of whether the case is subsequently dismissed by the Court after defendant complies with the condition(s).*

In the case *Matter of Roldan*,<sup>14</sup> the Board of Immigration Appeals interpreted the statutory language so broadly that any admission of guilt will constitute a conviction in perpetuity for immigration purposes. The Ninth Circuit decision in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) tempers this broad interpretation only for first-time simple possession and lesser drug offenses.

Meanwhile, as a practical matter, the DHS treats virtually all diversionary schemes as convictions for immigration purposes where, at a minimum, the police report was admitted into evidence at the time of the deferral and/or the defendant stipulated to facts.

## **B. Deferred Prosecutions Under RCW 10.05**

**PRACTICE POINT: A defendant’s plea of guilty will remain a conviction in perpetuity for immigration purposes. Thus, a guilty plea pursuant to a deferred sentence agreement will *not* be eliminated for immigration purposes regardless of whether s/he has subsequently been permitted to withdraw such plea pursuant to a successful completion of the conditions imposed (unless the offense involves first time simple possession of drugs).**

RCW 10.05 allows for "deferred prosecution" in certain misdemeanor cases. Deferred prosecution under this provision is available to defendants whose wrongful conduct was caused by alcoholism, drug addiction, or mental problems.<sup>15</sup>

Deferred prosecution under RCW10.05.020 establishes the procedure whereby the defendant does not plead guilty to the charges against her/him. Instead, the defendant is required to submit a statement that contains, *inter alia*, “... (c) a stipulation to the admissibility and sufficiency of the facts contained in the written police report; and (d) an acknowledgement that the statement will be entered and used to support a finding of guilty if the court finds cause to revoke the order granting deferred prosecution.” Additionally, the defendant is informed that the Court will not allow deferred prosecution if the defendant believes that s/he is innocent of the charges.<sup>16</sup>

The defendant also must agree to undergo treatment for alcoholism or drug addiction in accordance with the court's orders. If the defendant fails to comply with the court's orders, the court can revoke the deferred prosecution and enter a finding and judgment of guilt against the

<sup>13</sup> 8 USC § 1101(a)(48)(A); INA § 101(a)(48)(B).

<sup>14</sup> *Matter of Roldan*, 21 I&N Dec. 512 (BIA 1999).

<sup>15</sup> RCW § 10.05.020(1).

<sup>16</sup> RCW § 10.05.020(2).

defendant based upon the record. Five years following the entry of the deferred prosecution order, the court shall dismiss the charges against the defendant if s/he has successfully completed treatment.<sup>17</sup>

The courts have held that because the defendant has pleaded guilty and the court has imposed the requisite imposition on liberty, DHS and the Immigration Courts will treat these deferred prosecutions as convictions under immigration law. The Ninth Circuit considers the difference between a deferred prosecution agreement and a guilty plea to be a formality, and it held the deferred prosecution requirements for treatment to be sufficient to meet the punishment prong of the immigration definition of conviction.<sup>18</sup> Note that this means that a deferred prosecution will be a conviction in perpetuity for immigration purposes, regardless of whether or not the defendant complies with the deferral agreement and the case is dismissed in the criminal court.

However, the Board of Immigration Appeals, the Ninth Circuit and the Supreme Court have all held that DUI convictions, such as those under RCW § 46.61.5055, do not trigger statutory grounds for deportation or inadmissibility.<sup>19</sup> Thus, even though the deferred prosecution will constitute a conviction under immigration law, as long as the record does not reflect a conviction for being under the influence of a controlled substance, there is neither a statutory basis for removal nor a statutory bar to obtaining immigration benefits.<sup>20</sup>

### C. Other Types of Pre-Plea Deferred Adjudications

**PRACTICE POINT: Deferred adjudication agreements that require a defendant to stipulate to the admissibility and sufficiency of the facts (usually contained in the police report or affidavit of probable cause) are not “immigration safe” and will likely be treated as a conviction by immigration authorities regardless of any subsequent dismissal. Thus, it is critical to ensure that the agreement uses “immigration safe” language.**

Municipal and District Courts and prosecutors throughout Washington State make use of a wide variety of non-statutory pre-plea deferred adjudication schemes and procedures (i.e., Stipulated Orders of Continuance, Dispositional Continuance, Continuation For Dismissal). Additionally, the increasing prevalence of specialty courts such as Domestic Violence Court, Mental Health Court, and Drug Courts, often employ various deferred adjudications that do not require a formal plea of guilty. The specifics of each scheme vary somewhat, although all are designed to result in a dismissal of the charges if the defendant complies with certain conditions.<sup>21</sup>

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<sup>17</sup> RCW § 10.05.120.

<sup>18</sup> *U.S. v. Sylve*, 135 F.3d 680, 682 (9<sup>th</sup> Cir. 1998); *Abad v. Cozza*, 128 Wash. 2d 575 (Wash. 1996). See *Matter of Punu*, 22 I. I&N. Dec. 224 (BIA 1998).

<sup>19</sup> See *Matter of Torres Varela*, 23 I&N Dec. 78 (B.I.A., 2001)(simple DUI not a crime of moral turpitude); *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9<sup>th</sup> Cir. 2001)(DUI not a crime of violence and thus not an aggravated felony under INA 101(a)(43)(F)); see also *Montiel-Barraza v. INS*, 275 F.3d 1178 (9<sup>th</sup> Cir. 2002); *U.S. v. Portillo-Menodoza*, 273 F.3d 1224, 1228 (9<sup>th</sup> Cir. 2001)(with priors); *Leocal v. Ashcroft*, 125 S.Ct. 377 (2004).

<sup>20</sup> It is important to remember that such deferred prosecution agreements will still be considered a negative discretionary factor against the noncitizen in any application with DHS for immigration benefits.

<sup>21</sup> These agreements are used in relation to a variety of offenses that can trigger deportation/removal, such as domestic violence assault and theft.

Virtually all of the courts that permit some type of deferred adjudication process have boilerplate forms that are used to embody the agreements or stipulations. **For immigration purposes, the portion of these agreements that matters is where the defendant agrees to the admissibility of the police report into evidence with the understanding that if he violates the agreement the judge will rely (oftentimes solely) on the police report in determining the defendant's guilt or innocence. Some agreements go further and require the defendant to actually stipulate to the accuracy of the facts contained in the police report.**

These admissions are very dangerous for noncitizen defendants since they risk falling within the immigration statute's definition of conviction noted *supra*, which requires a mere admission of "facts sufficient to warrant a finding of guilt."<sup>22</sup> Defense attorneys should avoid agreeing to any deferred adjudication agreement that requires a stipulation to the sufficiency of the facts.

As an alternative, when negotiating deferred adjudication agreements for noncitizen defendants, counsel should seek to structure the relevant deferral language as:

Rather than admission of the police report at the time of the deferral, non-citizens would agree to waive their right to object and/or contest ANY evidence presented at any subsequent violation/revocation hearing and agree that the judge will review the evidence presented at that time (which would be the police report) and make a decision as to her/his guilt based solely on that evidence.

Thus, it would be understood at the time that the deferral scheme is agreed upon by the parties, that the prosecutor would present the police report at a *subsequent violation/revocation hearing* if the defendant does not comply with conditions. However, if the defendant complies with the conditions, the case is dismissed without any admissions by the defendant and the police report will not have been entered into evidence for purposes of determining guilt. This will (hopefully) avoid the offense being deemed a conviction for immigration purposes.

#### **D. Sample Alternative Immigration-Safe Language for Pre-Trial Diversion Agreements/SOCs**

*NOTE: If boilerplate forms are used, it is necessary to cross-out/eliminate language referencing admissions or stipulations of guilt/police reports/facts and substitute in the following language.*

**I understand that I have a right to contest and object to evidence presented against me. I give up the right to contest and object to any evidence presented against me as to my guilt or innocence regarding the underlying charge at any future hearings if I fail to comply with the conditions of this agreement. I also understand that I have the right to present evidence on my own behalf. I give up the right to present evidence on my own behalf as to my guilt or innocence regarding the underlying charge.**

**I understand that if I do not comply with the conditions of this agreement, evidence will be presented against me at a future hearing and I understand that the judge will read and review that evidence in determining my guilt or innocence.**

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<sup>22</sup> 8 USC § 1101(a)(48)(A)(i); INA § 101(a)(48)(A)(i). Note that some deferral agreements may require the defendant to stipulate that the facts in the police report are true. However, such a stipulation does not constitute a determination as to their sufficiency to support a finding of guilty. However, these admissions and stipulations are very risky for noncitizen defendants and should be avoided.

## V. Selected Removal Grounds that Can Be Triggered (or Not) by Driving Offenses

Convictions for driving offenses under RCW Title 46 can potentially trigger removal under numerous provisions of immigration law. An offense can fit into more than one removal ground at the same time. Thus, when dealing with a noncitizen facing a driving offense charge, it is important to make sure that whatever strategies are employed, defense counsel is doing so in light of all relevant immigration law provisions.<sup>23</sup>

### A. The three primary removal/deportation grounds<sup>24</sup> that are at issue in driving offense cases are:

- A conviction for an aggravated felony “crime of violence” (COV) for which the term of imprisonment is one year or more.<sup>25</sup>
- A conviction that constitutes an aggravated felony under the “obstruction of justice” prong of that provision of immigration law;<sup>26</sup>
- A conviction constituting a “crime involving moral turpitude.”<sup>27</sup>

A (perhaps *the*) primary goal of defense counsel when representing noncitizen defendants is to resolve the case in a way that does not result in a conviction that falls within any of these provisions that apply. The sections below provide an important overview of each of these immigration provisions that will assist defenders in understanding the necessary framework for resolving cases in a manner that avoids or minimizes the immigration consequences. § VI *infra* analyzes specific RCW driving offenses in light of whether they trigger any of these provisions and provides strategies and alternatives for avoiding doing so.

#### **PRACTICE POINTS:**

**Non-citizens who have the special status of “Temporary Protected Status (TPS)” are not legal permanent residents, and will lose that status and become removable for any felony or any second misdemeanor conviction.**<sup>28</sup>

**No legal permanent resident can have an application for US citizenship (naturalization) approved while on probation for any crime, even if it’s not otherwise a bar.**<sup>29</sup>

<sup>23</sup> Note that there are many additional removal grounds that can apply, than the ones discussed here.

<sup>24</sup> A DUI conviction could trigger a finding of inadmissibility under the “health-related grounds” for having or having had a physical or mental disorder that could or has pose a threat to property or safety of self or others. See § VI.H, *infra*, on DUI.

<sup>25</sup> See 8 USC 1101(a)(43)(F) and 8 USC 1227(a)(2)(A)(iii).

<sup>26</sup> See 8 U.S.C. 1101(a)(43)(S).

<sup>27</sup> A CIMT is both a ground of “inadmissibility,” 8 USC 1182(a)(2)(A)(i)(I); and of “deportability,” 8 USC 1227(a)(2)(A)(i).

<sup>28</sup> 8 USC § 1254a(c)(2)(B)(i); INA § 244(c)(2)(B)(i)

<sup>29</sup> 8 CFR § 316.10(c)(1)(c)--Proof of good moral character in certain [naturalization application] cases-- (1)--Effect of probation or parole. An applicant who has been on probation, parole, or suspended sentence during all or part of the statutory period is not thereby precluded from establishing good moral character, but such

## **B. Aggravated Felony Convictions Trigger Harsh Immigration Penalties**

In addition to being a ground of deportation<sup>30</sup>, a conviction that constitutes an aggravated felony triggers some of the harshest immigration consequences. These include:

- Barring a noncitizen from most forms of “relief” from deportation such as asylum,<sup>31</sup> cancellation of removal (i.e. pardon) for longtime legal residents;<sup>32</sup>
- Rendering a noncitizen ineligible to establish the requisite “good moral character” needed to apply for US citizenship;<sup>33</sup>
- Allowing noncitizens (except legal permanent residents) to be removed without ever seeing an immigration judge;<sup>34</sup>
- Triggering significant sentence enhancements for prosecution for illegal reentry after deportation.

Any non-citizen convicted of an offense defined under immigration law as an “aggravated felony” is deportable.<sup>35</sup> For offenses that risk triggering this provision, careful attention can keep a conviction from doing so.

### **PRACTICE POINTS:**

**A misdemeanor can be an aggravated felony even though Washington law only classifies it as a misdemeanor. Consequently, a misdemeanor that constitutes a “crime of violence” (COV) will be an aggravated felony where a sentence of 365 days was imposed (regardless of time suspended).**

**A sentence imposed (regardless of time suspended) of LESS THAN 365 days will ensure that a driving-related conviction does not constitute an aggravated felony crime of violence, regardless of whether the conviction is for a misdemeanor or a felony.**

**Immigration-safe deferred adjudication agreements (e.g. dispositional continuance) will avoid triggering this provision, which requires a conviction under immigration law. Note that deferred prosecution agreements under RCW 10.05 are not immigration-safe and will constitute a conviction.**

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probation, parole, or suspended sentence may be considered by the Service in determining good moral character. **An application will not be approved until after the probation, parole, or suspended sentence has been completed.**

<sup>30</sup> INA § 237(a)(2)(A)(iii); 8 USC 1227(a)(2)(A)(iii)

<sup>31</sup> INA §§ 208 (b)(2)(A)(ii), (B)(i)

<sup>32</sup> INA § 240A(a)(3); 8 USC § 1229b(a)(3)

<sup>33</sup> 8 CFR § 316.10(b)(1)(ii)

<sup>34</sup> INA § 238(b); 8 USC § 1228 (b)

<sup>35</sup> See 8 USC § 1227(a)(2)(A)(iii) and 8 USC § 1228(b).

## C. Driving Offenses and Aggravated Felony Crimes of Violence

### 1. An Overview

#### a. Statutory Definition of Aggravated Felony Crime of Violence (COV)

The aggravated felony definition under immigration law at 8 USC 1101(a)(43) includes a “crime of violence” as defined in 18 USC § 16, for which a sentence of at least one year is imposed.<sup>36</sup> The BIA and courts use a categorical definition of crime of violence, meaning that the determination is made based on the elements of the statute under which the person was convicted, and in some cases information in the record of conviction, not the actual conduct of the defendant.<sup>37</sup> See discussion of the categorical analysis at Section II, supra.

The definition as set forth in 18 USC § 16 is:

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

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

This definition is controlled by federal law. Washington criminal defense counsel should not confuse this definition at 18 USC § 16 with the definition of “crime of violence” under RCW § 9.41.010(11) or of “violent offense” under § 9.94A.030(50)<sup>38</sup>

#### b. Felony and Misdemeanor Classification: § 16(a) and (b)

**PRACTICE POINT: Misdemeanor offenses with a 365 day sentence can be more dangerous than felony offenses. Do not assume that simply reducing an offense from a felony to a misdemeanor will avoid deportation. Some felony offenses are actually better for noncitizen defendants.**

**Washington misdemeanor offenses can be classified as “aggravated felonies” under this COV provision ONLY if they fall under 18 USC 16(a) AND have a sentence imposed, regardless of time suspended of one year (365 days).**

<sup>36</sup> INA § 101(a)(43)(F), 8 USC § 1101(a)(43)(F). There is an exception for a “purely political offense.”

<sup>37</sup> See, e.g. *Leocal v. Ashcroft*, 543 US 1 (2004); *Ye v. INS*, 214 F.3d 1128 (9<sup>th</sup> Cir. 2000); *Matter of Sweetser*, Int. Dec. 3390 (BIA 1999).

<sup>38</sup> Note that “crime of violence” is a term used in illegal reentry cases under 8 USC § 1326 sentencing guidelines. COV is defined in a few different ways under the U.S. Sentencing Guidelines, and these definitions differ significantly from the definition at 18 USC § 16. Thus, not all illegal re-entry cases that define “crime of violence” control in immigration proceedings. One must see which definition is used and whether it has the same elements as 18 USC § 16.

**Washington felony offenses can be classified as aggravated “aggravated felonies” if they fall under either 18 USC 16(a) or 16(b) and have a sentence imposed, regardless of time suspended, of one year (365 days) or more.**

**Example: Fourth degree assault under R.C.W. 9A.36.041 can constitute an “aggravated felony” under 8 USC 16(a) where there is a sentence imposed of 365 days. It can never be an aggravated felony under 16(b), even if there is a 365 day sentence imposed.**

**Elements of a “Crime of Violence” Under 18 USC § 16 are Determined by Whether the Offense is a Felony or Misdemeanor.**

The aggravated felony “crime of violence” is defined in reference to 18 USC § 16, the definition of which is affected by felony/misdemeanor classification. For a misdemeanor or felony to be a crime of violence under 18 USC § 16(a), it must have the use, attempted use or threatened use of force against a person or property *as an element of the offense*.

A felony conviction, however, also can qualify as a crime of violence under the more broadly defined § 16(b), if “by its nature, [it] involves a substantial risk that physical force against the person or property of another may be *used* in the course of committing the offense.” The most commonly cited example is felony burglary of a dwelling. The offense does not have as an element the intent to use force – it can be committed by a person walking through an unlocked door and removing articles – but it carries the inherent risk that violence will ensue if the resident and the burglar meet during commission of the offense.<sup>39</sup> The Ninth Circuit held that sexual battery under Calif. P.C. § 243.4 (sexual touching a restrained person against his or her will) is not a crime of violence under the 18 USC § 16(a) standard, because there is no requirement that the restraint be by force.<sup>40</sup> However, it held that *as a felony* it is a crime of violence, under § 16(b), because the situation contains the inherent potential for violence.<sup>41</sup> Not every felony offense against a person or physical property is necessarily a crime of violence.

**c. Sentence of One Year or More Must Be Imposed**

A suspended sentence is a sentence for immigration purposes, as is any specified period of incarceration or confinement.<sup>42</sup> Avoiding a 365-day sentence for a gross misdemeanor like Assault 4 will eliminate any chance that it could be deemed an “aggravated felony” under this ground, even if it otherwise fit the definition of a crime of violence.

**Ensure a sentence imposed of less than 365 days, regardless of time suspended. Regardless of whether the offense is deemed to be a crime of violence or one “relating to the obstruction of justice”, obtaining a sentence of 364 days (or less) will insure that it will not constitute an aggravated felony.**

<sup>39</sup> See, e.g., *United States v. Becker*, 919 F.2d 568 (9<sup>th</sup> Cir. 1990).

<sup>40</sup> *United States v. Lopez-Montanez*, 421 F.3d 926, 928 (9<sup>th</sup> Cir. 2005) (conviction under Cal P.C. § 243.4(a) is not a crime of violence under USSG § 2L1.2(b)(1)(A) because it does not have use of force as an element). Section 2L1.2(b)(1)(A) uses the same standard as 18 USC 16(a).

<sup>41</sup> *Lisbey v. Gonzales*, 420 F.3d 930, 933-934 (9<sup>th</sup> Cir. 2005) (felony conviction of Cal. Penal Code, § 243.4(a) is categorically a crime of violence under 18 USC § 16(b)).

<sup>42</sup> INA 101(a)(48)(B); 8 USC § 1101(a)(48)(B)

#### **d. Conviction Required**

In order to trigger this ground of removal, the noncitizen must have a conviction.

Thus, carefully crafted “immigration-safe” deferred adjudication agreements (e.g. dispositional continuance) will not constitute a conviction and consequently cannot serve as a basis for removal/deportation regardless of the offense of conviction. See § IV, *supra*.

### **2. Elements of a Crime of Violence under 18 USC § 16**

#### **a. The Force Must Amount To Actual Violence**

In *Ye v. INS*, the Ninth Circuit held that “the force necessary to constitute a crime of violence [under 18 USC § 16] ... must *actually be violent in nature*.”<sup>43</sup> Finding that felony auto burglary under Calif. P.C. § 460(b) could be violated simply by reaching into an open window and removing an article, the court held that it was not a crime of violence. Recent cases affirm that a plea to an offense that can be violated by mere offensive touching is not a “crime of violence.”<sup>44</sup>

**Keep the record of conviction clear of evidence of actual violence.** The Board of Immigration Appeals held that a simple assault statute can be found to be a crime of violence under a modified categorical analysis, if the record of conviction establishes that force amounting to violence was used.<sup>45</sup> The Ninth Circuit has not ruled on this in the immigration context, although in the federal criminal context it has gone to the record to see if actual violence was involved.<sup>46</sup> Immigration counsel should argue that a driving offense involving reckless conduct such as reckless driving—or attempting to elude, apart from the disjunctive choice of “fails or refuses”—is a single offense that should be judged based on whether the minimum conduct required to violate the statute is a crime of violence. However, criminal defense counsel should make every possible effort to keep the record opaque, and keep out any indicia of actual conduct involving violent force, (or that actual harm resulted). See discussion of record of conviction and categorical analysis at § II, *supra*.

For a misdemeanor to be a crime of violence under 18 USC § 16(a), it must have the use, attempted use or threatened use of force against a person or property *as an element of the offense*. A felony conviction, however, can qualify as a crime of violence under either § 16(a) or the more

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<sup>43</sup> *Ye v. INS*, 214 F.3d 1128, 1133-34 (9th Cir. 2000).

<sup>44</sup> Some of these cases arose in the context of the domestic violence ground of deportability, which uses the same 18 USC § 16 definition of crime of violence. A crime of violence under 18 USC 16 committed against a person with a certain listed domestic relationship will cause deportability under 8 USC § 1227(a)(2)(E)(i); INA § 237(a)(2)(E)(i).

<sup>45</sup> *Matter of Sanudo*, 23 I&N Dec 968 (BIA 2006)

<sup>46</sup> The court in *Singh v. Ashcroft*, 386 F.3d 1228 (9th Cir. 2004) conducted a categorical, rather than a modified categorical, analysis: it looked to the minimum conduct required to violate the statute. *Singh* did not explicitly state that it would be improper to go to the record of conviction, however. The court in *Ortega-Mendez v. Gonzales*, 450 F.3d 101 (9th Cir. 2006) noted that the issue was not raised in the case. In criminal cases the Ninth Circuit has looked to the record to determine whether the defendant’s actions had involved real violence. See, e.g., *United States v. Belless*, 338 F.3d 1063 (9th Cir. 2003), *United States v. Nobriga*, *supra*. These cases might be distinguishable in that there is more leeway to address facts in a subsequent criminal hearing. See discussion of *Belless* in *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 393 (9th Cir. 2006).

broadly defined § 16(b), which requires the offense to carry an inherent *risk* that force will be used in its commission. However, not every felony conviction will be held a crime of violence.

**b. Neither Negligent nor Reckless Causation of Injury is a Crime of Violence**

In considering a case involving negligent driving under the influence, the Supreme Court held that the definition of a crime of violence under 18 USC § 16 involves use or risk of use of violent physical force, not merely causation or risk of causation of injury. *Leocal v. Ashcroft*, 125 S.Ct. 377 (U.S. 2004).

**i. Negligent Infliction of Injury is not a Crime of Violence**

In *Leocal v. Ashcroft*, the Supreme Court found that driving under the influence without an intent more than negligence was not a crime of violence under 18 USC § 16(a) or (b). Regarding § 16(a), the Court stated:

The critical aspect of § 16(a) is that a crime of violence is one involving the "use...of physical force against the person or property of another." As we said in a similar context in *Bailey*, "use" requires active employment. While one may, in theory, actively employ something in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident. Thus, a person would "use... physical force against" another when pushing him; however, we would not ordinarily say a person "use[s] . . . physical force against" another by stumbling and falling into him. When interpreting a statute, we must give words their "ordinary or natural" meaning. The key phrase in § 16(a) --the "use . . . of physical force against the person or property of another"--most naturally suggests a higher degree of intent than negligent or merely accidental conduct. Petitioner's DUI offense therefore is not a crime of violence under § 16(a).<sup>47</sup>

Similarly, the Court held that 18 USC § 16(b) covers offenses that present a *risk that violent physical force might be used in the course of committing the offense*, not a risk that injury might occur.

**Although is highly likely that the *mens rea* of reckless driving is covered by *Fernandez-Ruiz*, and thus excluded from the definition of a crime of violence, it would be prudent to avoid a sentence of 365 days; and to specify willful or wanton, rather than willful and wanton disregard, or simply ‘willful disregard.’**

18 USC § 16(b) “simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. The reckless disregard in § 16 relates not to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime. The classic example is burglary. A burglary would be covered under § 16(b) not because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.”<sup>48</sup>

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<sup>47</sup> *Leocal v. Ashcroft*, 125 S.Ct. 377, 382 (U.S. 2004) (citations omitted).

<sup>48</sup> *Id.* at 383.

**ii. Reckless Infliction of injury is not a crime of violence.**

In *Leocal v. Ashcroft* the Supreme Court held that a crime that involved the *negligent* infliction of injury (drunk driving) is not a crime of violence under 18 USC § 16. The court did not explicitly rule on whether *reckless* causation of injury was a crime of violence, although the reasoning of the case strongly supported such a finding. The Ninth Circuit had precedent going in both directions. In *Fernandez-Ruiz v. Gonzales*, the Ninth Circuit en banc resolved the issue by holding that a felony conviction for reckless causation of injury (under Ariz. Rev. Stat. § 13-1203(a)(1)/1204) is not a crime of violence.<sup>49</sup> Other circuits have come to the same conclusion.<sup>50</sup>

The en banc *Fernandez-Ruiz* opinion overruled prior Ninth Circuit cases. In *United States v. Ceron-Sanchez* the Ninth Circuit had held that the same offense, felony reckless infliction of injury under A.R.S. § 13-1203(a)(1)/1204 (reckless driving) is a crime of violence because it presents the risk of injury. In *Park v. INS* the court had held that involuntary manslaughter under Calif. P.C. 192(b) was a crime of violence, because it could be committed by criminal negligence which the court held equivalent to recklessness.<sup>51</sup> These decisions cited *United States v. Springfield*, where the Ninth Circuit had held that federal involuntary manslaughter is a crime of violence under a statute with the same standard as 18 USC § 16(b).<sup>52</sup> The Board of Immigration Appeals relied on these decisions to hold that involuntary manslaughter under an Illinois statute was a crime of violence.<sup>53</sup> These are no longer good law.

*Fernandez-Ruiz* reaffirmed the validity of the pre-*Leocal* decision *United States v. Hernandez-Castellanos*,<sup>54</sup> where the court had held that felony endangerment under A.R.S. § 13-1201 is not a crime of violence because that statute does not require proof of a risk that force will be used, but rather proof of a risk of physical injury. The Court noted that reckless actions such as leaving a child in a hot car or abandoning a container in which a child could become trapped, could cause harm without use of “force,” especially force amounting to violence as required by *Ye v. INS*.<sup>55</sup> *Fernandez-Ruiz* also upheld the post-*Leocal* case *Lara-Cazares v. Gonzales*, which had held that

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<sup>49</sup> *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc). *Malta-Espinoza v. Gonzales* 2007 U.S. App. LEXIS 4787 at 12-13 (9th Cir. 2007).

<sup>50</sup> See, e.g., *Singh v. Gonzales*, 432 F.3d 533 (3d Cir. 2006); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005); *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005).

<sup>51</sup> *Park v. INS*, 252 F.3d 1018, 1023 (9th Cir. 2001).

<sup>52</sup> *United States v. Springfield*, 829 F.2d 860 (9th Cir. 1987). This was the first case in the country to hold that reckless infliction of injury is a crime of violence. In 1999, it was pointed out that *Springfield* relied on an incorrect reading of the legislative history. The court had consulted the legislative history of a proposed but never-enacted amendment to a different offense. The 9th Circuit acknowledged the error in *Park*, but downplayed its importance in the decision. However, a close reading of *Springfield* shows that the erroneous interpretation was the deciding factor in an otherwise close case. The critique of *Springfield* is reprinted in article form as Brady and Tomlinson, “Intent Requirement of the Aggravated Felony Crime of Violence” in *Bender’s Immigration Bulletin*, v. 4 No. 10, May 15, 1999. Both *Springfield* and *Park* now are overruled by *Fernandez-Ruiz*.

<sup>53</sup> *Matter of Alcantar*, 20 I & N 801 (BIA 1994) (relying on *Springfield* to find that involuntary manslaughter by recklessness under Ill. Rev. Stat. Ch 38 par 9-3(a) is a crime of violence); cf *Matter of Vargas*, 23 I&N Dec. 651 (BIA 2004)(involuntary manslaughter under N.Y. Penal Code 125.20 is a crime of violence, because the record of conviction shows that the intent was not mere recklessness in this offense).

<sup>54</sup> *United States v. Hernandez-Castellanos*, 287 F.3d 876 (9th Cir. 2002).

<sup>55</sup> See discussion of requirement that force amount to violence in *Ye v. INS*, *supra* at §§ V.C.1.a & V.C.2.a.

California vehicular manslaughter caused by “criminal negligence,” which had been held equivalent to recklessness, is not a crime of violence.<sup>56</sup>

### 3. Drunk Driving

The Supreme Court in *Leocal v. Ashcroft*, *supra*, found that negligent driving under the influence is not a crime of violence under 18 USC § 16. The Ninth Circuit and almost all other circuits already had ruled in this way.<sup>57</sup> Unfortunately, for years before this the Board of Immigration Appeals had held the offense to be an aggravated felony, and had wrongly deported thousands of persons with DUI convictions.

It is possible that Congress at some point will legislatively overturn *Leocal*. In 2006 bills passed houses of Congress that would make a third misdemeanor DUI, or negligent causation of death, a crime of violence, so that it would be an aggravated felony if a sentence of a year or more was imposed. This did not become law in 2006, but because Congress is currently taking up immigration reform again, the legislative climate is highly unpredictable and it is a realistic possibility that the immigration statute could be amended to include some form of DUI offenses. Consequently, criminal **defense counsel should act conservatively and make every attempt to avoid a sentence imposed of a year or more for a drunken driving conviction, or in particular a third drunk driving conviction.**

Currently in the Ninth Circuit a recidivist sentence enhancement (i.e., a larger sentence based on having prior drunk driving convictions) is not counted toward the one year,<sup>58</sup> so that a year’s sentence imposed for multiple DUIs, where a single DUI would have a potential sentence of less than a year, should not pose a risk. However, legislation has targeted the Ninth Circuit recidivist sentence enhancement rule as well, to date unsuccessfully; also, dicta by the Supreme Court in *Lopez v. Gonzales* might be held to indicate disapproval of the recidivist rule.<sup>59</sup> The best advice is to be conservative when obtaining a sentence whenever possible.

Apart from the threat of future legislation, a DUI conviction does not trigger deportation/removal. Note that, (a) multiple or recent convictions may show that the person should be held inadmissible or barred from establishing good moral character due to current alcoholism or (b) an aggregate sentence of five years for two or more convictions of any type is a basis for inadmissibility and denial of immigration benefits such as a greencard or citizenship.<sup>60</sup> So it is important to advise clients that any DUI conviction will have a significant negative impact on any application for immigration benefits.

### D. Driving Offenses and the Aggravated Felony “Obstruction of Justice” Provision

The immigration statute’s aggravated felony definition at 8 USC 1101(a)(43) includes a provision that designates as an aggravated felony an “offense relating to obstruction of justice, perjury or

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<sup>56</sup> *Lara-Cazares v. Gonzalez*, 408 F.3d 1217 (9th Cir. 2004) (DUI manslaughter under P.C. § 191.5(a) is not a crime of violence). See also *United States v. Camacho-Lopez*, 450 F.3d 928, 930 (9th Cir. 2006)(same).

<sup>57</sup> *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001); see also *Montiel-Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002); *United States v. Portillo-Mendoza*, 273 F.3d 1224, 1228 (9th Cir. 2001)(with priors).

<sup>58</sup> See *US v. Corona-Sanchez*, 29 F.3d 1201 (9th Cir. 2002)(en banc).

<sup>59</sup> *Lopez v. Gonzales*, 127 S. Ct. 625,630 n.6 (2006)

<sup>60</sup> INA § 212(a)(2)(B); 8 USC § 1182(a)(2)(B).

subornation of perjury, or bribery of a witness” if a sentence of a year is imposed.<sup>61</sup> A primary concern, therefore, is to *avoid imposition of a one year sentence* regardless of time suspended, for any single offense that would be defined as “relating to” obstruction of justice, perjury or subornation, or bribery of a witness.

### 1. Definitions of Obstruction of Justice

- The elements of obstruction of justice include: (1) a pending judicial proceeding; (2) the defendant must have knowledge or notice of the pending proceeding; and (3) the defendant must have acted corruptly, that is with the intent to influence, obstruct, or impede that proceeding in its due administration of justice.”<sup>62</sup>
- Defining obstruction of justice as active interference with an ongoing judicial process also is consistent with the context of the aggravated felony statute. The other offenses listed in § 101(a)(a)(43)(S) -- perjury, subornation of perjury, and bribery of a witness—all relate to direct interference with and subversion of a judicial or administrative hearing, by lying under oath or tampering with witnesses.
- Obstruction of justice can be more broadly defined to include obstructing an officer from carrying out his duties. To date there has been no immigration law precedent that has extended the reach of this provision to such offenses.

### 2. Sentence of One Year or More Must Be Imposed

A suspended sentence is a sentence for immigration purposes, as is any specified period of incarceration or confinement.<sup>63</sup> Avoiding a 365-day sentence for a gross misdemeanor like Assault 4 will eliminate any chance that it could be deemed an “aggravated felony” under this ground, even if it otherwise fit the definition of a crime of violence.

**Ensure a sentence imposed of less than 365 days, regardless of time suspended. Whether the offense were deemed to be a crime of violence or one “relating to the obstruction of justice,” obtaining a sentence of 364 days or less will insure that it will not constitute an aggravated felony.**

### 3. Conviction Required

In order to trigger this ground of removal, the noncitizen must have a conviction.

Thus, carefully crafted “immigration-safe” deferred adjudication agreements (e.g. dispositional continuance) will not constitute a conviction and consequently cannot serve as a basis for removal/deportation regardless of the offense of conviction. See § V, *supra*.

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<sup>61</sup> INA § 101(a)(43)(S); 8 USC § 1101(a)(43)(S).

<sup>62</sup> *Matter of Espinoza*, Int. Dec. 3402 (BIA 1999). See also, *United States v. Grubb*, 11 F.3d 426, 437 (4<sup>th</sup> Cir. 1993); *United States v. Aguilar*, 115 S.Ct. 2357 (1995) (giving false statements to an FBI agent who may or may not testify before a grand jury is not sufficient to constitute a violation of 18 USC. § 1503.)

<sup>63</sup> INA 101(a)(48)(B); 8 USC § 1101(a)(48)(B).

## E. “Crimes Involving Moral Turpitude” (CIMTs)

### 1. Relevant Immigration Statutory Provision and to Whom it Applies

A conviction that constitutes a “crime involving moral turpitude” (CIMT) is a ground of deportation and ground of inadmissibility. A CIMT conviction can trigger deportation/removal proceedings for any noncitizen (including green-card holders) where such conviction is obtained after a lawful admission.<sup>64</sup>

CIMTs are also a ground of inadmissibility under the immigration law. Consequently, convictions that are CIMTs can bar non-citizens from entering the U.S., obtaining lawful status (e.g. a green-card), and acquiring citizenship.<sup>65</sup> As a ground of inadmissibility, they will also provide an additional basis for removal for undocumented non-citizens.

Therefore, CIMT provisions apply in some manner to all non-citizens.<sup>66</sup>

The CIMT provisions under immigration law have other important requirements and exceptions that may prevent your client from triggering them. For example, a green-card holder with only one CIMT conviction will not get deported for it unless it was committed within five years of her admission to the U.S.<sup>67</sup> If your client is charged with an offense that may constitute a CIMT, it is important to consult with competent immigration counsel to analyze specific statutes and pursue specific strategies.

### 2. Meaning of the term “moral turpitude”

“The source of confusion may very well be the BIA's schizophrenic law on the subject.”  
*Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117, 1119 (9th Cir. 2003) (Wardlaw, concurring)

The precise meaning of the term “moral turpitude” has never been fully settled.<sup>68</sup> It is a federal legal question controlled by judicial and administrative case law. The Board of Immigration Appeals (BIA) has held that moral turpitude refers generally to conduct that is inherently “base, vile, or depraved,” and contrary to the accepted rules of morality and the duties owed between persons or to society in general.<sup>69</sup> Under this standard, the nature of a crime is measured against

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<sup>64</sup> INA § 237(a)(2)(A)(i), (ii); 8 USC §§ 1227(a)(2)(A)(i), (ii). There is an exception to deportability for one CIMT, if it was not committed within 5 years of admission, but there is no such exception for the “crime of violence”- based grounds (aggravated felony).

<sup>65</sup> INA § 212(a)(2)(a)(i)(I); 8 USC § 1182(a)(2)(a)(i)(I). The inadmissibility grounds make non-citizens ineligible to receive visas or to enter the US. A person can become inadmissible for a CIMT conviction, but also if she “admits having committed” a CIMT or admits “committing acts which constitute the essential elements” of a CIMT. 8 USC § 1182(a)(2)(a)(i). The admission of the elements of a CIMT is hedged with certain restrictions. See, e.g. *Matter of G-M-*, 7 I&N Dec. 40 (Att’y Gen. 1956). *Matter of S-* 8 I&N Dec. 409 (BIA 1959); *Matter of C-Y-C-*, 3 I&N Dec. 623 (BIA 1950).

<sup>66</sup> Note that the CIMT deportability and inadmissibility provisions are not identical. They have numerous other requirements and exceptions under the statute. Thus, the specific application in any non-citizen's case may vary. However, the important point here is to avoid have a conviction classified as a CIMT. For more detail, see and compare 8 USC 1182(a)(2)(A) and 8 USC 1227(a)(2)(A)(i)& (ii).

<sup>67</sup> See the two CIMT exceptions discussed *infra at p. 26, § V.E.4.*

<sup>68</sup> See *Jordan v. De George*, 341 U.S. 223, 229 (1951).

<sup>69</sup> *Matter of L-V-C-*, Interim Decision 3382 (BIA 1999); *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988); see also *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995); *Grageda v. INS*, 12 F.3d 919, 921 (9th Cir. 1993) (noting that courts have described moral turpitude in general terms as “an `act of baseness or depravity contrary to accepted moral standards” (quoting *Guerrero de Nodahl*

contemporary moral standards and may be susceptible to change as prevailing views in society change.<sup>70</sup>

CIMTs often involve an evil intent, however such a specific intent is not a prerequisite to finding that a crime involves moral turpitude.<sup>71</sup> Of course, another line of cases has held that “evil intent is a requisite element” for a crime involving moral turpitude.<sup>72</sup> Crimes involving fraud are always within the scope of a CIMT.<sup>73</sup>

Other crimes involving acts of baseness or depravity have been found to be CIMTs even though they have no element of fraud and, in some cases, no explicit element of evil intent (e.g., murder, rape, robbery, kidnapping, voluntary manslaughter, some involuntary manslaughter offenses, aggravated assaults, mayhem, theft offenses, spousal abuse, child abuse, and incest). One way of thinking of it is, if the crime is sufficiently base, the evil intent can be inferred directly from the act.

A crime that is “malum in se” usually involves moral turpitude and one that is “malum prohibitum” offense does not, but this is not an absolute standard.<sup>74</sup> Neither the seriousness of a criminal offense nor the severity of the sentence imposed determines if offense is a CIMT,<sup>75</sup> nor does the fact that the crime is a felony.<sup>76</sup>

The specific statute of conviction is what controls. If it defines a crime in which turpitude *necessarily* inheres, then, for immigration purposes, the offense is a crime involving moral turpitude. Thus, whether a particular crime involves moral turpitude, “is determined by the statutory definition or by the nature of the crime, not by the specific conduct that resulted in the conviction.”<sup>77</sup> The crime must be one that necessarily involves moral turpitude without consideration of the circumstances under which the crime was, in fact, committed.<sup>78</sup> It's necessary

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v. *INS*, 407 F.2d 1405, 1406 (9th Cir. 1969)), and as “`basically offensive to American ethics and accepted moral standards” (internal citations omitted).

<sup>70</sup> *Matter of G-*, 1 I&N Dec. 59, 60 (BIA 1941) (the standard is “that prevailing in the United States as a whole, regarding the common view of our people concerning its moral character”). State Department regulations say that determination of whether a crime involves moral turpitude “shall be based upon the moral standards generally prevailing in the United States.” 22 CFR 40.21(a)(1).

<sup>71</sup> See *Rodriguez-Herrera v. INS*, *supra*, at 240 (noting that the United States Court of Appeals for the Ninth Circuit has “held only that without an evil intent, a statute does not necessarily involve moral turpitude”); *Gonzalez-Alvarado v. INS*, 39 F.3d 245, 246 (9th Cir. 1994) (noting that “[a] crime involving the willful commission of a base or depraved act is a crime involving moral turpitude, whether or not the statute requires proof of evil intent”); *Guerrero de Nodahl v. INS*, *supra*, at 1406; *Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994) (“Among the tests to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind.”); *Matter of Danesh*, *supra*; *Matter of Wojtkow*, 18 I&N Dec. 111 (BIA 1981); *Matter of Medina*, 15 I&N Dec. 611, 614 (BIA 1976) (stating that the “presence or absence of a corrupt or vicious mind is not controlling” and that criminally reckless behavior may be a basis for a finding of moral turpitude), *aff'd sub nom. Medina-Luna v. INS*, 547 F.2d 1171 (7th Cir. 1977).

<sup>72</sup> *Matter of Khourn*, 21 I&N Dec. 1041, 1046 (BIA 1997); *Matter of Flores*, 17 I&N Dec. 225, 227 (BIA 1980) (holding that an “evil or malicious intent is said to be the essence of moral turpitude”); *Matter of Abreu-Semino*, 12 I&N Dec. 775, 777 (BIA 1968) (finding that “crimes in which evil intent is not an element, no matter how serious the act or harmful the consequences, do not involve moral turpitude”).

<sup>73</sup> *Jordan v. De George*, *supra*, at 229.

<sup>74</sup> See *Kempe v. United States*, 151 F. 2d 680, 688 (8th Cir. 1945).

<sup>75</sup> *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992)

<sup>76</sup> See *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *Matter of Abreu-Semino*, *supra*, at 777.

<sup>77</sup> *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir. 1980)

<sup>78</sup> See *Goldshtein v. INS*, 8 F.3d 645, 647 (9th Cir. 1993).

to analyze whether the elements necessary for conviction under the statute render the offense a crime involving moral turpitude.<sup>79</sup> Although case law applying the definition of "moral turpitude" frequently reaches counter-intuitive or inconsistent results, a few broad principles can be discerned. In general, the following types of crimes have been held to involve moral turpitude:

- 1) Crimes (felonies or misdemeanors) in which either an intent to defraud or an intent to steal is an element;
- 2) Crimes (typically felonies) in which there is intent to cause or threaten great bodily harm, or in some cases if it is caused by a willful act or recklessness;
- 3) Felonies and some misdemeanors in which "malice" is an element;
- 4) Some sex offenses in which "lewd" intent is an element.

However where the statute includes some crimes that are moral turpitude and some that are not, the reviewing immigration authority or court can examine the "record of conviction," to see if the person was necessarily convicted of a CIMT.<sup>80</sup>

### 3. Moral turpitude and crimes of recklessness

Both the BIA and the federal courts have repeatedly held that offenses are CIMTs where they have *mens rea* requirements that the defendant acted intentionally or knowingly, coupled with the element of causing serious harm or acting in disregard of causing serious harm.<sup>81</sup> The Board of Immigration Appeals has ruled that, in certain circumstances, a crime committed with a reckless *mens rea* can be a CIMT.<sup>82</sup> The BIA has interpreted moral turpitude to include recklessness crimes if certain statutory aggravating factors are present.<sup>83</sup> In analyzing statutes with reckless *mens rea* components, the BIA has held that recklessness alone is insufficient to deem an offense a CIMT. In order for misconduct committed in a reckless manner to constitute a CIMT for immigration purposes, there must be some other aggravating factor involved. In its decision in *Matter of Fualaau*, the BIA set forth its test for determining when reckless misconduct constitutes a CIMT:

[A]n analysis of an alien's intent is critical to a determination regarding moral turpitude. . . . Although the Board has issued precedents holding that a conviction involving reckless conduct . . . may form the basis for a determination that a crime involves moral turpitude, we have never held that a crime involving reckless conduct is *per se* a crime involving moral turpitude. . . . In order for an assault of the nature at issue in this case to be deemed a crime involving moral turpitude, the element of a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury. . . . Here, where the violation at issue is similar to a simple assault, we find that the respondent did not

<sup>79</sup> See *Burr v. INS*, 350 F.2d 87 (9th Cir. 1965); *Matter of Short*, *supra*.

<sup>80</sup> *Matter of Grazely*, 14 I&N Dec. 330 (BIA 1973)

<sup>81</sup> *Grageda v. INS*, 12 F.3d 919 (9th Cir. 1993); *Nguyen v. Reno*, 211 F.3d 692 (1<sup>st</sup> Cir. 2000); *Matter of Ajami*, Int. Dec. 3405 (BIA 1999); *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996).

<sup>82</sup> *Matter of Medina* 15 I&N Dec. 611, 613 (BIA 1976); *Knapik v. Ashcroft*, 384 F.3d 84, 89 (3d Cir. 2004) ("[M]oral turpitude can lie in criminally reckless conduct."); *Matter of Fualaau*, 21 I&N Dec. 475, \_\_\_ (BIA 1996) "Although the Board has issued precedents holding that a conviction involving reckless conduct... may form the basis for a determination that a crime involves moral turpitude, we have never held that a crime involving reckless conduct is *per se* a crime involving moral turpitude." *id.*)

<sup>83</sup> *Matter of Medina* 15 I&N Dec. 611, 613 (BIA 1976);

commit a crime involving moral turpitude notwithstanding the state court's finding that he acted with a reckless state of mind.<sup>84</sup>

Offenses of recklessness that have qualified as CIMTs typically are aggravated assaults<sup>85</sup> or reckless homicide.<sup>86</sup> In those cases, recklessness was defined as a conscious disregard for a substantial and unjustifiable risk, constituting a gross deviation from a reasonable standard of care.<sup>87</sup> Reckless driving in Washington does contain a similar element of wanton, knowing disregard. *Knapik v. Ashcroft*, 384 F.3d 84, 89-90 (3rd Cir. 2004) held that a driving conviction for reckless endangerment<sup>88</sup> was a crime of moral turpitude. However, that statute specified that a person is guilty if “under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person.”

Arguably, the BIA holdings on criminal recklessness should be limited in application to the homicide or aggravated assault offenses with which those cases specifically dealt. For example, older authorities have held reckless driving not to involve moral turpitude.<sup>89</sup> In a recent case the 9th Circuit ruled that a misdemeanor reckless assault statute was not a CIMT because—like reckless driving-- “it does not require inflicting bodily injury of *any* kind... it requires neither willful conduct nor conduct resulting in bodily injury that is more than insubstantial.”<sup>90</sup>

#### 4. Moral Turpitude --- the exceptions for one such offense:

Sometime a non-citizen must plead to an offense that is, or may be a CIMT. Even where the offense is a CIMT, some legal immigrants and some immigrants seeking legal status may still avoid becoming deportable or inadmissible if the CIMT offense falls within an applicable exception.

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<sup>84</sup> *Matter of Fualaau*, 21 I&N Dec. 475, 478 (BIA 1996)(internal citations omitted).

<sup>85</sup> *Matter of Medina*, 15 I&N Dec. 611 (1976).

<sup>86</sup> *Matter of Wojtkow*, 18 I&N Dec. 111 (1981).

<sup>87</sup> Washington’s statutory definition is at RCW § 9A.08.010(1)(c): “A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.” Washington case law has held that because the conclusion that “an act is reckless depends on both what the defendant knew and how a reasonable person would have acted knowing these facts,” the statutory definition has been described as “includ[ing] a subjective and objective component.” *State v. Graham*, 2005 Wash. LEXIS 66 (Wash., January 13, 2005, Filed), citing *State v. R.H.S.*, 94 Wn. App. 844, 847, 974 P.2d 1253 (1999). Whether an act is reckless depends on both what the defendant knew and how a reasonable person would have acted knowing these facts. *State v. R.H.S.*, 94 Wn. App. 844, 1999 Wash. App. LEXIS 391 (Wash. Ct. App., 1999).

<sup>88</sup> Conviction under New York Penal Law § 120.25, for Reckless Endangerment in the first degree.

<sup>89</sup> See *In re Schiano Di Cola*, 7 F. Supp. 194 (D.C.R.I. 1934) (involuntary manslaughter by means of reckless driving did not involve moral turpitude); see also *Matter of C*, 2 I&N Dec. 716, 719-20 (1947) (dicta stating that neither reckless driving nor gross negligence involved moral turpitude).

<sup>90</sup> *Fernandez-Ruiz v. Gonzales* 486 F.3d 1159, 1167 (9th Circuit 2006) See also *Matter of Yue Fen Tan* A43 406 198 – Atlanta, BIA, 28 Immig. Rptr. B1-30, DEC 17 2003) (Unpublished BIA case which accepts-- in passing-- that a Georgia reckless driving statute is not a CIMT)

a. **A noncitizen can avoid becoming inadmissible<sup>91</sup> for a conviction under the moral turpitude ground by coming within the “petty offense exception” to the CIMT inadmissibility ground. The requirements are:**

- 1) The noncitizen must have committed only *one* crime involving moral turpitude;
- 2) The noncitizen must not have been "sentenced to a term of imprisonment in excess of six months" (regardless of time suspended); and
- 3) The offense must have a maximum possible sentence of one year.<sup>92</sup>

**This exception can benefit both undocumented as well as noncitizens with lawful status (greencard holders, asylees and refugees). Thus, whenever possible when dealing with a misdemeanor CIMT offense (e.g. misdemeanor theft), request a sentence of 180 days to preserve the possibility that this exception will apply.**

b. **The requirements of the CIMT ground of deportation<sup>93</sup>**

A noncitizen with only one CIMT will only be deportable if:

- 1) The crime was *committed* within five years after his or her last admission; or
- 2) The crime carries a maximum *potential* sentence of one year. (E.g.: a simple misdemeanor CIMT with a maximum possible sentence of 90 days would avoid deportability even though it had been committed within 5 years of admission; however all RCW gross misdemeanors meet this requirement as they have a potential sentence of one year).<sup>94</sup>

In order to tell if your client could be safe with one CIMT, you need to know her immigration status, how long she or he has had that status, and whether they are legally able to apply for some status where admissibility is a factor.

The WDA Immigration Project can help you analyze this, if the only recourse is to plead to a crime that is or might be considered a CIMT.<sup>95</sup>

**Don't rely on your client being “safe” with one conviction for a possible CIMT, unless you have consulted with an expert immigration lawyer, or with the WDA Immigration Project**

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<sup>91</sup> The grounds of inadmissibility apply to any non-citizen seeking to legally enter the US, to become a legal permanent resident, and to those who need to show the “good moral character” needed for many kinds of applications, including to become a US citizen.

<sup>92</sup> INA § 212(a)(2)(A)(ii)(II); 8 USC § 1182(a)(2)(A)(ii)(II).

<sup>93</sup> The grounds of deportation apply to any non-citizen who is in the US *after a legal admission*, even if she subsequently overstayed or lost status.

<sup>94</sup> INA § 237(a)(2)(A)(i); 8 USC § 1227(a)(2)(A)(i).

<sup>95</sup> WDA Immigration Project. For technical assistance email: [jonathan@defensenet.org](mailto:jonathan@defensenet.org); or call (206) 726-3332.

## VI. Selected RCW Driving Offenses: Analysis and Strategies

### A. RCW 9A.36.050 Reckless endangerment. (RE)(gross misdemeanor)

#### 1. Grounds that a conviction under this statute might trigger:

##### a. Crime involving moral turpitude (CIMT)

Some crimes committed with a reckless *mens rea* can be CIMTs. The BIA has interpreted moral turpitude to include recklessness crimes if certain statutory aggravating factors are present.<sup>96</sup> However, there is not a definitive case on this statute and there are arguments pro and con.<sup>97</sup> Defense counsel should assume conservatively that this *could* be a CIMT.

##### b. An aggravated felony, as a crime of violence (as defined in 18 USC 16) with a sentence of one year or more.

- This definition has two parts,<sup>98</sup> but the only part applicable to misdemeanors such as RE is § 16(a), which requires that the offense have *as an element* the use, attempted use, or threatened use of physical force against a person or property.
- In 2006 the Ninth Circuit joined a majority of other federal circuits, in limiting this crime of violence definition to crimes requiring intentional use of force.<sup>99</sup> **This means that it is very unlikely that RE could be deemed a crime of violence, under current case law.**

#### 2. Possible strategies to avoid removal

It is prudent for defense counsel to:

- avoid a 365 day sentence for RE, (just in case the Supreme Court were to rule directly in a case involving the reckless use of force,<sup>100</sup> or Congress were to retroactively change the aggravated felony definition).
- keep any references to the specific use of violent force out of the record of conviction

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<sup>96</sup> *Matter of Medina* 15 I&N Dec. 611, 613 (BIA 1976);

<sup>97</sup> See, e.g., the unpublished “index decision” *In Re Almeraz-Hernandez* A78-624-143 - Eloy (BIA 9-6-2006) finding a similar Arizona statute not to be a CIMT (“[T]he Arizona endangerment statute does not require that any harm actually befall the victim or that the risk of harm be created by any particular aggravated means, such as with the use or threat of violence.” *id.* at 3.); however, a New York reckless endangerment law, § 120.25, where conduct specifically creates “a grave risk of death” and evinces “depraved indifference to human life” was found to be a CIMT. *Knapik v. Ashcroft* 384 F.3d 84 (3rd Cir. 2004). The Arizona statute is much closer to RCW § 9A.36.050, and provides a strong argument that RE is not a CIMT.

<sup>98</sup> The term “crime of violence” means— (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. 18 USC § 16.

<sup>99</sup> *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1129 (9th Cir. 2006)

<sup>100</sup> *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004) specifically did “not present us with the question whether a state or federal offense that requires proof of the *reckless* use of force against a person or property of another qualifies as a crime of violence under *18 USC § 16*” 125 S.Ct. 384.

- if the offense involved the use of a firearm, that should be kept out of the record of conviction.<sup>101</sup>
- since there is no definitive ruling on whether RCW 9A.36.050 is a CIMT:
  - See if the defendant would fit into or benefit from one of the two CIMT exceptions outlined *supra* at p.26; § V.E.4;
  - To the extent possible keep any admissions of actual harm inflicted, out of the record of conviction;
  - Plead to the alternative offense of disorderly conduct under RCW 9A.84.030 - Disorderly Conduct - Disorderly conduct is neither a CIMT nor a COV under immigration law. It does not trigger grounds of deportation, inadmissibility or any provisions of the aggravated felony definition.

**B. RCW 9A.76.175 Making a false or misleading statement to a public servant. (GM)**

**1. Grounds that a conviction under this statute might trigger:**

**a. Crime involving moral turpitude (CIMT)**

- Merely making a false or misleading statement should not be categorically a crime of moral turpitude but because the statute also requires that the statement be a material statement “reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties” there could be some ambiguity.
- Because the minimum conduct seems to require neither actual intent to mislead nor actual reliance by a public servant,<sup>102</sup> immigration counsel has a good argument that this is not a CIMT.
- The case law on false statements as CIMTs goes both ways. The element of mere falsity, when contrasted or opposed to fraudulent intent, or when lacking “materiality” has sometimes been found not to involve moral turpitude.<sup>103</sup> A conviction under federal law for knowingly possessing an altered immigration document does not involve moral turpitude unless intent to use the document unlawfully is an element of the offense.<sup>104</sup>

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<sup>101</sup> There is a separate ground of deportation for a crime involving the use of firearms. 8 USC 1227 § \_\_ While a firearm or weapon is not an element of RE, it would be tempting fate to specify the use of a gun as the basis for conviction.

<sup>102</sup> “[T]he statute provides a statement is material if it is “reasonably likely” to be relied upon by a public servant. ...It does not require actual reliance” *State v. Godsey*, 131 Wn. App. 278, 291 (Wash. Ct. App. 2006)

<sup>103</sup> See, e.g.: *Hirsch v. INS*, 308 F.2d 562 (9th Cir. 1962); *Matter of Marchena*, 12 I&N Dec. 355, 1967 WL 14033 (BIA 1967). The Ninth Circuit ruled that illegally completing an I-9 form in violation of 18 USC § 1546(b)(3), and making a false attestation about a social security card in violation of 42 USC § 408(a)(7)(B), are not crimes involving moral turpitude. *Beltran-Tirado v INS*, 213 F.3d 1179 (9<sup>th</sup> Cir. 2000).

<sup>104</sup> *Matter of Serna*, Int. Dec. 3188 (BIA 1992) (record of conviction under 18 USC § 1546 showed conviction was only for possession and not for use). *But see: Zaitona v. INS*, 9 F.3d 432, 437-38 (6th Cir. 1993) (opining

- In its most recent case on the topic the BIA found that an unsworn false *written* statement made with “intent to mislead a public servant in performing his official function” *did* involve moral turpitude.<sup>105</sup>
- Since it is hard to imagine knowingly making a false or misleading statement, one likely to be relied on by a public servant, without some degree of intent to mislead,<sup>106</sup> **defense counsel should conservatively assume this *could* be found to be a CIMT**

**b. An aggravated felony offense “relating to obstruction of justice” . . . for which the term of imprisonment is at least one year.**

- It is highly unlikely that this could be deemed a crime “relating to obstruction of justice,” both because it does not require actual reliance on the statement by a public servant<sup>107</sup>, and because the official duties of a public servant, in the course of which reliance might occur, are broader than those relating to the criminal justice system or the operation of a legal tribunal.<sup>108</sup>
- But if the record of conviction included proof of specific intent, and of actual reliance in relation to the operation of the justice system, it could leave the defendant vulnerable to an extreme interpretation of the statute.

**2. Possible strategies to avoid removal for RCW 9A.76.175:**

- Avoiding a sentence of 365 days or more. This removes any possibility of it being deemed an aggravated felony as “obstruction of justice”
- Control the Record of Conviction:
  - even though materiality is a requirement of the false statement<sup>109</sup> counsel should still avoid putting an admission into the ‘record of conviction’ that the statement was made with an actual specific intent to mislead, much less for any fraudulent purpose.
  - The record of conviction should be kept as minimal as possible, and not specify that the statement was actually relied on, nor that the duties of the public servant were related to the Court or justice system.

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that making a false statement on a driver's license application is moral turpitude). *Cf. Montero-Ubri v. INS*, 229 F.3d 319, 321 (1st Cir. 2000) (indictment for use of false driver's license sufficient to prove moral turpitude even though mere possession would not be); *Michel v. INS*, 206 F.3d 253, 263 (2d Cir. 2000) (possession of stolen bus passes was moral turpitude because knowledge of stolen status was an element);

<sup>105</sup> *Matter of Jurado-Delgado* 24 I&N Dec. 29, 34-35 (BIA 2006) (“We find that the materiality of the false statements made is not controlling in this case.”) That case arose in the 3rd Circuit. *Cf. Hirsch v. INS*, 308 F.2d 562 (9th Cir. 1962) (merely false vs. fraudulent, is what divides non-CIMT from CIMT)

<sup>106</sup> Nonetheless it should be possible for immigration counsel to distinguish RCW 9A.76.175 from *Jurado-Delgado*, *supra*, in that: it does not require a written statement; and the merely false, as opposed to misleading, statement arguably does not require actual intent to mislead, much less fraudulent intent.

<sup>107</sup> *State v. Godsey*, 131 Wn. App. 278, 291 (Wash. Ct. App. 2006) (contrasting RCW 9A.76.175 with “obstructing a law enforcement officer, which courts have interpreted to require reliance” *id.*)

<sup>108</sup> *Matter of Espinoza*, Int. Dec. 3402 (BIA 1999)

<sup>109</sup> See WPIC 120.04 (2005)(2,3)

- Non-citizens should either plead inclusively to “false or misleading,” in the disjunctive, if possible. If you have to choose, it is probably better that the statement be merely false, and that it be oral rather than written.
- Since there is no definitive ruling on whether RCW 9A.36.050 is a CIMT, check to see if the defendant would benefit from one of the two CIMT exceptions outlined *supra* at p.26, § V.E.4.

**C. RCW 46.52.010 Duty on striking unattended car or other property “Hit & Run unattended”**

**1. Grounds that a conviction under this statute might trigger:**

**a. Crime involving moral turpitude (CIMT)**

There are no cases that have spoken specifically to whether H&R offenses constitute crimes of moral turpitude under immigration law. The lack of such litigation indicates that it is usually not treated as a CIMT.

Under RCW 46.52.010 (1), a defendant will be guilty of a simple misdemeanor where s/he (1) collides with another unoccupied vehicle; (2) fails to provide the owner/operator of the vehicle notification of the accident and the requisite information concerning the defendant.

Under RCW 46.52.010 (2), the defendant is guilty of a simple misdemeanor where s/he (1) is “involved in an accident”; (2) which results in property damage (to property other than another vehicle as covered in section (1)); and (3) s/he fails to provide the property owner with the requisite information.

Both provisions of this statute involve a failure of a duty to identify oneself and/or report an accident, which carries the implication of dishonesty. The Washington courts have recognized that one of the two primary intentions of the legislature in passing this statute is to prevent people from avoiding liability for their acts by leaving the scene without identifying themselves.<sup>110</sup> Nonetheless there is still a strong argument that this misdemeanor property offense is not a CIMT since the statute does not contain either an element of malice or intent to defraud. At least one of the three immigration judges in Seattle has ruled that this offense is not a CIMT. The Ninth Circuit has held that the knowing or intentional felonious destruction of property under the malicious mischief in the second degree statute – a more significant property destruction offense – did not rise to the level of being a CIMT.<sup>111</sup> Because it lacks an element of evil intent and is akin to a strict liability offense, it is unlikely that it could be found to be a CIMT.

**b. Could H&R Unattended Be an Aggravated Felony Crime of Violence?**

Nothing in the elements of this misdemeanor provision involves the use or threat of the use of force, as required under 18 USC § 16 in order to be a COV under the aggravated felony definition. This statute involves the punishment of a failure of an affirmative duty to report an

<sup>110</sup> *State v. Perebeynos*, 121 Wn. App. 189, 195; 87 P.3d 1216 (2004)

<sup>111</sup> See *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995).

accident or collision. The antecedent collision or harm to property is not the offense being punished here, and would not constitute the requisite volitional use of force required under 18 USC 16.<sup>112</sup> Thus, it is not a COV under immigration law.

## 2. Possible strategies to avoid removal

- To be completely safe, where possible, defense counsel would do well to negotiate for an alternative plea to attempted malicious mischief 3<sup>rd</sup> under RCW 9A.48.090.
- Keep admissions of intent behind the failure to notify out of the record of conviction.
- Plead guilty to the alternative offense of disorderly conduct under RCW 9A.84.030 - **Disorderly conduct is neither a CIMT nor a COV under immigration law. It does not trigger grounds of deportation, inadmissibility or any provisions of the aggravated felony definition.**

## D. RCW 46.52.020 Duty in case of personal injury or death or damage to attended vehicle or other property

### 1. Grounds that a conviction under this statute might trigger:

#### a. Crime involving moral turpitude (CIMT)

RCW 46.52.020 is a divisible statute that incorporates numerous offenses. Generally, it must be proven that defendant (1) was “involved” in an accident that involved the injury or death of an individual or that “involved” damage to a vehicle that was occupied by an individual; (2) knows or should have known that s/he was “involved” in the accident; (3) left the scene of the accident without providing the requisite information or without providing assistance to any injured persons.

Washington courts have determined that the term “involved in an accident” is a question of fact. However, the term is not limited to reckless or illegal behavior by defendant.<sup>113</sup> Nor is it required that defendant be the cause of the accident or injury.<sup>114</sup> The purpose of this statute is two-fold: (1) to prevent people from avoiding liability for their acts by leaving the scene without identifying themselves; and (2) to provide assistance for injured persons as soon as possible.<sup>115</sup> The state does not need to prove that defendant knew that there was death, injury or property damage. Rather the state need only prove that defendant knew or should have known that s/he was involved in an accident.<sup>116</sup>

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<sup>112</sup> See *Leocal v. Ashcroft*, 124 S. Ct. 1405, 2004 U.S. LEXIS 1030 (U.S., 2004); *U.S. v. Trinidad-Aquino*, 259 F.3d 1140 (9<sup>th</sup> Cir. 2001).

<sup>113</sup> *State v. Perebeynos*, 121 Wn. App. 189; 87 P.3d 1216; 2004 Wash. App. LEXIS 653 (Div. I, 2004); *State v. Hughes*, 80 Wn. App. 196, 202, 907 P.2d 336 (1995).

<sup>114</sup> *State v. Bourne*, 90 Wn. App. 963, 970, 954 P.2d 366 (1998).

<sup>115</sup> *Perebeynos* at 195.

<sup>116</sup> *State v. Vela*, 100 Wn.2d 636, 639, 673 P.2d 185 (1983). “[T]he statute cannot be construed to require knowledge of injuries... Knowledge of the accident is all the knowledge that the law requires. If a motorist knows he has been involved in an accident and fails to stop, he is guilty of violating RCW 46.52.020. If only property damage is done in the accident, he is guilty of a misdemeanor for failure to stop. If injury or death to a

There are no cases that have spoken specifically to whether H&R offenses constitute crimes of moral turpitude under immigration law. See § V.E, *supra*, on CIMTs.

There are two possible ways to violate this statute: (1) failure to provide the requisite information; and (2) failure to provide aid to an injured person. **Failure to provide information**, without more, should not be found to involve moral turpitude since the statute does not require proof of a specific intent to harm, defraud or to evade legal accountability. However, since one of the two underlying purposes of the statute – clearly expressed in the legislative history and the case law - is to prevent persons from avoiding liability, a conviction under this prong arguably implies evasion of accountability. This could be used to argue that the offense is a CIMT.

**Failure to provide aid to injured persons** under this statute does not require a showing of reckless disregard or malice. It does, however, involve failure of a societally recognized duty that persons owe to one another. Further, a violation of this part of the statute is more egregious in that it involves injury to persons, not just damage to property. Thus, there is a real possibility that immigration courts and the DHS (formerly INS) adjudicators would consider RCW 46.52.020's failure to report an accident where injury or death has occurred, as coming within the definition of a CIMT. Nonetheless, neither the elements of the crime nor the legislative purpose require an evil intent.<sup>117</sup>

**b. Could H&R Attended be an Aggravated Felony Crime of Violence?**

Nothing in the elements of this provision involves the use or threat of the use of force, as required under 18 USC § 16(a), nor—in regard to the felony violations-- is there a substantial risk of the “use” of force needed in order to be a COV under 18 USC § 16(b.) 18 USC § 16 defines ‘crime of violence for the aggravated felony definition. This statute involves the punishment of a failure of an affirmative duty to report an accident or collision or to render aid. The antecedent collision or harm to property or people is not the offense being punished here, and would not constitute the requisite risk of the intentional use of force required under 18 USC 16.118 Thus, it is not a COV under immigration law.

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person results from the accident, he is guilty of a felony for failure to stop. The statute... serves the underlying rationale of facilitating investigation of accidents and providing immediate assistance to those injured. To require an additional element of knowledge would tend to defeat the public interest which is served by requiring persons involved in vehicle collisions to stop and provide identification and other personal information and to be available to render assistance if required.” *id* at 641.

<sup>117</sup> E.g.: “failure to stop and render aid,” (hit & run) in violation of Texas Transportation Code § 550.021, is not a “per se” CIMT under Texas state law. See, *Tate v. State Bar of Texas*, 920 S.W.2d 727 (Court of Appeals, First District, Houston, 1996) (emphasis added): “[T]he State Bar took the position that the crime of failing to stop and render assistance is not a crime involving moral turpitude per se. We agree . . . For example, a defendant could make the conscious choice to proceed to the hospital with his wife who is in late stages of labor rather than stop to render aid after being involved in a serious accident; such mitigating circumstances could be relevant to a trier of fact in determining whether the defendant acted with “moral turpitude”, i.e., whether his actions reflect adversely on his moral fitness to continue in the practice of law.”

<sup>118</sup> See *Leocal v. Ashcroft*, 124 S. Ct. 1405, 2004 U.S. LEXIS 1030 (U.S., 2004); *U.S. v. Trinidad-Aquino*, 259 F.3d 1140 (9<sup>th</sup> Cir. 2001).

## 2. Strategies to Avoid removal

- Avoiding a 365 day sentence avoids any chance of it being deemed an aggravated felony as either a crime of violence or a crime “relating to obstruction of justice,” even if Congress were to retroactively legislate that H&R otherwise came under these aggravated felony definitions.
- If defendant is compelled to plead guilty to an offense under this statute, defense counsel should:
  - Try to negotiate for a plea to RCW 46.52.020(2)’s gross misdemeanor offense involving only damage to property. Keeping in mind the concerns articulated above, there is a stronger argument that this offense would not be a CIMT; to be held morally turpitudinous, misdemeanors involving property damage or property taking typically must contain an element of malice or specific intent to defraud.
  - Keep admissions of intent—such as an intentional or deliberate failure to comply-- out of the record of conviction.
  - Failure to render assistance to an injured person is the least immigration-safe way to be convicted of this, and should be avoided.

## 3. Alternatives

Negotiate a plea to either: 1) RCW 46.52.010 (H&R unattended); or 2) RCW 9A.48.070-090 - malicious mischief (in any degree). Although, if pleading to malicious mischief be sure that the sentence imposed is less than 365 days, regardless of time suspended. Malicious mischief is the preferred option since the Ninth Circuit has already expressly held that Malicious Mischief 2 is not a CIMT.<sup>119</sup> Assault 3 with negligence RCW 9A.36.031 (f) was found by the BIA not to be a CIMT as well.<sup>120</sup>

### E. RCW 46.61.020 – Refusal to Give Information (Misdemeanor)

#### 1. Grounds that a conviction under this statute might trigger:

##### a. Crime Involving Moral Turpitude

- Because this statute can be violated in numerous ways, it will be deemed a divisible statute for purposes of analyzing if it is a CIMT under immigration law, if just one of the enumerated ways of committing the offense could involve “turpitude.” See § V.E *supra*, on CIMTs generally, § VI.B on false or misleading statement, *supra*.
- Thus, it could be critical to which portion of this statute a noncitizen defendant pleads, since some of the conduct here might constitute a CIMT and some surely is not.

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<sup>119</sup> *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9<sup>th</sup> Cir. 1995).

<sup>120</sup> *Matter of Perez-Contreras*, 20 I&N Dec.615 (BIA 1992)

- The portions of this statute that are most problematic for noncitizens are those that involve giving false information. This statute does not specifically require an intent to defraud or particularly evil intent, which are traditional elements of finding an offense to be a CIMT. However, it does implicate deceitful conduct. There is no Washington caselaw specifically holding this offense to expressly involve fraud. See the discussion on providing false information to a public servant, at § VI.B *supra*.
- The other portions of the statute which involve refusals to stop or to provide information to an officer are much “safer” for noncitizens. Since these portions of the statute also involve neither fraud nor malice nor any conduct that is inherently evil, there is little likelihood that they would be deemed to be CIMTs, even though there is no specific immigration caselaw regarding this statute.

**Could a conviction under this statute constitute a crime of violence under 18 USC 16 or a crime “relating to obstruction of justice” and, thus, possibly constitute an aggravated felony?**

- Clearly neither the refusal to stop nor any other part of the statute has the use of force as an element.
- Nor does it have as an element the interference with an ongoing judicial process or intent to obstruct an officer from doing her official duties. See § V.D, *supra* on obstruction of justice.

**2. Strategies to Avoid Removal**

- Thus, if a noncitizen chooses to plead guilty to a violation of this statute, defense counsel should be sure to negotiate for a specific plea to one of the provisions of the statute that does not involve giving false information. If the actual conduct did involve false information, it would still be better to plead in the disjunctive, leaving the specific way undefined.
- Avoiding a 365-day sentence avoids the possibility—even if convicted of affirmatively providing false information—of the unlikely charge that this ‘relates to’ obstruction of justice.
- Disorderly conduct under any of the provisions of RCW 9A.84.030 would also be a “safe” alternative to this statute for noncitizen defendants.

**F. RCW 46.61.024 - Attempting to elude police vehicle (class C felony)**

Washington courts have determined that this offense has a three-part test. As the court in *State v. Hudson*<sup>121</sup> explained:

Eluding occurs when (1) a uniformed officer in a marked vehicle gives a signal to stop, (2) a driver willfully fails to stop, and (3) the driver exhibits a willful or wanton disregard for others in attempting to elude the police vehicle.<sup>122</sup>

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<sup>121</sup> 85 Wn. App. 401, 932 P.2d 714 (1997).

<sup>122</sup> *Hudson*, 85 Wn. App. at 403 (citing *State v. Stayton*, 39 Wn. App. 46, 49, 691 P.2d 596 (1984)).

In 2003, the Washington State legislature amended the *mens rea* of the statute from, “who drives his vehicle in a manner indicating a wanton and willful disregard for the lives or property of others...” to read, “who drives his vehicle in a reckless manner...”

**1. Grounds that a conviction under this statute might trigger:**

**a. Crime Involving Moral Turpitude**

- Reckless crimes *can* be crimes of moral turpitude, but recklessness alone is not enough. There must usually be some aggravating element. See § V.E.3 *supra* on recklessness & CIMTs.
- There are no immigration cases which have directly addressed whether attempt to elude is a crime involving moral turpitude (CIMT) under either mens rea standard. However, the 2003 amendments lowering the *mens rea* from “willful or wanton disregard for others” to “in a reckless manner” may be significant.<sup>123</sup> The BIA has repeatedly held that an analysis of a noncitizen’s intent in committing an offense is critical to a determination of whether the offense is a CIMT.<sup>124</sup>
- Recklessness is defined at 9A.08.010 as when [a] person ... knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.” However, “in a reckless manner” has been defined as “driving in a rash or heedless manner, indifferent to the consequences.”<sup>125</sup> Since this is a lesser *mens rea* than “wanton and willful disregard” it must be a type of recklessness.
- The issue for the post-2003 version of RCW 46.61.024 is whether the 2nd element of “while attempting to elude a pursuing police vehicle” would constitute an aggravating factor sufficient to elevate the reckless driving involved here to a CIMT. At present there is no case law answering this question.

There are arguments that cut both ways, **but defense counsel should assume conservatively, that attempting to elude might be charged as a CIMT.**

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<sup>123</sup> *State v. Roggenkamp* 153 Wn.2d 614; 106 P.3d 196; (Wash Sup.Ct. 2005), distinguishing “in a reckless manner” from “wanton & willful disregard” for purposes of subsection (1)(b) of the vehicular homicide statute (RCW 46.61.520). Presumably, as a term of art, “in a reckless manner” is also a lesser *mens rea* than that of reckless driving for the purpose of analyzing attempting to elude. *id* at 623, 626.

<sup>124</sup> *Matter of Fualaau*, 21 I&N Dec. 867 (BIA 1994); *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992).

<sup>125</sup> “[T]hrough a series of decisions by this court, a definition of the term “in a reckless manner” for purposes of the vehicular homicide and vehicular assault statutes has evolved and is now well settled. This evolution [culminated in our decision in *State v. Bowman*, 57 Wn.2d 266, 270, 271, 356 P.2d 999 (1960), in which we indicated that driving ‘in a reckless manner’ means ‘driving in a rash or heedless manner, indifferent to the consequences.’” *Roggenkamp* at 621-622.

## b. Aggravated Felony Crime of Violence

Could a conviction for attempting to elude constitute a crime of violence (COV) under 18 USC 16 and, thus, be an aggravated felony? NO, not under current case law.

- If there is not a sentence to 365 days or more, the question does not arise.
- In *Fernandez-Ruiz v. Gonzales*, the Ninth Circuit *en banc* resolved the issue by holding that a felony conviction for reckless causation of injury is not a crime of violence.<sup>126</sup> See § V.C.2.b.ii *supra*, Reckless Infliction of injury is not a crime of violence..

## 2. Possible Strategies to Avoid Removal

- Keeping the sentence less than 365 days avoids the Aggravated Felony issue. It would also protect your client if the specific issue reaches the Supreme Court and the Court decides not to limit the crime of violence definition to intentional crimes, but to allow some crimes of recklessness;
- If your client is an LPR see if she might fit into the exception to *deportability* for a single CIMT. (See § V.E.4.a, at p.27, *supra*.) Because it is a felony, this offense will not fit into the exception to *inadmissibility*, but it might if you can negotiate an alternative plea to a (possible CIMT) GM and obtain a sentence of not more than 6 months.
- Try to keep any admissions of actual harm, injury or property damage arising from the offense out of the record of conviction

## 3. Safer Alternatives

RCW 9A.48.070-090 Malicious Mischief: The best (most “immigration safe”) alternative is to negotiate a plea to malicious mischief, or attempted malicious mischief, in any degree under RCW 9A.48.070-090. One theory in support of this would be to assert that the defendant’s conduct could constitute an attempt to diminish the value of property, as contemplated in the definition of malicious mischief at RCW 9A.48.100, given the significant possibility that the reckless driving would (or did) cause damage to property. Be sure to request a sentence of 364 days imposed (regardless of time suspended) if the plea is to malicious mischief in the third degree.

RCW 46.61.502 – Driving Under the Influence

RCW 46.61.522(b) – Attempted Vehicular Assault per DUI prong

Because this has a *mens rea* equivalent to a DUI, (or one that, as a legal fiction, cancels itself out) it should not be a CIMT. However avoid a plea to having been under the influence of “a drug.”<sup>127</sup>

RCW 46.61.500 - Reckless Driving

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<sup>126</sup> *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc). Pre-*Fernandez-Ruiz* decisions included: *US v. Campos-Fuerte*, 357 F.3d 956 (9th Cir. 2004) (California eluding an officer statute is a COV); and *Park v. INS*, 252 F.3d 1018, 1023 (9th Cir. 2001) (California manslaughter involving reckless mens rea is COV); *United States v. Grajeda-Ramirez*, 348 F.3d 1123, \*, 2003 U.S. App. LEXIS 23068 (9th Cir. 2003) (Colorado reckless vehicular assault is COV).

<sup>127</sup> See § VI.K *infra*, p.49 (on neg. 1).

**CAUTION:** If the offense of reckless driving under RCW 46.61.500 is being considered as an alternative plea, defense counsel must review that section herein prior to negotiating such a plea. Between the two, reckless driving-- preferably with a sentence of less than 365 days – is arguably a “better” option for noncitizens, despite the higher *mens rea*. Thus, defense counsel must exercise caution before choosing this as an alternative to an attempt to elude plea. Because this is a gross misdemeanor, even if it were a CIMT, it could fit into the exception to inadmissibility if the sentence were *not more than 180 days* and there were no other CIMT conviction.

#### RCW 9A.36.050 – Reckless Endangerment

**CAUTION:** If the offense of reckless endangerment is being considered as an alternative plea, defense counsel must review that section herein prior to negotiating such a plea. Because this is a gross misdemeanor, even if it were a CIMT, it could fit into the exception to *inadmissibility* if the sentence were *not more than 180 days* and there is no other CIMT conviction.

*Note: It is not clear whether, between reckless driving and reckless endangerment, which is the best. Probably either would be better than attempting to elude,<sup>128</sup> but this is only if malicious mischief, DUI or disorderly conduct are not available options. Thus, defense counsel must exercise caution before choosing this as an alternative plea to an attempt to elude offense. The Ninth Circuit (and the immigration courts) will probably consider the reckless endangerment statute subject to the “modified categorical” analysis, so, structuring the plea is critical here.*

### **G. RCW 46.61.500 – Reckless Driving – (gross misdemeanor)**

#### **1. Grounds that this might trigger:**

##### **a. Crime involving moral turpitude**

- Reckless driving should probably **not** be considered a “crime involving moral turpitude.” However, there is no immigration case directly on RCW 46.61.500.
- While the statute is denoted as “reckless driving”, the *mens rea* of the statute differs from 9A.08.010’s definition of recklessness, but it still contains the basic ingredient of knowing disregard of risk. It defines the offense of reckless driving as one of “willful or wanton disregard for the safety of persons or property”.
- Some crimes with a reckless *mens rea* can be CIMTs. See § V.E.3 *supra*. Washington courts have also ruled that “willful or wanton disregard for the safety of persons or property” is a *higher mens rea* than the “in a reckless manner” required for the reckless prong of vehicular assault, vehicular homicide, and attempting to elude.<sup>129</sup> Because of that, and based on the

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<sup>128</sup> If attempted reckless endangerment or attempted reckless driving were allowable (as a permissible legal fiction?)— and could be lowered to simple misdemeanors by RCW 9A.28.020(3)(e)— it would fit into both exceptions, to deportability and inadmissibility for a single CIMT. See § V.E.4, *supra*. See Knapik v. Ashcroft, 384 F.3d 84, 92 (3rd Cir. 2004) (reviewing only the immigration implications of the plea: attempted recklessness is not a CIMT because it is an a nonsensical *mens rea*.)

<sup>129</sup> “Courts have held that the ‘reckless manner’ element of vehicular assault means to drive in a rash or heedless manner, with indifference to the consequences. *State v. Bowman*, 57 Wn.2d 266, 271, 356 P.2d 999 (1960); *Medrano v. Schwendeman*, 66 Wn. App. 607, 609-10, 836 P.2d 833 (1992). The degree of reckless

caselaw definition of willful or wanton disregard,<sup>130</sup> it is arguably a higher standard of culpability than that of RCW 9A.080.010(c). Nonetheless, because it involves only willful disregard rather than deliberate or intentional harming, it should still be categorized as a reckless rather than an intentional offense<sup>131</sup>

- Both the BIA and the federal courts have repeatedly held that offenses are CIMTs where they have mens rea requirements that the defendant acted intentionally or knowingly *coupled with* the element of causing serious harm or acting in disregard of causing serious harm.<sup>132</sup>
- Because the willfulness of reckless driving is in the knowing disregard of the possibility of harm, rather than the knowing and purposeful infliction of harm, there are strong arguments that this is— as the title indicates-- a crime of recklessness. If, as we think “willful and wanton disregard” is perhaps an aggravated species of recklessness but recklessness nonetheless-- then there is a strong argument that the offense is not a CIMT under immigration law. In analyzing statutes with reckless *mens rea* components, the BIA has held that recklessness alone is insufficient to deem an offense a CIMT. In order for misconduct committed in a reckless manner to constitute a CIMT for immigration purposes, there must be some other aggravating factor involved, which RD does not have as an element.
- There are strong arguments on the immigration side that reckless driving is not a CIMT, but there is no definitive case law. Defense counsel should exercise due caution when considering a plea to this offense. It is recommended to pursue the alternative offenses listed below.

**b. Aggravated felony ‘crime of violence’ with a sentence of a year or more (See § V.C, *supra* on crimes of violence.)**

- In *Leocal v. Ashcroft* the Supreme Court held that a crime that involved the *negligent* infliction of injury (drunk driving) is not a crime of violence under 18 USC § 16. The court

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behavior in vehicular assault (‘reckless manner’) is less than in the ‘willful or wanton disregard’ of reckless driving.” *State v. Thompson*, 90 Wn. App. 41, 48 (Wash. Ct. App. 1998); *State v Roggenkamp* 153 Wn.2d 614, 626-7 (Wash Sup.Ct. 2005)

<sup>130</sup> Washington courts have held that taken together, the terms "willful" or "wanton" usually mean "that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences. Wanton or willful does not require “that the defendant's driving endangered anyone else, or that a high probability of harm actually existed. Instead, the evidence need only establish that the defendant engaged in conduct from which a [trier of fact] could infer wanton or willful disregard for the lives or property of others.” *State v. Brown*, 40 Wn. App. 91, 96, 697 P.2d 583 (1985) (internal citation to treatise omitted). “[W]anton [or] willful disregard for the lives or property of others” includes both a subjective and objective component. *State v. Sherman*, 98 Wn.2d 53, 57-58, 653 P.2d 612 (1982). “Wanton or willful” does not require “that the defendant's driving endangered anyone else, or that a high probability of harm actually existed. Instead, the evidence need only establish that the defendant engaged in conduct from which a [trier of fact] could infer wanton or willful disregard for the lives or property of others.” *State v. Treat*, 109 Wn. App. 419, 427, 35 P.3d 1192 (2001) (quoting *State v. Refuerzo*, 102 Wn. App. 341, 348-49, 7 P.3d 847 (2000 )).

<sup>131</sup> See RCW §§ 9A.08.010(4) (willfulness requirement satisfied by acting knowingly).

<sup>132</sup> *Grageda v. INS*, 12 F.3d 919 (9th Cir. 1993); *Nguyen v. Reno*, 211 F.3d 692 (1<sup>st</sup> Cir. 2000); *Matter of Ajami*, Int. Dec. 3405 (BIA 1999); *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996).

did not explicitly rule on whether *reckless* causation of injury was a crime of violence, although the reasoning of the case strongly supported such a finding. The Ninth Circuit had precedent going in both directions.

- **In *Fernandez-Ruiz v. Gonzales*, the Ninth Circuit en banc resolved the issue by holding that a felony conviction for reckless causation of injury is *not* a crime of violence.**<sup>133</sup>
- The remaining question here is whether reckless driving with a “willful or wanton disregard for the safety of persons or property” can be construed as a crime of recklessness, and so controlled by *Fernandez-Ruiz*. Knowing disregard<sup>134</sup> is still within the definition of recklessness—a “conscious disregard” of risk-- analyzed in *Fernandez-Ruiz*. It is still not the same as the “*intentional* use of physical force” against another.<sup>135</sup> Wanton or willful does not require “that the defendant's driving endangered anyone else, or that a high probability of harm actually existed. Instead, the evidence need only establish that the defendant engaged in conduct from which a [trier of fact] could infer wanton or willful disregard for the lives or property of others.”<sup>136</sup>
- So there is a very strong case that reckless driving is an offense of recklessness, which *Fernandez-Ruiz* has ruled cannot be a 'crime of violence' under 18 USC 16.

## 2. Possible strategies to avoid removal

- **Avoiding a sentence of 365 days avoids any possibility of an aggravated felony charge**, in case the Supreme Court were to rule directly in a case involving the reckless use of force,<sup>137</sup> or Congress were to retroactively change the aggravated felony definition
- It would further lessen the chance of RD being treated as a CIMT if the plea were to **willful rather than wanton** disregard; and it would better if the disregard were for the **safety of property only** rather than of persons.
- Control the record of conviction to keep out a factual basis that includes actual harm to persons or property, or actual violence.
- Since there is no completely definitive ruling on whether reckless driving is a CIMT, see if the defendant would fit into or benefit from one of the two CIMT exceptions outlined *supra* at p.26, § V.E.4.

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<sup>133</sup> *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc). See § V.C, *supra* on COVs.

<sup>134</sup> RCW 9A.08.010(4) defines “willfully” as acting “knowingly with respect to the material elements of the offense.”

<sup>135</sup> *Fernandez-Ruiz* at 1132.

<sup>136</sup> *State v. Treat*, 109 Wn. App. 419, 427, 35 P.3d 1192 (2001) (quoting *State v. Refuerzo*, 102 Wn. App. 341, 348-49, 7 P.3d 847 (2000)).

<sup>137</sup> *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004) specifically did “not present us with the question whether a state or federal offense that requires proof of the *reckless* use of force against a person or property of another qualifies as a crime of violence (COV) under 18 USC § 16” 125 S.Ct. 384.

### 3. Safer Alternatives

The following offenses would be preferable alternatives to reckless driving as they are neither crimes involving moral turpitude nor crimes of violence. Please review the sections for each of these offenses for more analysis of the offense under immigration law before deciding to pursue them as alternative pleas.

#### RCW 9A.84.030 - Disorderly Conduct

RCW Malicious Mischief – The best (most “immigration safe”) alternative is to negotiate a plea to malicious mischief, or attempted malicious mischief, in any degree under RCW 9A.48.070-090. One theory in support of this would be to assert that the defendant’s conduct could constitute an attempt to diminish the value of property, as contemplated in the definition of malicious mischief at RCW 9A.48.100, given the significant possibility that the reckless driving would (or did) cause damage to property. Be sure to request a sentence of 364 days imposed (regardless of time suspended) if the plea is to malicious mischief in the third degree.

#### RCW Negligent Driving; RCW 46.61.502 – Driving Under the Influence; RCW 46.61.504 – Physical Control

RCW 46.61.500 – Attempted Reckless Driving – For certain noncitizen defendants who have no prior convictions that are CIMT offenses, a plea to attempted reckless driving may be an acceptable alternative. However, defense counsel should not pursue a plea to this offense without first consulting with competent immigration counsel who can determine for certain whether a specific defendant pleading guilty to attempted reckless driving would fall within 8 USC 1101(a)(2)(A)(ii)’s CIMT “petty offense” exception to the grounds of inadmissibility, or would avoid deportability under the CIMT ground at 8 USC 1227(a)(2)(A)(i). (See § V.E.4, p.26 *supra*)

RCW 9A.76.170 – Bail Jumping – Where applicable (i.e. defendant has FTA’d at some point) bail jumping under section (d) of this provision is an acceptable alternative. Note that **bail jumping where the underlying charge is a felony will constitute an aggravated felony** under immigration law at 8 USC 1101(a)(43)(T) and is not an acceptable alternative under any circumstance.

Bail Forfeiture – Bail forfeiture as a disposition, without a guilty plea or other stipulation to facts, is a terrific alternative, wherever possible, for avoiding potential immigration consequences. It does not constitute a conviction for immigration purposes. Thus, regardless of the charged offense, it will not trigger grounds of deportation, inadmissibility, or any provisions of the aggravated felony definition. *It is imperative that counsel ensure there are no written admissions of guilt by the defendant to the charged offense.*

## H. RCW 46.61.502 Driving Under the Influence (GM)<sup>138</sup>

### 1. Grounds that a conviction under this statute might trigger

#### a. A DUI offense is not a ‘crime involving moral turpitude’<sup>139</sup>

- In one case the BIA held that an Arizona offense of driving under the influence while legally prohibited from driving is a crime involving moral turpitude.<sup>140</sup> Washington does not have a single aggravated DUI offense that contains these two elements (prohibiting DUI while the license is suspended). A person can be convicted separately of driving while prohibited from doing so, and of driving under the influence, but the separate convictions should not come within the *Lopez-Meza* rule.
- Starting July 1st, 2007 there is a new felony DUI section, RCW 46.61.502(6). This makes a DUI with certain priors a class C felony.<sup>141</sup> **This does not add or alter any elements of the DUI offense itself.** The BIA has ruled that “[m]oral turpitude cannot be viewed to arise from some undefined synergism by which two offenses are combined to create a crime involving moral turpitude, where each crime individually does not involve moral turpitude.”<sup>142</sup> The 9th Circuit has ruled that strictly recidivist enhancements are not part of the core analysis of whether a conviction fits into a removal category.<sup>143</sup>

#### b. Aggravated felony crime of violence with a sentence of one year or more

**This offense is not a ‘crime of violence’ and therefore cannot be an aggravated felony under the crime of violence ground.** The issue of whether a DUI can be an aggravated felony as a “crime of violence” was resolved by the Supreme Court in *Leocal v. Ashcroft*.<sup>144</sup> Proposals to

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<sup>138</sup> Effective 7-1-07, § (6) is a class C felony.

<sup>139</sup> *Matter of Torres-Varela* 23 I&N Dec. 78 (BIA 2001). Even two or more serial convictions for a straight DUI does not convert the offense into a CIMT.

<sup>140</sup> *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999) . The Ninth Circuit overturned *Lopez-Meza*, holding that the particular Arizona statute was divisible for moral turpitude purposes because it could be violated without the person actually driving the vehicle. *Hernandez-Martinez v Ashcroft*, 329 F.3d 1117 (9th Cir. 2003). The BIA might still rule this way, if faced with a statute that prohibited actual driving with a suspended license. The *Lopez-Meza* reasoning is questionable even then, but when analyzing DUI offenses immigration advocates should check to see if the offense for which the person was convicted required proof *both* of DUI *and* of a legal prohibition against driving.

<sup>141</sup> The recidivist felony will occur if: “(a) The person has four or more prior offenses within ten years as defined in RCW 46.61.5055; or (b) the person has ever previously been convicted of vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), or vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b).”

<sup>142</sup> *Matter of Short* 20 I&N Dec. 136 (BIA 1989)

<sup>143</sup> *U.S. v. Corona-Sanchez*, 291 F.3d 1201 (9<sup>th</sup> Cir. 2002)(en banc); See also *Oliveira-Ferreira v. Ashcroft*, 382 F.3d 104 (9<sup>th</sup> Cir. 2004).

<sup>144</sup> (See also n. 91). See *Leocal v. Ashcroft*, 125 S.Ct. 377 (2004). (Florida felony DUI conviction was not a COV: “[i]n no ‘ordinary or natural’ sense can it be said that a person risks having to ‘use’ physical force against another person in the course of operating a vehicle while intoxicated and causing injury.” *id.* at 383). See also *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9<sup>th</sup> Cir. 2001)(DUI not a crime of violence and thus not an aggravated felony under INA 101(a)(43)(F)); *Montiel-Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002); *U.S. v. Portillo-Mendoza*, 273 F.3d 1224, 1228 (9th Cir. 2001)(with priors)

make some repeat DUIs into aggravated felonies were proposed in 2006. See § V.C.3, *supra* on Drunk Driving.

**c. Inadmissibility for the health-related ground of “a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others”<sup>145</sup>**

Under certain circumstances the government has asserted that a DUI is indicative of a mental disorder (alcoholism) with behavior that has posed a threat (drunk-driving), which makes a non-citizen inadmissible under the health-related grounds. Persons who are going to apply for an immigrant visa at the US Consulate in Juarez, Mexico will be subject to this ground if they have a DUI within the last 2 years.<sup>146</sup> Consular decisions are not reviewable, so Counsel should find out if their client is going to be seeking an immigrant visa at the US Consulate in Cde. Juarez.<sup>147</sup>

**2. Strategies to avoid inadmissibility**

A person with a pending interview for permanent resident status at the US consulate in Juarez, Mexico might especially want to avoid a DUI, and prefer to plead to negligent (non-drug) or even reckless driving if possible.

**3. Should a client accept an offer to plead to reckless driving (RD)?**

Although we think that RD should be found to *not* be a crime involving moral turpitude (CIMT), there is not a case saying so, as there is for DUI. A person who will seek to be admitted in the next few years as a legal resident at the Juarez Consulate might want to plead to RD instead of DUI, to avoid the health-inadmissibility issue outlined above. A person who would not be deportable for a single CIMT, even if RD *were* a CIMT, has less to worry about. A conviction for RD with a total sentence of no more than 180 days could fit into the exception to *inadmissibility* for one CIMT. This is a tactical decision that should be made in a way that takes into account the client’s particular immigration situation.

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<sup>145</sup> INA § 212(a)(2)(A)(iii); 8 USC 1182(a)(1)(A)(iii); “[a]ny alien-- who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)--(I)--to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or (II)-- to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior... is inadmissible.”

<sup>146</sup> See excerpt from the January 1st, 2007, *Bender’s Immigration Bulletin*, “Update from Ciudad Juarez” by Charles Wheeler. Summary of information provided by Santiago Burciaga, Chief of Immigrant Visa Section at Cde. Juarez, & Warren Jannssen, nearest USCIS Officer in Charge:

“Inadmissibility for Prior DUI: If the applicant has been convicted of even one driving while intoxicated (DUI) during the last two years, he or she will be denied an immigrant visa based on the health-related ground of inadmissibility for having a physical or mental disorder. The applicant will be issued a Class A certification. If the DUI occurred between two and three years ago, it still might be considered, but there will not be an automatic denial.”

<sup>147</sup> All immigrant visas for Mexican nationals, who are unable to “adjust status” to permanent resident from inside the US, are processed at the Juarez Consulate. We haven’t heard of other Consulates imposing such a *de facto* rule. There is an immigrant waiver available for some people found inadmissible under health grounds, but it is complicated and beyond the scope of this material. INA 212(g)(3); 8 USC § 1182(g)(3).

## I. RCW 46.61.504 - Physical Control of Vehicle Under the Influence

### 1. This offense should normally not trigger any immigration-related grounds *but*:

- A physical control conviction under RCW 46.61.504(1)(b) or (c) based on being *under the influence of a drug* should be avoided, since drug abuse and addiction are grounds of inadmissibility and deportability. A noncitizen is inadmissible if the drug addiction or abuse is current and deportable if addiction or abuse occurred at any time after admission into the United States.<sup>148</sup> Also, admitting the “acts constituting the essential elements” of a crime relating to a controlled substance can result in inadmissibility for drug crimes.<sup>149</sup>
- The offense’s connection to alcohol consumption might be of concern if the person is going to apply for an immigrant visa at the US Consulate in Ciudad Juarez, Mexico.<sup>150</sup>
- a. **This offense should not be either a “crime of moral turpitude” or an aggravated felony crime of violence (which in any case is avoided by getting a sentence of less than 365 days).**

- Since a DUI is neither a CIMT nor a crime of violence, Physical Control of Vehicle also is not in either category- *a fortiori*. There is a BIA case holding that an Arizona DUI, where knowledge that the driver’s license was suspended was an *element* of the crime, was a CIMT.<sup>151</sup> The 9th Circuit overturned that case because the statute could be violated without the person actually driving the vehicle.<sup>152</sup>
- The Supreme Court has ruled that a felony DUI is not a crime of violence-- even under the broader definition of crime of violence at 18 USC § 16 (b), applicable to felonies.<sup>153</sup> This should apply with equal or greater force to the new felony provision RCW § 46.61.504(6) creating a Class C felony based on prior offenses (*also see § II.A. on the “categorical analysis” and § V.C.3, at p.21 supra on recidivist enhancements.*)

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<sup>148</sup> INA § 212(a)(1)(A)(iii), 8 USC § 1182(a)(1)(A)(iii) [inadmissibility ground]; INA § 237(a)(2)(B)(ii), 8 USC § 1227(a)(2)(B)(ii) [deportation ground].

<sup>149</sup> INA § 212(a)(2)(A)(i)(II), 8 USC § 1182(a)(2)(A)(i)(II). A conviction under RCW § 46.61.5249 (c) is not necessarily conclusive as to these drug-related grounds; it would just be better avoided if at all possible.

<sup>150</sup> See fn. 144 in DUI section, *supra*.. This is just a caution, in view of that particular consulate’s policy.

<sup>151</sup> *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999), (A conviction for aggravated DUI after the defendant's license had been suspended or revoked—and where knowledge of that previous suspension was an element-- was a conviction for a crime involving moral turpitude). Washington does not have a DUI statute with those elements.

<sup>152</sup> *Hernandez-Martinez v Ashcroft*, 329 F.3d 1117 (9th Cir. 2003). “One may be convicted under [the statute] for sitting in one’s own car in one’s own driveway with the key in the ignition and a bottle of beer in one’s hand. . . . [W]e find it difficult to believe that our society holds conduct in one’s own backyard to be ‘inherently base, vile or depraved and contrary to the accepted rules of morality,’ *id.* See *City of Mount Vernon v. Miguel Angel Quezada-Avila*, 77 Wn. App. 663, 893 P.2d 659 (1995).(A person may be guilty of physical control of an inoperable vehicle.)

<sup>153</sup> *Leocal v. Ashcroft*, 543 U.S. 1, 10 (U.S. 2004)

**b. Inadmissibility for the health-related ground of “a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others”**

See § VI.H on DUI, *supra*, dealing with this ground, which seems to only be a problem for those with recent DUIs who apply for an immigrant visa at the US Consulate in Juarez, Mexico. We have no information as to whether this *de facto* rule would be applied to a person with a conviction for Physical Control of Vehicle. Logically it should not.

*This should be a relatively safe charge that does not trigger any removal ground.*

**J. RCW § 46.61.520(1) Vehicular Homicide, & RCW § 46.61.522(1) Vehicular Assault**

Each of these statutes is divisible as each has three separate subsections requiring a different *mens rea*. The three subsections in each statute are parallel. This is not a full treatment of all six serious felony offenses,<sup>154</sup> but a basic outline that should serve to alert defense counsel to certain issues.

**1. DUI prong**

RCW 46.61.520(1)(a) Vehicular homicide--- death ... proximately caused by: While under the influence of intoxicating liquor or any drug;

RCW 46.61.522(1)(b) Vehicular assault — While under the influence of intoxicating liquor or any drug,... and causes substantial bodily harm to another;

**a. What removal grounds might be triggered?**

**i. Aggravated felony a crime of violence with a sentence of a year or more**

- A conviction under the strictly DUI prong of either statute will *not* be an aggravated felony, even if the sentence were a year or more.
- The Supreme Court treated an analogous DUI vehicular assault statute in *Leocal*<sup>155</sup> and analyzed 18 USC § 16(b)'s applicability to a Florida statute that penalized conduct almost identical to that proscribed by R.C.W. § 46.61.520(1)(a), and found that because the statute required no *mens rea* element, it did not fall within § 16's “crime of violence” definition.<sup>156</sup>

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<sup>154</sup> But see: “[t]he vehicular homicide statute provides three alternate means of committing the same crime and does not define separate crimes. *State v. Osborn*, 28 Wn. App. 111, 116-17, 626 P.2d 980 (1980), review denied, 97 Wn.2d 1012 (1982). Therefore, the jury must be unanimous on the issue of guilt, but it need not be unanimous on the way the crime was committed as long as the State presents substantial evidence supporting each charged alternative. *State v. Miller*, 60 Wn. App. 767, 772, 807 P.2d 893 (1991).” *State v. Maurice*, 79 Wn. App. 544, 549-550 (Wash. Ct. App. 1995). See also *State v. Tang*, 77 Wn. App. 644 (Wash. Ct. App. 1995). In any case the crimes are distinct for immigration purposes.

<sup>155</sup> *Leocal v. Ashcroft* 540 U.S. 1176 (2004)

<sup>156</sup> Similar to RCW § 46.61.520(1)(a), the statute at issue in *Leocal* makes it a 3rd degree felony for a person to operate a vehicle while under the influence and, “by reason of such operation, caus[e] . . .[s]erious bodily injury to another.” Florida Stat. § 316.193(3)(c)(2). Although the Florida statute “requires proof of causation of injury, [it] does not require proof of any particular mental state.” *Leocal*, 125 S. Ct. at 382, citing *State v.*

**ii. Crime involving moral turpitude**

- “[N]either the seriousness of the offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude.”<sup>157</sup> A DUI is not a crime involving moral turpitude.<sup>158</sup> The DUI prong does not require even a showing of negligence.<sup>159</sup> Because there is no intent requirement at all, if not for the causal connection requirement, the statute would be essentially one of strict liability.<sup>160</sup> Because the state is not required to prove a causal connection between the driver's intoxication and the ensuing fatality,<sup>161</sup> there is a strong argument that this is not more of a CIMT, than an ordinary DUI, in spite of the tragic outcome. The fact that a death or serious harm resulted does not automatically equal turpitude.<sup>162</sup> Because “[d]emonstration of such a culpable mental state is not required”<sup>163</sup> and because there is no “conscious disregard” of a risk of harm<sup>164</sup> there is a strong immigration-side argument that this is not a CIMT under the “intent test.”
- However, under the “contrary to . . . the duties owed between persons or to society in general” test sometimes used for CIMTs, there is more of a chance that this could be treated as a CIMT. See § V.E, *supra*, on CIMTs generally.

**2. The “Reckless Manner” prong**

RCW 46.61.520(1)(b) Vehicular homicide—in a reckless manner

RCW 46.61.522(1)(a) Vehicular assault — in a reckless manner and causes substantial bodily harm

**a. What removal grounds might be triggered?**

**i. Aggravated felony a crime of violence with a sentence of a year or more**

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*Hubbard*, 751 So. 2d 552, 562-64 (Fla. 1999) (holding, in the context of a DUI manslaughter conviction under § 316.193, that the statute does not contain a mens rea requirement.). For that reason, the Court held that the offense was neither a “crime of violence” under § 16(a) nor § 16(b). *Leocal*, 125 S. Ct. at 382-83.

See also *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9<sup>th</sup> Cir. 2001); *Montiel-Barraza v. INS*, 275 F.3d 1178 (9<sup>th</sup> Cir. 2002); *United States v. Portillo-Menodoza*, 273 F.3d 1224, 1228 (9<sup>th</sup> Cir. 2001)(with priors).

<sup>157</sup> *Matter of Serna*, 20 I&N Dec 579 (BIA 1992)

<sup>158</sup> “The crime must be one that necessarily involves moral turpitude without consideration of the circumstances under which the crime was, in fact, committed. See *Goldeshtein v. INS*, 8 F.3d 645, 647 (9<sup>th</sup> Cir. 1993).” *Matter of Torres-Varela* 23 I&N Dec. 78)

<sup>159</sup> “Under the intoxication prong. . . We hold that RCW 46.61.522 cannot be construed to require a showing of negligent conduct as an element of vehicular assault.” *State v. Hursh*, 77 Wn. App. 242, 246 (Wash. Ct. App. 1995)

<sup>160</sup> Or: “RCW 46.61.520, as amended in 1991” may be a strict liability crime. *State v. Rivas*, 126 Wn.2d 443, 453 (Wash. 1995); “Our vehicular homicide statute is a strict liability law.” (citing *Rivas*) *State v. Lopez*, 93 Wn. App. 619, 624 (Wash. Ct. App. 1999) (Brown, J. dissenting).

<sup>161</sup> *State v. Randhawa*, 133 Wn.2d 67, 941 P.2d 661 (1997); *State v. Salas*, 127 Wn.2d 173, 897 P.2d 1246 (1995).

<sup>162</sup> See e.g. *Matter of Sweetser* 22 I&N Dec. 709, 711 (IJ finding that Colorado criminally negligent child abuse was not a CIMT—child drowned in tub-- not appealed).

<sup>163</sup> *Torres-Varela* at 85.

<sup>164</sup> *Matter of Franklin*, 20 I&N Dec. 867, \_\_ (BIA 1994)

A conviction under the “reckless manner” prong should not trigger the aggravated felony crime of violence ground, after *Fernandez-Ruiz*'s<sup>165</sup> ruling that a felony conviction for reckless causation of injury is not a crime of violence. See § V.C.2.b, *supra*, on COV and recklessness, generally.

*ii. Crime involving moral turpitude*

Because “in reckless manner” implies a conscious or knowing disregard of the risk of significant harm, there is a real likelihood that this could be found to be a “crime involving moral turpitude.”<sup>166</sup>

**3. “Disregard for Safety of Others” prong**

RCW 46.61.520(1)(c) Vehicular homicide— With disregard for the safety of others.

RCW 46.61.522(1)(c) Vehicular assault — With disregard for the safety of others and causes substantial bodily harm to another

**a. What removal grounds might be triggered?**

*i. Aggravated felony a crime of violence with a sentence of a year or more*

A conviction under the “reckless manner” prong should not trigger the aggravated felony crime of violence ground, after the ruling in *Fernandez-Ruiz, supra*, that a felony conviction for reckless causation of injury is not crime of violence. If the “disregard for safety” were actually a type of negligence— as seems possible-- then *Leocal* and *Fernandez-Ruiz* would both clearly prevent this from being a deemed a crime of violence.

*ii. Crime involving moral turpitude*

- Since the “disregard for safety” has been defined as a type of negligence, albeit “aggravated negligence”<sup>167</sup> there is a good argument that this is not a CIMT. (That this is a lesser *mens rea* than of RCW 46.61.520(1)(b) and RCW 46.61.522(1)(a) might find support in the fact that this is the only one of the three ways of committing either of these offenses, that is not listed as a "serious offense" under RCW §§ 9.41.010 (12)(k) or (l)).

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<sup>165</sup> *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc). *Malta-Espinoza v. Gonzales* 2007 U.S. App. LEXIS 4787 at 12-13 (9th Cir. 2007)

<sup>166</sup> Immigration counsel could try to argue that the Vehicular Assault *mens rea* of “in a reckless manner” -- which has been found to be a lesser *mens rea* than that of the “wanton and willful disregard” required for reckless driving, and equivalent to in a “rash or heedless manner, with indifference” to the danger or risk of harm (*Roggenkamp* , at 626)-- is a lower species of recklessness that does not reach willful, disregard. See discussion of reckless driving and attempting to elude, *supra* at §§ VI.F & G. *But cf State v. Bailey*, 2006 Wash. App. LEXIS 1287 (Wash. Ct. App. 2006) (“disregard” is defined as ‘t]he action of ignoring or treating without proper respect or consideration.’ One cannot ignore or mistreat something without first being conscious of it.”) But if that were so, then the disregard prong could be a higher *mens rea* than the “rash or heedless manner” of the reckless manner prong, more like the recklessness of RCW § 9A.08.010(1)(c), since 9A.08.010(1)(d) does not mention disregard as an aspect of negligence.

<sup>167</sup> *State v. Eike*, 72 Wn.2d 760, 765-66 435 P.2d 680 (1967) “*In State v. Jacobsen*, 78 Wn.2d 491, 477 P.2d 1 (1970), the court reaffirmed that disregard for safety implies ‘an aggravated kind of negligence, falling short of recklessness, but more serious than ordinary negligence.’ *Jacobsen*, at 498.” *State v. May*, 68 Wn. App. 491, 495-496 (Wash. Ct. App. 1993). *But see Roggenkamp* at 626.

- That a negligent felony resulting in significant harm is not a CIMT, is supported by the BIA’s ruling on RCW § 9A.36.031 (f).<sup>168</sup> However, since this is an aggravated form of negligence, and the case law is ultimately unclear as to how to categorize it (e.g.: “disregard” as such-- albeit *knowing* disregard-- is only specified under RCW 9A.08.010 as an aspect of recklessness, and not of negligence<sup>169</sup>)

**Counsel should conservatively assume that the “disregard” prong could be treated as a CIMT.**

**4. Possible Strategies to Avoid Removal**

- None of these offenses should be aggravated felony crimes of violence under current law and case law. However Counsel should be aware that proposals to redefine some DUI offenses as deportable offense were floated in 2006 and could come up again. See § V.C.3, *supra*, on Drunk Driving.
- If someone must plead to one of these offenses, **the strictly DUI prong is the least harmful:**
  - Because it is protected from being deemed a crime of violence not only by *Fernandez-Ruiz* and *Trinidad-Aquino*<sup>170</sup>, but directly by *Leocal*<sup>171</sup>; and
  - Because there is a very strong argument that it is not a crime involving moral turpitude.
- Between the “in a reckless manner” and the “disregard for the safety of others,” the disregard prong is better if it is in fact a lesser *mens rea* or a degree of negligence.
- Especially if pleading to “a reckless manner” or “disregard for safety” prong, Counsel should find out if the defendant’s offense would-- if deemed to be a CIMT-- fit into the exception to deportability for one CIMT. See § V.E.4, p.26, *supra*, on this. The WDA Immigration Project can help you figure this out.

**5. Alternative felony offenses**

- The best (most “immigration safe”) alternative is to negotiate a plea to Assault in the 3rd Degree with Negligence under RCW §§ 9A.36.031(f) or (d)
- RCW § 9A.36.031(f) has been found not to be a CIMT.<sup>172</sup> § (d) should be the same as long as the weapon is not a firearm. Under *Leocal* and *Fernandez-Ruiz*, a crime of negligence does

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<sup>168</sup> *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992): a conviction for Assault 3 under RCW § 9A.36.031(1)(f) (“with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering”) is not a crime involving moral turpitude, where intentional or reckless conduct is excluded from the statutory definition of the crime. The BIA withdrew from an earlier decision holding “that any assault resulting in great bodily harm involves moral turpitude, without regard to the existence of intentional conduct or the conscious disregard of a substantial and unjustifiable risk.” *id.* at \_\_\_.

<sup>169</sup> Compare RCW §§ 9A.08.010(1)(c) and (d).

<sup>170</sup> *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc); *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001).

<sup>171</sup> *Leocal v. Ashcroft*, 125 S.Ct. 377, 382 (U.S. 2004) (citations omitted).

not involve or risk the “use” of force, and so cannot be an aggravated felony crime of violence.

- Malicious Mischief – Malicious mischief, or attempted malicious mischief, in any degree under RCW 9A.48.070-090, is an immigration-safe charge. (This assumes you can switch to a crime against property.) Malicious Mischief 2 is not a CIMT, and without a sentence of one year, or more could not be an aggravated felony crime of violence. Given the broad definition of property damage it is likely that it is *not* categorically a ‘crime of violence’ even with a sentence of one year or longer.

(For alternative misdemeanors see the alternatives given at § VI.F, RCW 46.61.024 - Attempting to elude police vehicle (class C felony), *supra*)

#### K. RCW 46.61.5249 Negligent driving — First degree

##### **This offense should normally not trigger any immigration-related grounds, however:**

- A negligent driving conviction under RCW 46.61.5249 based on showing the “effects of having consumed ... an illegal drug,” should be avoided, especially if specified as coming under § 46.61.5249 (2)(c)(i), or (ii).<sup>173</sup> Drug abuse and addiction are grounds of inadmissibility and deportability. A noncitizen is inadmissible if the drug addiction or abuse is current and deportable if the addiction or abuse occurred at any time after admission into the United States.<sup>174</sup> Also, admitting the “acts constituting the essential elements” of a crime relating to a controlled substance can result in inadmissibility for drug crimes.<sup>175</sup>
- The offense’s connection to alcohol consumption might be of some concern if the person is going to be applying for an immigrant visa at the US consulate in Ciudad Juarez, Mexico.<sup>176</sup>

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<sup>172</sup> *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992)

<sup>173</sup> RCW § 46.61.5249 (c) "Exhibiting the effects of having consumed an illegal drug" means that a person by speech, manner, appearance, behavior, lack of coordination, or otherwise exhibits that he or she has consumed an illegal drug **and either: (i)** is in possession of an illegal drug; or **(ii)** is shown by other evidence to have recently consumed an illegal drug." If one absolutely *had* to be convicted under this subsection, it would still be better if the specific controlled substance were not specified.

<sup>174</sup> INA § 212(a)(1)(A)(iii), 8 USC § 1182(a)(1)(A)(iii) [inadmissibility ground]; INA § 237(a)(2)(B)(ii), 8 USC § 1227(a)(2)(B)(ii) [deportation ground].

<sup>175</sup> INA § 212(a)(2)(A)(i)(II), 8 USC § 1182(a)(2)(A)(i)(II). A conviction under RCW § 46.61.5249 (c) is not necessarily conclusive as to these drug-related grounds; it would just be better avoided if at all possible.

<sup>176</sup> See fn.144 in DUI section. This is just a caution; we haven’t heard of this being a problem in relation to offenses other than DUI .

**The following offenses are not likely to trigger any crime-related immigration law or removal ground:<sup>177</sup>**

**L. RCW 46.61.022 Failure to obey officer**

This offense is not likely to trigger crime-related immigration deportation or removal grounds.<sup>178</sup>

**M. RCW 46.20.005 No valid operator's license (NVOL)**

Whether a misdemeanor under RCW § 46.20.005 or an infraction, this offense does not fit into any category that makes a person inadmissible or deportable under immigration law.

**N. RCW 46.20.342 Driving while license invalidated**

**O. RCW 46.61.525 Negligent driving — Second degree.**

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<sup>177</sup> See Practice Point on p.14, *supra*, relating to specific TPS status, and to delay of naturalization

<sup>178</sup> E.g., in regard to “crime of violence” see *United States v. Nobriga*, 408 F.3d 1178, 1181 (9th Cir. 2005)(withdrawn for other reasons) (Haw. Rev. Stat. § 709-906(1) is *not* categorically a crime of violence because it proscribes “refusing compliance with the lawful order of a police officer,” which can be effected without violence. That case concerned the definition of crime of violence under 18 USC § 922(a)(3) which is almost exactly the same as 18 USC § 16.)