

**GUIDE TO THE BASIC IMMIGRATION CONSEQUENCES  
OF TENNESSE CRIMES**

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**How to use this guide:** Select Tennessee criminal offenses are listed in order of their code section. Under each offense, guidance is offered as to whether the offense would be classified by a judge as an “aggravated felony,” as a “crime involving moral turpitude,” or perhaps as some other type of offense carrying an immigration consequence.

**Limitations of this guide:** This guide was developed as a tool for criminal defense practitioners, and, as such, it gives conservative recommendations and focusses on whether certain convictions should be avoided. Unfortunately, very little in “cimmigration” law is clear-cut, and there are few cases directly on point for Tennessee criminal statutes. This guide should not be relied upon as providing a definitive answer, but it does provide a starting point and a review of the primary case law regarding specific crimes. Each entry gives a general answer (yes, probably, maybe not, etc.) regarding classification and then discusses the case law and rationale behind the general answer. Be aware that case law interpretations may vary widely between various immigration officials, prosecutors, and judges. Additionally immigrants from Tennessee may face immigration proceedings in either the Sixth Circuit or, if incarcerated, the Fifth Circuit. Tennessee immigration inmates are sent to Jena, Louisiana for detention and immigration court. Finally, remember that the vast majority of non-citizen defendants do not have immigration lawyers to make legal arguments on their behalf. When advising criminal defendants, we need to be very conservative in our analysis, because the client will most likely not have any recourse if DHS decides to charge a conviction as a CIMT or aggravated felony. On the flip side, please do not let this guide discourage you from making creative arguments in immigration court as to why a crime should not be classified in a certain way.

**Updates:** This guide is an ongoing project that is updated regularly, but immigration law changes quickly and we make no claim to always be 100% up to date or all-encompassing. We encourage you to Shepardize any cases or citations before relying on them.<sup>2</sup> If you find recent case law that you think changes the analysis, please email [MaryHarcombe@jis.nashville.org](mailto:MaryHarcombe@jis.nashville.org) so that we can incorporate the new case law into the guide. Similarly, please email if you receive IJ decisions in Memphis or Jena that support or contradict the analysis in this guide.

**Other resources:** Useful guidance for analyzing these issues is available through similar guides posted by the National Immigration Project ([www.nationalimmigrationproject.org](http://www.nationalimmigrationproject.org)), the Immigrant Defense Project ([www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org)), and the Immigrant Legal Resource Center ([www.ILRC.org](http://www.ILRC.org)). These organizations also have several in-depth practice advisories about specific concepts and recent important cases in crimmigration law. Another excellent resource is the National Lawyer Guild's *Immigration Law and Crimes*, by Dan Kasselbrenner and Lory Rosenberg.

**Abbreviations:**

AGF: Aggravated felony, which triggers *virtually unavoidable* deportation

CMT: Crime involving moral turpitude. Usually triggers inadmissibility. Also triggers deportability if (a) committed within 5 years of admission and the sentence is 1+ years or (b) there are two CIMT convictions

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<sup>1</sup> This guide was originally created in 2008 by Michael C. Holley. It was updated and expanded in 2013 by Will York. It was updated and expanded most recently in 2017 by Mary Kathryn Harcombe with assistance from Caleb Mundy and Randy Hiroshige. This guide is updated routinely as new case law comes out, but please always double-check any citations you use.

<sup>2</sup> Note that BIA cases are classified as “administrative materials” rather than “cases” in Lexis.

“not arising out of a single scheme.”

- COV: Crime of violence, which is an AGF if the sentence imposed is one year or more
- CSO: Controlled substance offense, which triggers deportation proceedings
- DHS: Department of Homeland Security – controls the arrest, detention, and prosecution of immigration cases
- DVO: Domestic violence offense, which triggers deportation proceedings under INA §237(a)(2)(E). This categorization includes stalking. Note that DVO does not include all TN crimes with a DV aspect.
- CAC: Crime Against Children (includes abuse, neglect, & abandonment), triggers deportation under INA §237(a)(2)(E)
- FAO: Firearms offense, which triggers deportation proceedings
- GMC: Precludes a finding of Good Moral Character, which is necessary for a period of time (usually 5 years) in order to qualify for citizenship, voluntary departure, etc.
- ROC: The “record of conviction.” This is the record created by the State in procuring the conviction, and it is limited to the indictment or other charging document, the judgment, any written plea agreement, any recorded plea colloquy, and/or any jury instructions and verdict form.
- PSC: Particularly Serious Crime - is definitely any aggravated felony or felonies for which an alien has been sentenced to an aggregate term of at least five years, and the Attorney General of the United States is free, notwithstanding the 5 year sentence requirement, to determine an alien has been convicted of a particularly serious crime. 8 U.S.C. § 1231(b)(3)(B)(iv). The AG of th United States, has issued a later ruling that AGF involving narcotics trafficking are also presumptively PSC, unless “unusual circumstances” mitigated that finding (factors provided in the case). In re Y-L-, 23 I. & N. Dec. 270, 2002 WL 358818 (A.G. 2002). An alien who is convicted of a PSC is ineligible for withholding of removal relief generally available under 8 U.S.C. § 1231(b)(3)(A) which prevents the AG from removing an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

**Appendices:**

Appendix A of this Guide provides pertinent statutory definitions.

**Select Tennessee Offenses**

**37-1-156, Contributing to the Delinquency of a Minor**

AFG: No, because the maximum sentence is less than a year.

CIMT: Probably not. If, however, if the ROC shows that the offense was sexual in nature, then it will likely be a CIMT. See *Matter of R---P---*, 4 I.&N. Dec. 607 (BIA 1952) and *Matter of C--*, 5 I.&N. Dec. 65 (BIA 1953)(where the ROC shows “lewd and lascivious acts,” the crime is a CIMT).

**39-11-403, Facilitation of a felony**

AGF: In practice, when the underlying crime is an agg fel, then facilitation will usually be an agg fel, but that is not true across the board. In the agg fel analysis, one should look at the elements involved in that specific facilitation offense. This means combining the elemental requirements of facilitation liability with the elements of the facilitated offense. See *United States v. Chandler*, 419 F.3d 484, 487 (6th Cir. 2005)(holding that facilitation of an agg assault was a COV because the facilitation presented a serious risk of physical injury, not because agg assault is an enumerated COV). See also *United States v. Vanhook (Vanhook II)*, 640 F.3d 706, 711 (6th Cir. 2011) (facilitation of burglary is not a COV under the ACCA because facilitation requires a mere knowing mens rea, which does not rise to the level of a “purposeful, violent, and aggressive” crime as required by *Begay v. United States*, 553 U.S. 137 (2008)); *United States v. Trejo-Palacios*, 418 F.Supp. 2d 915 (S.D. Tex. 2006)(in an ACCA case involving facilitation of agg robbery under TN law, the conviction was not automatically a COV or AGF just based on the underlying crime).

CIMT: Unclear. The BIA has held that it is “appropriate to look at the substantive crime[] to determine whether inchoate offenses, such as attempt, conspiracy, accessory before the fact, facilitation or solicitation constitute crimes involving moral turpitude.” *Matter of Gonzalez Romo*, 26 I&N Dec. 743 (BIA 2016). On the other hand, mens rea is a critical component of finding a crime to be a CIMT, and, unlike with solicitation, attempt, and conspiracy crimes, inchoate facilitation does not require the same mens rea as the substantive offense. Based on *Gonzalez Romo*, DHS will most likely charge facilitation as a CIMT, but there are good arguments to be made in front of an Immigration Judge.

CSO: If the substantive crime is a CSO, then facilitation is a CSO, because it is still “relating to a controlled substance.” See *Matter of Del Risco*, 20 I&N Dec. 109 (BIA 1989); see also *In re Pacheco-Ventura*, 2003 BIA LEXIS 14 (BIA Dec. 29, 2003).

**39-11-411, Accessory After the Fact**

AGF: Yes, as long as the sentence is 1 year or more. Accessory counts as a crime of “obstruction of justice or perjury” as used in INA §101(a)(43)(S). *In re Batista Hernandez*, 21 I&N Dec. 955 (BIA 1997); see also *In re Valenzuela Gallardo*, 25 I&N Dec. 838 (BIA 2012). Note that accessory is not an inchoate offense that takes the characteristics of the underlying charge. See *Batista-Hernandez*.

CMT: Unclear, but best to avoid if the underlying offense is a CIMT. In homicide cases, accessory has been found to be a CIMT because the homicide was a CIMT. See *Matter of Sanchez-Marin*, 11 I&N Dec. 264 (BIA 1965); see also *Cabral v. INS*, 15 F.3d 193 (1<sup>st</sup> Cir. 1994). On the other hand, the *Batista-Hernandez* argument that accessory isn’t an inchoate offense would seem to apply to CIMTs as well as AGFs. The *Batista* court specifically declined to address the CIMT question.

**39-12-101, Criminal Attempt**

- AGF: If the underlying offense would be an AGF, then the attempt would also be one. 8 U.S.C. § 1101(a)(43)(U).
- CMT: If the underlying offense would be a CMT, then the attempt would also be one. 8 U.S.C. § 1182(a)(2)(A)(i). *See also Matter of Katsansis*, 14 I. & N. Dec. 266 (BIA 1973).
- CSO: If the underlying offense would be a CSO, then the attempt would also be one. 8 U.S.C. § 1182(a)(2)(A)(i) & 8 U.S.C. § 1227(a)(2)(B)(i).

**39-12-102, Solicitation**

- AGF: It will likely be charged according to the same rule as for attempts and conspiracies even though 8 U.S.C. § 1101(a)(43)(U) does not specifically include solicitation in the agg fel definition. Especially in the case of violent crimes, courts usually find solicitation to be an agg fel.. *See Matter of Guerrero*, 25 I. & N. Dec. 631 (BIA 2011)(solicitation of a crime of violence is also a crime of violence); *Prakash v. Holder*, 579 F.3d 1033 (9th Cir. 2009)(solicitation of rape is an agg felony). There is some argument for solicitation not being an agg fel when the underlying crime is non-violent, though this should not be relied upon. *See Padilla v. Kentucky*, 559 U.S. 356 (2010) (discussing the ABA guide mentioning that “Solicitation is not a drug-trafficking offense because a generic solicitation offense is not an offense related to a controlled substance and therefore not an aggravated felony.”); *see also United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001).
- CMT: It will likely be charged according to the same rule as for attempts and conspiracies even though 8 U.S.C. § 1182(a)(2)(A)(i) does not specifically include solicitation. *See Matter of Gonzalez Romo*, 26 I&N Dec. 743 (BIA 2016)(court should look to substantive crime to determine whether inchoate offenses – including conspiracy – are CIMTs); *Landero-Guzman v. Holder*, 344 Fed. App’x 454 (9th Cir. 2009) (holding that conviction under Arizona law of possession of drugs for sale was a CIMT where solicitation required the intent that the substantive offense be committed and alien failed to produce evidence of prosecution of any other person for the underlying substantive charge) (applying *Barragan-Lopez v. Mukasey*, 508 F.3d 899, 902-05 (9th Cir. 2007)). There is an argument that solicitation should be treated as a non-CIMT, but it’s not advisable to rely on this. *See United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001).
- CSO: If the underlying offense is a CSO, then solicitation is a CSO. *Matter of Zorilla-Vidal*, 24 I&N Dec. 768 (BIA 2009)(outside of the 9<sup>th</sup> Circuit, solicitation of a CSO counts as a CSO).

**39-12-103, Criminal Conspiracy**

- AGF: If the underlying offense would be an AGF, then the conspiracy would also be one. 8 U.S.C. § 1101(a)(43)(U).
- CMT: If the underlying offense would be a CMT, then the conspiracy would also be one. 8 U.S.C. § 1182(a)(2)(A)(i).
- CSO: If the underlying offense would be a CSO, then the conspiracy would also be one. 8 U.S.C. § 1182(a)(2)(A)(i) & 8 U.S.C. § 1227(a)(2)(B)(i).

**39-13-101(a)(1), Assault.**

- AGF: No, because maximum punishment is less than one year. *See also Suazo-Perez v. Mukasey*, 512 F.3d 1222 (9th Cir. 2008) (when assault conviction might have merely involved offensive touching, it is not a COV).
- CMT: Depends on the subsection, and the statute is divisible as to whether the conviction is pursuant to (a)(1), (a)(2), or (a)(3), but it is not divisible within each subsection. *See Matter of Chairez (Chairez III)*, 26 I&N Dec 819 (BIA 2016) (analyzing similar Florida assault statute).  
**Subsection (a)(1) – Bodily injury assault:** should not be a CIMT, though it is safest to have the judgment indicate a “reckless mens rea”. “Simple assaults or batteries are generally not considered CIMTs because they require only general intent or only a minimal touching and no injury.” *Singh v. Holder*, 321 Fed Appx. 473 (6<sup>th</sup> Cir. 2009)(unpublished). *See also Matter of Fualaau*, 21 I. & N. Dec. 475 (BIA 1992) (en banc). *See also Matter of Perez-Contreras*, 20 I. & N. Dec. 615 (BIA 1992); *Matter of J-*, 4 I. & N. Dec. 512, 514 (BIA 1951); *In re Ernst Solon*, 24 I. & N. Dec. 239, 241 (BIA 2007) (“[W]e have recognized that not all crimes involving the injurious touching of another person reflect moral depravity on the part of the offender.”) (citing Tenn. Code Ann. § 39-13-101 as example of state statute that proscribes wide range of behavior, including both morally depraved conduct and not). In the 5<sup>th</sup> Circuit, knowing or intentional simple assault can be a CIMT, but RECKLESS simple assault cannot. Since (a)(1) includes a reckless mens rea, the statute cannot categorically be a CIMT. *Gomez-Perez v. Lynch*, --- (Fifth Cir. 2016) (an identical Texas statute - “intentionally, knowingly, or recklessly causes bodily injury” - is not categorically a CIMT). Furthermore, the *Gomez-Perez* court found that the different mens rea options were means rather than elements, and thus that the TX statute is not divisible. *See also Matter of Chairez*, 26 I&N Dec 819 (BIA 2016).
- Subsection (a)(2) – Reasonable fear assault:** In the 5<sup>th</sup> Circuit, this may be charged as a CIMT. Historically, simple assault was not considered a CIMT (*See Matter of Fualaau*, 21 I. & N. Dec. 475 (BIA 1992)), but, twice recently the 5<sup>th</sup> Circuit has upheld the BIA’s finding that simple assault under a Texas statute requiring intentional or knowing mens rea is a CIMT. *See Esparza-Rodriguez v. Holder*, 699 F.3d 821, 823-826 (5th Cir. 2012) and *Martinez-Olivera v. Holder*, 598 Fed. Appx. 285 (5th Cir. Mar. 19, 2015). The Texas assault statute, however, does not include a fear prong, and there is some good language in *Esparza-Rodriguez* that can be used to argue that subsection 101(a)(2) (fear prong) does NOT qualify as a CIMT. (“the assault statute must require ‘a meaningful level of harm, which must be more than mere offensive touching’”, 699 F.3d at 824). *See also In re Wu*, 27 I&N Dec. 8 (BIA 2017). In the 6<sup>th</sup> Circuit (in Memphis immigration court), a general simple assault conviction, even under (a)(2), is less likely to be charged as a CIMT.
- DVO: Yes, if there is a domestic relationship between the parties. *See Matter of Estrada*, 26 I&N Dec 749 (BIA 2016). The domestic relationship does not need to be an element of the crime, but rather is a “circumstance-specific” inquiry that does not trigger the categorical approach. *Estrada* clarifies that *U.S. v. Hayes*, 555 U.S. 415 (2009), does apply to the immigration context. See further discussion below under TCA §39-13-111 (domestic violence).
- CAC: No. General assault statutes are not categorically crimes against children. *In re Velazquez-Herrera* 24 I&N Dec 503 (BIA 2008). Also shouldn’t be divisible such that the ROC comes into play.

### 39-13-101(a)(3), Offensive Contact Assault.

- AGF: No, because maximum punishment is less than one year. *See also Suazo-Perez v. Mukasey*, 512 F.3d 1222 (9th Cir. 2008) (when assault conviction might have merely involved offensive touching, it is not a COV). However, when there is already an order of protection in place, even offensive touching can be a COV (but this behavior is captured under the agg assault statute – 39-13-102(c)). *United States v. Cooper*, 739 F.3d 873, 882 (6<sup>th</sup> Cir. 2014).

- CMT:** No. Even when the “victim” is a police officer, this shouldn’t be a CIMT when there is no actual bodily injury or use of a dangerous weapon. *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988); *see also Esparza-Rodriguez v. Holder*, 699 F.3d 821, 824 (5<sup>th</sup> Cir. 2012) (following the BIA’s decision in *Matter of Solon*; partially overruled on other grounds by *Mathis v. United States*, 195 L. Ed.2d 604 (2016)); *Matter of Solon*, 24 I. & N. Dec. 239, 241-42 (BIA 2007) (stating that convictions that require only minimal touching without any evidence of actual injury are generally not CIMT); and *Matter of Sejas*, 24 I. & N. 236 (BIA 2007).
- DVO:** No, because offensive contact is not a Crime of Violence, and DVO is defined in §237(a)(2)(E) as a “crime of violence” under 18 USC §16. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 349 (BIA 2014) (“The phrase ‘physical force’ denotes violent, active force capable of causing pain or injury to another person”). *See also Matter of Velasquez*, 25 I. & N. Dec. 278 (B.I.A. 2010) (VA’s “assault and battery” statute is not categorically a COV for DVO purposes because “battery” includes mere “unlawful touching”); *see also United States v. Castleman*, 188 l. Ed.2d 426 (2014) (ft. nt. 4) (finding that offensive touching battery qualifies as a misdemeanor crime of domestic violence for the purposes of 18 U.S.C. §922(g)(9), but specifically excluded it as a crime of violence for immigration purposes, or a crime of violence under 18 U.S.C. § 16).

### 39-13-102, Aggravated Assault

- AGF:** Usually yes. The Government will certainly treat any conviction as a COV if the sentence imposed is one year or more, and so the client must be forewarned that even a plea to reckless aggravated assault will likely trigger deportation proceedings.

The Agg Assault statute as a whole is NOT a COV, but because of its divisible nature, DHS can look at the ROC (indictment, plea agmt, etc) to see which subsection the conviction comes under. *See United States v. Cooper*, 739 F.3d 873, 883 (6<sup>th</sup> Cir. 2014).

**Subsection (a)(1)(A):** “Regular” C felony Agg Assault under (a)(1)(A) is definitely a COV (and thus agg fel). The Sixth Circuit has definitively found a conviction under TCA §39-13-102(a)(1)(A) to be a COV. *United States v. Cooper*, 739 F.3d 873, 882 (6<sup>th</sup> Cir. 2014).

**Subsection (a)(1)(B):** Reckless Agg Assault – Split opinions between the 5<sup>th</sup> and 6<sup>th</sup> Circuits. But if your client is in custody, chances are he will be sent to Louisiana, and 5<sup>th</sup> Circuit law controls.

In the Sixth Circuit, reckless aggravated assault under the “bodily injury prong” is not a COV. *United States v. McMurray*, 653 F.3d 367 (6<sup>th</sup> Cir. 2011) (vacating and remanding sentencing by Trauger, J., and holding (1) Tennessee aggravated assault is not categorical COV when it includes reckless behavior; and (2) not COV under these particular facts applying modified categorical approach); *See also United States v. Martinez-Ortega*, 482 Fed. App’x 96 (6<sup>th</sup> Cir. 2012) (same, holding ROC did not show that aggravated assault conviction was a COV); *United States v. Cooper*, 739 F.3d 873, 882 (6<sup>th</sup> Cir. 2014) (A conviction under §39-13-102 “does not categorically qualify as a crime of violence ... according to our past decisions, because the statute criminalizes reckless conduct”). The Sixth Circuit has explicitly stated that “a crime requiring only recklessness does not qualify as a ‘crime of violence’”. *United States v. Portela*, 469 F.3d 496 (6<sup>th</sup> Cir. 2006) (TN vehicular assault – which is committed by recklessly causing bodily injury to another while driving – is not a COV). **However**, the 6<sup>th</sup> Circuit found that reckless agg assault by deadly weapon requires the *intentional* use or display of a weapon, thus making a conviction under subsection (a)(1)(B)(iii) a crime of violence. *United States v. Mendoza-Mendoza*, 239 Fed. Appx. 216, 221 (6<sup>th</sup> Cir. Aug. 15, 2007). *Mendoza* is unpublished, but its holding is implicitly adopted in *McMurray*. 653 F.3d at 373. On the other hand, in a 2014 footnote in *Cooper*, the court stated that the *Mendoza* holding “is arguably in conflict with our opinion today,” thus re-opening the possibility of challenges to *Mendoza*. *United States v. Cooper*, 739 F.3d 873, FN1 (6<sup>th</sup> Cir. 2014)

In the Fifth Circuit, Reckless Agg Assault is almost certainly a crime of violence and thus an aggravated felony. *See United States v. Mungia-Portillo*, 484 F.3d 813 (5th Cir. 2007) (holding reckless aggravated assault “falls within the ordinary, contemporary, and common meaning of aggravated assault,” thus classifying crime as COV for USSG).

**Subsection (c)** (restraining order) – Categorically a crime of violence and thus an aggravated felony if the sentence is over a year. *United States v. Bell*, 575 Fed. App’x. 598 (6<sup>th</sup> Cir. 2014)(unpublished).

**CMT:** Yes. Any conviction under subsection (a)(1)(A) or (a)(1)(B) is a CMT – doesn’t matter if it’s via SBI or deadly weapon. *See Matter of Fualaau*, 21 I. & N. Dec. 475 (BIA 1992); *See also Matter of Hernandez*, 26 I&N Dec. 464 (BIA 2015)(“recklessly placing another in ‘imminent danger of serious bodily harm’ is ‘reprehensible conduct’ that constitutes a crime involving moral turpitude.”); *Matter of Jing Wu*, 27 I&N Dec. 8 (BIA 2017)(even general intent (reckless) assault is a CIMT if there are aggravating factors such as a weapon or force sufficient to cause SBI).

**DVO:** Same as for simple assault, *supra*.

### 39-13-103, Reckless Endangerment

**AGF:** Misd RE is definitely not an agg fel (COV analysis doesn’t matter bc it’s not punishable by a year)  
 Felony RE: *shouldn’t* be an agg fel, but risky. In general, a reckless mens rea is not usually sufficient for classification as a CIMT. *See See United States v. Portela*, 469 F.3d 496 (6th Cir. 2006); *See also United States v. Fish*, 758 F.3d 1, FN 4 (1st Cir. 2014)(FN 4 lists cases from all circuits stating COV needs more than reckless mens rea). HOWEVER, some courts wiggle around this by finding an intentional mens rea in the decision to utilize a deadly weapon. *See United States v. Mendoza-Mendoza*, 2007 U.S. App. LEXIS 20081 (6th Cir. Aug. 15, 2007) (unpublished; holding that Tennessee reckless aggravated assault is a COV at least when it involves the use or display of a deadly weapon because it has an intentional element (use or display of a deadly weapon), along with the reckless intent to assault); *United States v. Shelton*, 290 Fed. App’x 776, 779 (6th Cir. 2008) (same)(NOTE: both *Mendoza* and *Shelton* are based on the 18 USC 16(b) definition of “crime of violence”. Oral arguments have been heard, and a decision from the Supreme Court is pending in *Sessions v. Dimaya*, 137 S.Ct. 31 (2017 *cert. granted*) on whether the definition in 16(b) is unconstitutionally vague. The pending ruling could change the underlying rationale on much of the case law in the area of AGF by COV); In any event, this offense should be avoided, because DHS will likely charge it as an AGF.

**CMT:** Yes – even the misdemeanor version. “[R]ecklessly placing another in ‘imminent danger of serious bodily harm’ is ‘reprehensible conduct’ that constitutes a crime involving moral turpitude.” *Matter of Hernandez*, 26 I&N Dec. 464 (BIA 2015) (addressing Texas’ “deadly conduct” statute). *See also Idy v. Holder*, 674 F.3d 111 (1st Cir. 2012) (New Hampshire law that is nearly identical to our misd R.E. is a CIMT).

### 39-13-106, Vehicular Assault

**AGF:** No, the Sixth Circuit has held that this Tennessee offense is not a COV and it doesn’t fall under any of the other AGF categories. *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006). *See also United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001)(Tx DWI with injury is not a COV under §16 because there’s no substantial likelihood of intentional use of force and the recklessness required by the statute is insufficient.) For a review of similar cases in other circuits, see *United States v. Fish*, 758 F.3d 1, FN 4 (1st Cir. 2014).

**CMT:** Yes. The analysis is the same as for misdemeanor reckless endangerment: reckless mens rea is sufficient

for a CIMT where the action causes serious bodily injury. *See Matter of Hernandez*, 26 I&N Dec. 464 (BIA 2015) (“recklessly placing another in ‘imminent danger of serious bodily harm’ is ‘reprehensible conduct’ that constitutes a crime involving moral turpitude.”); *Matter of Jing Wu*, 27 I&N Dec. 8 (BIA 2017) (even general intent (reckless) assault is a CIMT if there are aggravating factors such as a weapon or force sufficient to cause SBI).

### 39-13-111, Domestic Assault

AGF: No, as long as it’s a misdemeanor. But if it’s a felony under the new subsection (c)(3), then it is an AGF because it’s a COV with a sentence of at least a year.

CMT: Probably, as long as there is actual injury or the ROC shows a mens rea of “intentionally”. *See Calderon-Dominguez v. Mukasey*, 261 Fed. Appx. 671 (5th Cir. 2008) (where the ROC supported a finding that petitioner pleaded guilty to *intentionally* assaulting his spouse, BIA’s finding of CIMT was reasonable); *See also Adalpe-Garcia v. Holder*, 472 Fed. Appx. 304 (5<sup>th</sup> Cir. 2012). “Willful infliction of injury” in the DV context is clearly a CIMT. *See Matter of Tran*, 21 I&N Dec. 291 (BIA 1996). *See also Grageda v. INS*, 12 F.3d 919, 922 (9th Cir. 1993) (“spousal abuse is an act of baseness or depravity contrary to accepted moral standards”, thus, when combined with a “willful” mens rea, it is a CIMT). Where a statute just requires “force”, without any showing of injury, domestic battery may not be a CIMT, but DHS will still probably charge it as one. *See Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9th Cir. 2006). Also – see discussion of Assault above. There is at least an argument that because “bodily injury” DV includes the “recklessly” mens rea, that part of the statute cannot, under the categorical approach, be a CIMT. *See Fernandez-Ruiz v. Gonzales*, 486 F.3d 1159, 1166 (9th Cir. 2006)

DVO: Yes, unless it’s the B misd offensive contact assault. The B misd version should be safe. *See United States v. Castleman*, 134 S.Ct. 1405, 1411 n.4 (2017). There is an argument that reckless assault under subsection (a)(1) should not constitute a COV under the categorical approach (and thus can’t be a DVO under INA §277(a)(2)(E)) – but it’s not a safe disposition. And remember that even a single misdemeanor DVO triggers deportability under INA §237(a)(2)(E) / 8 U.S.C. § 1227(a)(2)(E).

Note: simply pleading a DV charge to a simple assault does not cure the problem. DHS may use ROC documents to prove that the victim is in a relationship with the accused that counts as a “domestic relationship.” It is not necessary for the domestic relationship to an element of the crime charged itself, but DHS has the burden to prove the relationship, and the accused can refute. *Bianco v. Holder*, 624 F.3d 265, 272 (5th Cir. 2010).

### 39-13-202, First Degree Murder

AGF: Murder is categorically an AGF under 8 U.S.C. § 1101(a)(43)(A).

CMT: Yes. *See, e.g., Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994).

PSC: Yes.

### 39-13-210, Second Degree Murder

AGF: Yes. 8 U.S.C. § 1101(a)(43)(A); *see also* 8 U.S.C. § 1101(43)(B); *In re Vargas-Sarmiento*, 23 I. & N. Dec. 651 (BIA 2004). This is so even for the type of second-degree murder that results from unlawful drug distribution because the offense would be deemed a drug-trafficking offense. The requisite mens rea for the crime is knowingly. *See State v. Randolph*, 676 S.W.2d 943, 947 (Tenn. 1984) (holding that that not every



sale of a controlled substance that results in a death is second degree murder, but that if all circumstances were taken into account and if it was competently established beyond a reasonable doubt that defendant(s) acted with such conscious indifference to the consequences of their highly illegal activities, that the trier of fact could conclude guilt of second degree murder. Therefore, only with a mens rea of knowing will produce a second degree murder conviction for the unlawful drug distribution provision.)

CMT: Yes.

### **39-13-211, Voluntary Manslaughter**

AGF: Yes. *See In re Vargas-Sarmiento*, 23 I. & N. Dec. 651 (BIA 2004).

CMT: Yes. *See Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994).

### **39-13-212, Criminally Negligent Homicide**

AGF: No, but DHS may charge it as a COV (and thus as an AGF) simply because it is a homicide. COV does not include accidental or negligent conduct. *See Leocal v. Ashcroft*, 543 U.S. 1, 9-11 (2004). *See also In re Sweetser*, 22 I. & N. Dec. 709 (BIA 1999) (holding that permitting a child to be unreasonably placed in a situation which poses a threat is not a COV because it involves no element of use, attempted use, or threatened use of physical force); *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006) (holding that “recklessly causing bodily injury to another” is not a COV because the mens rea is mere recklessness).

CMT: No. A CIMT requires “reprehensible conduct” plus “some form of ‘scienter’ such as specific intent, knowledge, wilfulness, or recklessness.” *Matter of Hernandez*, 26 I.&N. Dec. 464 (BIA 2015). Criminal negligence (unconscious and unreasonable disregard of danger) falls below recklessness and is thus not sufficient to qualify an offense as a CIMT. *See Matter of Jing Wu*, 27 I&N Dec. 8, 8 (BIA 2017)(citing *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992)).

### **39-13-213, Vehicular Homicide**

AGF: Probably not, but DHS may charge it as a COV (and thus as an AGF) simply because it is a homicide. This should not be deemed a COV for the same reason that Tennessee Vehicular Assault is not a COV. *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006).

CMT: Yes. *See, e.g., Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994). *See Vehicular Assault analysis above. See also Tenn. Op. Atty. Gen. No. 98-225 (Tenn.A.G.), 1998 WL 851370 (Tennessee AG opinion finding that TN 39-12-213 was a CIMT for state purposes.)*

### **39-13-215, Reckless Homicide**

AGF: Probably not, but DHS may charge it as a COV (and thus as an AGF) simply because it is a homicide. In most circuits, recklessness does not rise to the level of a COV. *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006)(TN vehicular assault is not a COV because requires mere reckless mens rea). Note that unlike Reckless Agg Assault or Reckless Endangerment, this statute does not require use of a deadly weapon, so there’s really no way for a court to find any intentional mens rea. *See United States v. Mendoza-Mendoza*, 239 Fed. Appx. 216, 221 (6th Cir. Aug. 15, 2007)(unpublished)(reckless agg assault requires an intentional mens rea for use or display of the deadly weapon, and thus can be a COV).

CMT: Yes, because “reckless” in 39-13-215 is as defined in TN 39-11-302(c) which includes the language “consciously disregards a substantial and unjustifiable risk.” This is sufficient mens rea to qualify as a CIMT. *See, e.g., Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994). *See also Matter of Hernandez*, 26 I&N Dec. 464 (BIA 2015)(“recklessly placing another in ‘imminent danger of serious bodily harm’ is ‘reprehensible conduct’ that constitutes a crime involving moral turpitude.”); *Matter of Jing Wu*, 27 I&N Dec. 8 (BIA 2017)(even general intent (reckless) assault is a CIMT if there are aggravating factors such as a weapon or force sufficient to cause SBI).

### **39-13-216, Assisted Suicide**

AGF: Arguably this is not a COV because it is not committed “against” another, as required by the statutory definition of 18 U.S.C. § 16. Also, if the offense is of the subsection (a)(1) variety, it involves no use of force, and so should not be deemed a COV.

CMT: Unclear

### **39-13-218, Aggravated Vehicular Homicide**

AGF: Probably not, but DHS may charge it as a COV (and thus as an AGF) simply because it is a homicide. This should not be deemed a COV for the same reason that Tennessee Vehicular Assault is not a COV. *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006). *See* Aggravated Assault, Tenn. Code Ann. § 39-13-102, *supra*, for discussion. Should be the same analysis as under Vehicular Homicide; the aggravating factors are number of convictions and/or amount of alcohol content in the blood, which should not change AGF or CIMT analysis.

CMT: Yes. *See, e.g., Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994). Should be the same analysis as under Vehicular Homicide; the aggravating factors are number of convictions and/or amount of alcohol content in the blood, which should not change AGF or CIMT results.

### **39-13-302, False Imprisonment**

AGF: No. Unlike in other states, the crime does not require use of force and is therefore not a COV. *See contra United States v. Soto-Sanchez*, 623 F.3d 317 (6th Cir. 2010). Even if it were considered a COV, it isn’t an AGF because the sentence is under a year.

CMT: Probably no, but risky because of similarity to kidnapping. This statute is described, in both the Sentencing Commission Comments and by the Tennessee Supreme Court in *State v. Cecil*, 409 S.W.3d 599, 604 (Tenn. 2013), as broadly addressing any situation where there is an interference with another’s liberty. It should not be a CIMT because there is no requirement of malice or ill intent. *See Hamdan v. INS*, 98 F.3d 183 (5th Cir. 1996) (indicating Louisiana simple kidnapping is not a CMT.); *Matter of Alfaro*, 25 I. & N. Dec. 417, 422 (BIA 2011) (citing *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 626 (9th Cir. 2010)) (conviction under California false imprisonment statute not categorically CMT because did not require intent to harm, intentional violence, menace, fraud, or deceit). Note that the BIA typically refers to the closely related offense of kidnapping as a CMT, although no reason is given. *Matter of P-*, 5 I. & N. Dec. 444 (BIA 1953); *In re Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001).

### **39-13-303, Kidnapping**

AGF: Yes. Even if the kidnapping is accomplished by fraud, it contains the element of “substantial risk of bodily

injury.” Thus the statute is almost certain to be deemed a COV under §16(b) (though note this may change depending on the outcome of *Dimaya v. Sessions*).

CMT: Probably, and will certainly be charged as one. The BIA cases involving kidnapping mention it as a CMT, although no rationale is given. *Matter of P-*, 5 I. & N. Dec. 444 (BIA 1953); *In re Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001); *Matter of C-M-*, 9 I. & N. Dec. 487 (BIA 1961) *but see Hamdan v. INS*, 98 F.3d 183 (5th Cir. 1996) (indicating Louisiana simple kidnapping is divisible and convicted section not a CMT.)

### **39-13-304, Aggravated Kidnapping**

AGF: Yes. Realistically this will always be charged as a COV, although there’s at least an argument that neither subsection (a)(1) nor (a)(2) involve a substantial risk of physical force.

CMT: Yes. *See Matter of Torres-Varela*, 23 I. & N. Dec. 78, 84 (BIA 2001)(noting that traditional CIMT crimes include murder, rape, statutory rape, robbery, kidnaping, voluntary manslaughter, some involuntary manslaughter offenses, mayhem, theft offenses, spousal abuse, child abuse, and incest).

### **39-13-305, Especially Aggravated Kidnapping**

AGF: Yes, unless it’s under subsection (a)(2), in which case there is at least an argument that it’s not a COV because no substantial risk of physical force. The other subsections are indisputably crimes of violence.

CMT: Yes. *See Matter of Torres-Varela*, 23 I. & N. Dec. 78, 84 (BIA 2001)(noting that traditional CIMT crimes include murder, rape, statutory rape, robbery, kidnaping, voluntary manslaughter, some involuntary manslaughter offenses, mayhem, theft offenses, spousal abuse, child abuse, and incest).

### **39-13-401, Robbery**

AGF: Yes. Robbery is usually considered a COV, especially under the “violence” prong. Even under the “fear” prong, however, Robbery is an aggravated felony because it counts as a “theft offense” pursuant to INA §101(a)(43)(G). Most recently, see *Matter of Ibarra*, 26 I&N Dec. 809 (BIA 2016).

CMT: Yes. *Matter of Martin*, 18 I. & N. Dec. 226 (BIA 1982). *See also Matter of Torres-Varela*, 23 I. & N. Dec. 78, 84 (BIA 2001)(noting that traditional CIMT crimes include murder, rape, statutory rape, robbery, kidnaping, voluntary manslaughter, some involuntary manslaughter offenses, mayhem, theft offenses, spousal abuse, child abuse, and incest).

### **39-13-402, -403, Aggravated Robbery**

AGF: Yes.

CMT: Yes. *See Matter of Torres-Varela*, 23 I. & N. Dec. 78, 84 (BIA 2001)(noting that traditional CIMT crimes include murder, rape, statutory rape, robbery, kidnaping, voluntary manslaughter, some involuntary manslaughter offenses, mayhem, theft offenses, spousal abuse, child abuse, and incest).

### **39-13-404, Carjacking**

AGF: Yes, a COV because it is essentially a robbery offense. *See also In re Brevia-Perez*, 23 I. & N. Dec. 766

(BIA 2005) (holding that knowingly operating another's vehicle without consent is a COV). *But see United States v. Crowell*, 997 F.2d 146, 149-50 (6th Cir. 1993) (holding that an aggravated vehicle theft offense does not constitute a "crime of violence" under Sentencing Guidelines' definition).

CMT: Yes.

### **39-13-502, Aggravated Rape**

AGF: Yes. Pursuant to 8 U.S.C. § 1101(43)(A). The TN agg rape statute matches the generic definition of "rape". *See Matter of Keeley*, 27 I&N Dec. 146 (BIA 2017)(generic definition of rape includes "an act of vaginal, anal, or oral intercourse or digital or mechanical penetration of the vagina or anus, no matter how slight," accomplished though "force or fear, or under other prohibitive conditions").

CMT: Yes. *See Matter of Torres-Varela*, 23 I. & N. Dec. 78, 84 (BIA 2001)(noting that traditional CIMT crimes include murder, rape, statutory rape, robbery, kidnaping, voluntary manslaughter, some involuntary manslaughter offenses, mayhem, theft offenses, spousal abuse, child abuse, and incest).

### **39-13-503, Rape**

AGF: Yes, unless it's rape accomplished by fraud. Arguably, using fraud (§ 39-13-503(a)(4)) to commit a rape does not constitute a generic "rape." *See Matter of Keeley*, 27 I&N Dec. 146 (BIA 2017)(generic definition of rape includes "an act of vaginal, anal, or oral intercourse or digital or mechanical penetration of the vagina or anus, no matter how slight," accomplished though "force or fear, or under other prohibitive conditions"). *But see United States v. Mack*, 53 F.3d 126 (6th Cir. 1995) (holding that sexual battery through deception is a "violent felony"); *Patel v. Ashcroft*, 401 F.3d 400 (6th Cir. 2005) (indicating that an offense is a COV when it involves a *nonconsensual* sexual act); *Dawson v. United States*, 702 F.3d 347 (6th Cir. 2012) (statute not divisible under the ACCA because the (a)(4) fraud element "clearly falls within the ACCA's residual clause as a crime that presents a serious potential risk of physical injury to another"). Assault with intent to commit sexual battery, however, is not categorically a COV. *See United States v. Arnold*, 58 F.3d 1117 (6th Cir. 1995).

CMT: Yes. *See Matter of Torres-Varela*, 23 I. & N. Dec. 78, 84 (BIA 2001)(noting that traditional CIMT crimes include murder, rape, statutory rape, robbery, kidnaping, voluntary manslaughter, some involuntary manslaughter offenses, mayhem, theft offenses, spousal abuse, child abuse, and incest).

### **39-13-504, Aggravated Sexual Battery**

AGF: Yes. *See United States v. Hargrove*, 416 F.3d 486, 495 and n.3 (6th Cir. 2005) (summarizing Sixth Circuit holdings related to sex offenses).

CMT: Yes.

### **39-13-505, Sexual Battery**

AGF: Yes (as long as the sentence is a year or more). *See United States v. Craig*, 630 F.3d 717, 723 (8th Cir. 2011) (TN statute section (a)(2)(without consent) is a COV under the USSG). *But see Lisbey v. Gonzales*, 420 F.3d 930 (9th Cir. 2005) (COV only if the offense without the use of physical force occurred with substantial risk of the use of physical force). Note that if the victim is a minor, this can be an agg fel "sexual abuse of a minor" even though it's not an element. *See Matter of De Millan*, 26 I&N Dec. 904

(BIA 2017) (as in *Nijhawan*, sex battery is a conviction that allows the court to look behind the conviction to determine the age of the victim – in contradiction to the categorical approach).

CMT: Yes.

### 39-13-506, Statutory Rape

AGF: No, unless the conviction is under subsection (b)(1) (minor is 13 to 15 years old and defendant is 4 to 10 years older). The Supreme Court has held that stat rape laws are categorically not “sex abuse of a minor” Agg Fels if the laws include minors aged 16 and older. *Esquivel-Quintana v. Sessions*, 2017 U.S. LEXIS 3551 (May 30, 2017) (overturning the Sixth Circuit’s ruling in *Esquivel-Quintana v. Lynch*, 810 F.3d 1019 (6th Cir. 2016)). Ironically, in Tennessee, this means that neither mitigated nor aggravated statutory rape can be an Agg Fel, but standard E felony statutory rape CAN be an aggravated felony.

CMT: Unclear. The Government will likely charge it as a CMT, although there is good case law against it. “Statutory rape is notable in that it has been found to involve moral turpitude even though has no intent element.” *In re Torres-Varela*, 23 I&N Dec. 78 (BIA 2001). *But see Quintero-Salazar v. Keisler*, 506 F.3d 688 (9<sup>th</sup> Cir. 2007)(noting, among other things, that it cannot be a CIMT because as “a strict liability crime that does not require any showing of scienter, it lacks the requisite element of willfulness or evil intent”).

### 39-13-511, Public Indecency - indecent exposure

AGF: The Government will charge as AGF if ROC supports that victim is a minor. Ordinarily, however, the crime is not chargeable as a felony. The statute by its own terms encompasses both felonious and misdemeanor conduct.

CMT: Maybe. The statute seems divisible because it includes both “offensive” conduct and conduct involving sexual arousal or gratification (“lewdness”) as separate subsections. The subsection involving gratification/arousal is almost definitely a CMT. *See In re Medina*, 26 I. & N. Dec. 79 (BIA 2013). The only defense would be to argue that the statute is not divisible. (MK)  
Subsection (a)(1)(B) – involves children and thus is definitely a CIMT

### 39-13-513, Prostitution

CMT: Yes. *See In the Matter of W--*, 4 I&N Dec. 401 (BIA 1951). *See also Rohit v. Holder*, 670 F.3d 1085 (9<sup>th</sup> Cir. 2012) and *Florentino-Francisco v. Lynch*, 2015 U.S. App. LEXIS 8719 (10<sup>th</sup> Cir. May 27, 2015).

Also: Any alien who “has engaged in prostitution within 10 years of date of application” is statutorily inadmissible pursuant to §212(a)(2)(D). However, this requires the showing of “a pattern of behavior or deliberate course of conduct” *In re Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008). *See also Matter of T--*, 6 I&N Dec. 474 (BIA 1955).

### 39-13-514, Patronizing Prostitution

CMT: Yes. Explicitly held so in *Rohit v. Holder*, 670 F.3d 1085 (9<sup>th</sup> Cir. 2012). Adopted by the 10<sup>th</sup> Circuit in *Florentino-Francisco v. Lynch*, 2015 U.S. App. LEXIS 8719 (10<sup>th</sup> Cir. May 27, 2015). Adopted by the 6<sup>th</sup> Circuit in *Jose Dolores Reyes v. Lynch*, (6<sup>th</sup> Cir. August 26, 2016).

GMC: No. *In re Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008)

Also: Note – Any alien who “has engaged in prostitution” or attempts to “procure” prostitution within 10 years of the date of application is statutorily inadmissible pursuant to §212(a)(2)(D). Since this is a separate ground from the CIMT bar, there is no petty offense exception. “Engage” has been defined to mean an ongoing course of action, and does not seem to include the purchase of services, only the sale of them. Solicitation of a prostitute on one’s own behalf does not count as “procuring prostitution” pursuant to INA §212(a)(2)(D) and thus does not preclude cancellation of removal under §240A(2). *In re Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008) (No contrary case law in the 5<sup>th</sup> or 6<sup>th</sup> Circuits) *But see Amador-Palomares v. Ashcroft*, 382 F.3d 864, 867 (8<sup>th</sup> Cir. 2004)(a single act of attempting to solicit a prostitute rendered defendant statutorily ineligible for a GMC finding)

### **39-13-515, Promoting Prostitution**

CMT: Yes, see discussion of Prostitution and Patronizing Prostitution.

AGF: Probably not, though DHS may charge it as one under 8 U.S.C. §1101(a)(43)(K)(i) (an offense that “relates to the owning, controlling, managing, or supervising of a prostitution business”). The TN promoting law should be construed as overbroad, and thus not categorically an agg fel, because of our state’s broad definition of prostitution. *See Prus v. Holder*, 660 F.3d 144 (2d Cir. 2011)(promoting prostitution under NY law is not categorically an aggravated felony because the state defines prostitution as “sexual conduct”, while the INA implicitly defines it as “sexual intercourse”). TCA §39-31-512(6) defines prostitution as “sexual activity” which courts have interpreted as including non-intercourse activities such as lap dances. *See State ex rel. Gibbons v. Jackson*, 16 S.W.3d 797, 802 (Tenn. App. 1999). Assuming the courts don’t break with the Second Circuit, the *Prus* argument should work for a TN promoting conviction.

### **39-13-523, Rape of a child**

AGF: Yes on several bases.

CMT: Yes. *See Matter of Torres-Varela*, 23 I. & N. Dec. 78, 84 (BIA 2001)(noting that traditional CIMT crimes include murder, rape, statutory rape, robbery, kidnaping, voluntary manslaughter, some involuntary manslaughter offenses, mayhem, theft offenses, spousal abuse, child abuse, and incest).

CAC: Yes.

### **39-13-527, Sexual Battery by an authority figure**

AGF: Yes.

CMT: Yes. *See Matter of Torres-Varela*, 23 I. & N. Dec. 78, 84 (BIA 2001)(noting that traditional CIMT crimes include murder, rape, statutory rape, robbery, kidnaping, voluntary manslaughter, some involuntary manslaughter offenses, mayhem, theft offenses, spousal abuse, child abuse, and incest).

CAC: Yes.

### **39-13-528, Solicitation of a minor**

AGF: Yes, as long as the solicited crime is an AGF. The Fifth Circuit has found solicitation to be “sexual abuse” where the act solicited qualifies as “sexual abuse”, regardless of whether the purported victim is a child or

an undercover police officer. *See Sharif v. Holder*, 342 Fed. Appx. 967 (5th Cir. 2009)(citing *Hernandez-Alvarez v. Gonzales*, 432 F.3d 763 (7th Cir. 2005)). *See also Gatterm v. Gonzales*, 412 F.3d 758 (7th Cir. 2005) (solicitation of a 17 year old girl for oral sex in exchange for cigarettes is an AGF). The Sixth Circuit has not addressed this issue directly, but it has approvingly cited the BIA’s use of the definition of sexual abuse in 18 USC §3509(a)(8), which includes the “persuasion” or “inducement” of a minor to engage in sexually explicit conduct. *Esquivel-Quintana v. Lynch*, 810 F.3d 1019 (6th Cir. 2016)(citing *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 (B.I.A. 1999))(overturned on other grounds).

CMT: Yes.

CAC: Probably.

### **39-13-529, Soliciting Sexual Exploitation of a Minor by Electronic Means**

AGF: Most likely. The Government will charge this as an attempted “Sexual Abuse of a Minor” offense under 8 U.S.C. § 1101(a)(43)(A), (U) and thus as an AGF. The Fifth Circuit defines “sexual abuse” broadly as involving sexual arousal or gratification and “wrongly and improperly using the minor and thereby harming the minor”. *United States v. Zavala-Sustaita*, 214 F.3d 601 (5th Cir. Tex. 2000)(finding that exposing oneself to a child is sexual abuse). This circuit has found solicitation to be “sexual abuse” where the act solicited qualifies as “sexual abuse”, regardless of whether the purported victim is a child or an undercover police officer. *See Sharif v. Holder*, 342 Fed. Appx. 967 (5th Cir. 2009)(citing *Hernandez-Alvarez v. Gonzales*, 432 F.3d 763 (7th Cir. 2005)). *See also Gatterm v. Gonzales*, 412 F.3d 758 (7th Cir. 2005) (solicitation of a 17 year old girl for oral sex in exchange for cigarettes is an AGF).

CMT: Yes.

### **39-13-531, Aggravated Rape of a Child**

AGF: Yes.

CMT: Yes.

CAC: Yes.

### **39-13-522, Statutory Rape by Authority Figure**

AGF: Unclear, but avoid if possible because DHS will almost certainly charge it as an AGF. In the wake of *Esquivel-Quintana v. Session*, 137 S.Ct 1562 (2017), regular statutory rape under TN law is not categorically “sex abuse of a minor” because the statute includes minors aged 16 and 17. The case leaves open the possibility, however, that stat rape of a 16 or 17 year old could be “sex abuse of a minor” if there was a “special relationship of trust.”

CMT: Probably, because of the special relationship of trust.

### **39-14-103, Theft of Property**

AGF: Yes, if it’s a felony (sentence of 1 year or more). *See* 8 U.S.C. § 1101(a)(43)(G). Note, the TN statute qualifies as a generic theft offense even though it doesn’t explicitly require a *permanent* taking. *See In re V-Z-S-*, 22 I. & N. Dec. 1338 (B.I.A. 2000) (“intent to deprive” is sufficient to constitute a theft offense, even

if it can include a temporary deprivation) (widely upheld by BIA and circuit court decisions).

CMT: Yes. Under the TN statute, “intent to deprive” includes both temporary and permanent takings, but this is no longer a relevant distinction, as long as “the owner’s property rights are substantially eroded.” *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016). *See also Chacon v. Sessions*, 2017 U.S. App LEXIS 13946 (5th Cir. 2017)(Oklahoma statute requiring general “intent to deprive” is a CIMT in the wake of *Diaz-Lizarraga*); *but see Lozano-Arredondo v. Sessions*, 866 F.3d 1082 (9th Cir. 2017).

### 39-14-104, Theft of Services

AGF: It depends. This is *not* a “theft offense” under 8 U.S.C. § 1101(a)(43)(G) for AGF purposes because there’s no loss of the “rights and benefits of ownership.” *See In re V-Z-S-*, 22 I. & N. Dec. 1338 (B.I.A. 2000). Nonetheless, a conviction under this statute may be an AGF as an offense involving “fraud or deceit” with a loss of over \$10,000 under 8 U.S.C. § 1101(a)(43)(M). The theft of services statute is probably divisible with respect to subsections (a)(1), (a)(2), and (a)(3). A conviction under (2) and (3) is probably not a “fraud or deceit” offense because there’s no element of misrepresentation. *See Rogie Laquian Vasquez*, A046 562 059 (BIA Jan. 19, 2017)(unpublished). A conviction under (1) is likely to be charged as a “fraud of deceit” offense, but there’s a decent argument that the crime is overinclusive because it covers services obtained by coercion. Remember that the amount of loss is “circumstance specific,” meaning it doesn’t trigger a categorical analysis; DHS can look to the record of conviction to determine whether the loss was over \$10,000. *Nijhawan v. Holder*, 557 U.S. 29 (2009).

CMT: Yes. This will always be charged by DHS as a CIMT, but there’s at least an argument that since the services may be obtained “by any other means”, the statute encompasses behavior that is not fraudulent and thus is overbroad and not a CIMT.

### 39-14-106, Joyriding

AGF: No, because it cannot be punished by a one year prison sentence.

CMT: No. Even though the traditional permanent vs impermanent taking dichotomy is no longer used after *Diaz-Lizarraga*, joyriding is still the classic example of a *de minimis* taking that does not rise to the level of “substantially eroding” an owner’s property rights. *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016). *See also Chacon v. Sessions*, 2017 U.S. App LEXIS 13946, 5 (5th Cir. 2017)(“a theft or larceny statute is not a CIMT in circumstances where it criminalizes a *de minimis* taking, such as joyriding.”)

### 39-14-112, Extortion

AGF: Probably, as long as the ROC shows the intent was to obtain physical property. The statute is almost certainly divisible as to subsections (a)(1), (a)(2), and (a)(3). *See State v. Fitzpatrick*, 2015 Tenn. Crim. App. Lexis 730, 2015 WL 5242915. Extortion to obtain property is clearly an AGF theft, so if subsection (a)(1) is internally divisible, then a conviction would be an AGF where the ROC shows the intent was to obtain property. *Matter of Ibarra*, 26 I&N Dec 436 (BIA 2016). Unfortunately, subsection (a)(1) would probably be found divisible (see Pattern Jury Instruction §11.04; *see also State v. Leberry*, 2005 Tenn. Crim. App. LEXIS 295, \*52, 2005 WL 711913. Alternatively, sometimes extortion is a COV, but “coercion” under TN law does not necessarily include any risk of force, so there’s a strong argument against such classification. TCA §39-11-106(a)(3). *See Strelchikov v. Att’y Gen. of the United States*, 242 Fed. App’x 789, 791-92 (3d Cir. 2007) (federal extortion statute is a COV because has element of threat or use of force).



CMT: Probably. *See Matter of G- T-*, 4 I. & N. Dec. 446 (BIA 1951); *Matter of F-*, 3 I. & N. Dec. 361 (BIA 1949); *Matter of Vella*, 27 I&N Dec. 138 (BIA 2017)(responded doesn't dispute that his extortion conviction is a CIMT).

### **39-14-114, Forgery.**

AGF: Yes if at least a one-year sentence was imposed. 8 U.S.C. § 1101(a)(43)(R). Also, yes, if the amount of loss is \$10,000 or more. 8 U.S.C. § 1101(a)(43)(M). *Cf. In re Aldebesh*, 22 I. & N. Dec. 983 (BIA 1999).

CMT: Yes, because of the required "intent to defraud or harm another." *See Matter of Islam*, 25 I&N Dec. 637 (BIA 2011)("Forgery and possession of stolen property have long been considered to be crimes involving moral turpitude").

### **39-14-115, Criminal Simulation**

AGF: Yes if at least a one-year sentence was imposed. 8 U.S.C. § 1101(a)(43)(R). Also, yes, if the amount of loss is \$10,000 or more. 8 U.S.C. § 1101(a)(43)(M). Although a merely possessory type of this offense is arguably *not* an AGF. *See Richards v. Ashcroft*, 400 F.3d 125 (2d Cir. 2005) (Sotomayor, J.). *See also Omari v. Gonzales*, 419 F.3d 303, 308-09 (5th Cir. 2005) (conviction to commit interstate transportation of stolen airline tickets did not come within "fraud or deceit" definition of AGF, absent evidence that offense involving stolen tickets involved fraud or deceit).

CMT: Yes, because of the intent to defraud. *See United States v. Barb*, 20 F.3d 694 (6th Cir. 1994).

### **39-14-118, Illegal possession or fraudulent use of Credit or Debit Card.**

AGF: It depends. Yes, for subsection (b) of the statute if a at least a one-year sentence is imposed or if the amount of loss is \$10,000 or more. No, for subsection (a) of the statute if it is the Class A misdemeanor offense.

CMT: Yes, a conviction under subsection (b) is a CMT. But the effect of a conviction under subsection (a) is questionable. Subsection (a) might be considered a CMT (although the requisite intent to defraud is apparently not an element), but it will not result in deportation and will at least allow the alien rendered inadmissible to qualify for the petty-offense exception. Thus, a subsection (a) conviction punished as a Class A misdemeanor with a sentence of under 6 months is probably a safe plea (assuming no other CIMTs)

### **39-14-121, Worthless checks**

Note that there is inconsistent caselaw about whether this crime involves dishonesty. The Sixth Circuit found that this offense does not require an intent to defraud and thus "is not, as a matter of law, a crime of dishonesty." *United States v. Barb*, 20 F.3d 694 (6th Cir. 1994). The TN Supreme Court, on the other hand, rejected the Sixth Circuit reasoning and held that a worthless check conviction is a "crime of dishonesty" and is thus probative of truthfulness. *State v. Russell*, 382 S.W.3d 312, 317 (Tenn. 2012).

AGF: It depends. If the loss is over \$10,000, this crime is likely an AGF under 8 USC §1101(M)(i) (fraud or deceit + >\$10,000 in loss). The statute does not necessarily involve fraud (mens rea is "with fraudulent intent or knowingly," but issuing a check knowing there are insufficient funds could comprise deceit. *See Patel v. Mukasey*, 526 F.3d 800 (5th Cir. 2008)(the affirmative act of concealing a felony necessarily

involves fraud or deceit). Worthless check *should* not be an AGF under 8 USC §1101(G) (theft offense), because there's no element of taking "without consent." See *Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008)(a fraud-based crime is not a "theft offense" for agg fel determination).

CMT: Unclear, should be avoided if possible. Historically, a worthless check conviction was not a CIMT unless there was intent to defraud. *Matter of Balao*, 20 I. & N. Dec. 440 (BIA 1992); see also *Matter of Zangwill*, 18 I. & N. Dec. 22 (BIA 1981) (FL's worthless-check offense, which includes offenses involving mere knowledge of insufficient funds, is *not* a CIMT); *Matter of Logan*, 17 I&N Dec. 367 (BIA 1980)(AR worthless check statute with "intent to defraud" element IS a CIMT). On the other hand, "if a crime's essential element 'involves fraud or deception,' or 'include[s] dishonesty or lying,' it is a CIMT." *Villegas-Sarabia v. Sessions*, Docket No. 15-50992 (5th Cir., Oct. 31, 2017)(citing *Hyder v. Keisler*, 506 F.3d 388 (5th Cir. 2007) and *Omagah v. Ashcroft*, 288 F.3d 254 (5th Cir. 2002))(finding that affirmatively concealing a felony is a CIMT). The *Villegas-Sarabia* court went even further to explain that where "a felony requires assertive dishonest conduct, it necessarily requires an intentional act of deceit," which makes it a CIMT. *Id.* at \*10.

### 39-14-134, Alteration of item's distinguishing numbers

AGF: No, because max sentence is 11/29.

CMT: Probably, because of the intent to deceive. "[C]rimes including an element of intentional deception are crimes involving moral turpitude." *Villegas-Sarabia v. Sessions*, Docket No. 15-50992 (5th Cir., Oct. 31, 2017)(citing *Fuentes-Cruz v. Gonzales*, 489 F.3d 724 (5th Cir. 2007))

FAO: Shouldn't be. Under the categorical approach, this statute cannot be deemed a firearm offense. And the item at issue is clearly a "means" rather than an element of the offense, so the modified categorical approach should not be applicable.

### 39-14-150, Identity theft

AGF: Probably. Will likely be charged as a: "theft offense" under (43)(G), "related to" forgery under (43)(R), see *Richards v. Ashcroft*, 400 F.3d 125 (2d Cir. 2005)(possession of a forged document with intent to deceive is "an offense related to ... forgery"), or fraud/deceit over \$10,000 (43)(M), see *Inyang v. Holder*, 2014 U.S. App LEXIS 9011 (6<sup>th</sup> Cir. Mar. 12, 2014). The 8<sup>th</sup> Circuit has held that the Iowa offense (fraudulently using ID w/ intent to obtain credit, benefit, services, etc) is an aggravated felony as a "theft offense" for federal sentencing purposes. *United States v. Mejia-Barba*, 327 F.3d 678 (8th Cir. Neb. 2003). See also *Ezeigwe v. AG of the United States*, 491 Fed. Appx. 337 (3d Cir. 2012)(NY statute counts as a theft offense – but requires use of fraud); *Eke v. Mukasey*, 512 F.3d 372, (7th Cir. 2008)(IL statute counts as fraud). But see *Mandujano-Real v. Mukasey*, 526 F.3d 585 (9th Cir. 2008)(OR ID theft statute doesn't count as theft – but note that there's no element of intent to profit, benefit, or deprive). Note that there are no published BIA cases on ID theft.

CMT: Risky. The argument comes down to whether the TN statute encompasses behavior that is not fraudulent. Arguably, since our statute doesn't require loss or taking something of value, it's overbroad and not categorically a CIMT. See *Juarez-Romero v. Holder*, 359 Fed. Appx. 799 (9<sup>th</sup> Cir. Dec. 2, 2009)(WA statute requiring obtaining something "of value" is categorically a CIMT). See also *Linares-Gonzalez v. Lynch*, 823 F.3d 508 (9<sup>th</sup> Cir. 2016)(because CA Penal Code §530.5 does not require intent to harm or cause actual loss, the statute encompasses acts that are not turpitudinous).

### 39-14-301, Arson

AGF: Yes. A state arson conviction is an agg fel under 8 U.S.C. § 1101(43)(E)(i) as long as the state statute matches the substantive elements of 18 U.S.C. §844(i), to wit: maliciously damaging or destroying, by means of fire or an explosive, any building, vehicle, or other real or personal property. *Torres v. Lynch*, 136 S.Ct. 1619 (2016)(the jurisdictional/interstate commerce element of §844(i) need not be considered); *see also Espinal-Andrades v. Holder*, 777 F.3d 163 (4th Cir. 2014) . In this context, “maliciously” has been defined to include “willful disregard of the likelihood that damage or injury will result.” *Matter of Bautista*, 25 I&N Dec. 616 (BIA 2011). There is an argument that the TN definition of “knowing” (“aware that the conduct is reasonably certain to cause the result”) is a lesser mens rea that is not included in “malicious.” TCA 39-11-106(a)(20). Nevertheless, DHS will almost certainly charge arson as an agg fel.

CMT: Yes, a CMT. *See Matter of S-*, 3 I. & N. Dec. 617 (BIA 1949).

### **39-14-302, Aggravated arson**

AGF: Yes, for same reason as Arson, § 39-14-301, *supra*.

CMT: Yes, it is a CMT, for same reason as Arson, § 39-14-301, *supra*.

### **39-14-303, Setting fire to personal property or land**

AGF: Yes, for same reason as Arson, § 39-14-301, *supra*. Note that the federal definition includes “any building, vehicle, or other real or personal property.” 18 U.S.C. §844(i).

CMT: Avoid. This might be charged as a CMT; arguably it is not one. But seek a reckless burning conviction, § 39-14-305, instead.

### **39-14-305, Reckless burning**

AGF: Probably not. At least subsections (a)(1) and (a)(3) don’t require damage or harm as an element, so these parts should not be a categorical match under 8 U.S.C. § 1101(43)(E)(i). Additionally, recklessness, which requires a “conscious disregard”, is arguably a lower mens rea than maliciously, which requires a “willful disregard”. *See Matter of Bautista*, 25 I&N Dec. 616 (BIA 2011).

CMT: No. This is not a CMT because it lacks an element of depraved intent.

### **39-14-402, Burglary**

AGF: Almost certainly. Burglary is listed as an aggravated felony in 8 U.S.C. § 1101(a). “Generic burglary” requires that the structure be “a building or enclosed space”. *Shepard v. United States*, 544 U.S. 13, 15-16 (U.S. 2005). Tennessee’s agg burglary statute is a “generic burglary”, so the same analysis should apply to simple burglary. *See United States v. Nance*, 481 F.3d 882, 887-88 (6th Cir. 2007). Note also that if the ROC shows intent to commit theft, then, at least in the 5<sup>th</sup> Circuit, this will qualify as an “attempted theft offense,” which always counts as an agg fel. *See Garcia v. Holder*, 756 F.3d 839 (5<sup>th</sup> Cir. 2014)(burglary of a motor vehicle is an “attempted theft offense” if the entry is made with intent to steal.) Likely also an agg fel as a COV. *See US v. Delgado-Enriquez*, 188 F.3d 592, 959 (5<sup>th</sup> Cir 1999).

**Motor Vehicle** - Usually, but not always. It all depends on whether there is intent to commit theft. It’s an Agg Felony (as an “attempted theft offense”) if the sentence is over a year and the ROC shows intent to

commit theft. *Garcia v. Holder*, 756 F.3d 839 (5<sup>th</sup> Cir. 2014) (BMV with intent to steal is an “attempted theft offense” under the agg felony definition) (similar holdings in 7<sup>th</sup>, 9<sup>th</sup>, and 10<sup>th</sup> circuits); *see also Pulido-Alatorre v. Holder*, 381 Fed. Appx. 355, 358 (5<sup>th</sup> Cir. 2010) (applying the categorical approach, the BIA’s determination that BMV is a CIMT is reasonable). This statute should be considered divisible for purposes of determining the intended crime in the 5<sup>th</sup> Circuit (*Garcia v. Holder*) and is highly likely to be divisible in the 6<sup>th</sup> Circuit. Even after the elements vs means distinction codified by *Mathis v. U.S.*, 136 S.Ct. 2243 (2016), the intended crime probably counts as an element, not a means (see pattern jury instructions) → rendering the statute divisible. Note that BMV is not an aggravated felony under the “burglary” definition. *See United States v. Nance*, 481 F.3d 882, 887 (6<sup>th</sup> Cir. 2007); *see also In re Perez*, 22 I.&N. Dec 1325 (BIA 2000).

**CMT:** Probably yes. Historically, the analysis revolved around whether the intended crime was a CIMT; the act of breaking and entering, standing alone, is not a CIMT. *Matter of M*, 2 I. & N. Dec. 721 (BIA 1946). Under the categorical approach, however, the analysis changes a bit, and we first have to look to whether the statute is divisible between the intended crimes of “felony, theft, or assault.” The statute is most likely divisible as to the intended crime (see pattern jury instructions), so the modified categorical approach would apply. Under the modified categorical approach, if the ROC shows that theft was the intended crime, then the conviction is a CIMT. If the ROC shows that the intended crime was “a felony” or “assault,” then there’s a good argument that the conviction is NOT categorically a CIMT. The terms “felony” and “assault” both include both turpitudinous and non-turpitudinous conduct, so there’s no categorical match. For a recent analysis, see *Matter of J-G-D-F-*, 27 I&N Dec. 82 (BIA 2017). Note - if you can successfully argue that the statute is *not* divisible as to intended crime, then it should not be a CIMT, even if the intended crime was theft.

**Motor Vehicle** – most likely. The analysis is the same as for simple burglary, but there is additional prior case law in which the Fifth Circuit found that the BIA did not err in finding Texas’ misdemeanor BMV statute (equivalent to ours) to be categorically a CIMT. *Pulido-Alatorre v. Holder*, 381 Fed. Appx 355 (5<sup>th</sup> Cir 2010). If the ROC shows an intent to commit theft, this is very likely to be found a CIMT (see analysis above).

### **39-14-403, Aggravated Burglary**

**AGF:** Yes. Burglary is listed as an aggravated felony in 8 U.S.C. § 1101(a), and Tennessee’s agg burglary statute has been held to be a generic burglary offense. *See United States v. Nance*, 481 F.3d 882, 887-88 (6<sup>th</sup> Cir. 2007) (holding that TN agg burglary is generic burglary and thus qualifies as a violent felony under the ACCA).

**CMT:** Almost certainly. Regardless of the underlying crime, the act of unlawfully entering a “dwelling” with the intent to commit any crime has been found to be a CIMT. *Uribe v. Sessions*, 855 F.3d 622 (4<sup>th</sup> Cir. 2017). *See also Matter of J-G-D-F-*, 27 I&N Dec. 82 (BIA 2017); *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009). Note – there’s an argument that the TN statutory definition of “habitation” is significantly broader than the definitions of “dwelling” in *Uribe* and *J-G-D-F* and thus that the TN statute is not categorically a CIMT. “Dwelling” is defined as “a structure that a person regularly uses as a place in which to sleep” and has not been “abandoned completely.” *Uribe* at 626. If *Uribe* and *J-G-D-F* are found to not apply, however, TN agg burglary would still be a CIMT if the ROC shows that the intended crime was theft. (see discussion under Burglary) Either way, it’s almost certain that DHS will charge this as a CIMT.

### **39-14-404, Especially aggravated burglary**

**AGF:** Yes.

CMT: Almost certainly. If the building is a habitation, then this is almost certainly a CIMT under *Matter of J-G-D-F-*, 27 I&N Dec. 82 (BIA 2017) and *Matter of Louissaint*, 24 I&N 754 (BIA 2009). If the building is not a habitation, then the issue is less clear. (see analysis of Burglary, supra) It is almost certain, however, that DHS will charge this as a CIMT, especially in light of the assault line of cases indicating that SBI is an aggravating factor that may bump a crime up to a CIMT.

### **39-14-405, Criminal trespass**

AGF: No, because the maximum sentence is 30 days. Moreover, it is not a “burglary” offense because there is no intent to commit a crime. See *United States v. Mahon*, 444 F.3d 530, 534 (6th Cir. 2006).

CMT: No. Trespass is only a CMT where it has as an essential element the intent to commit a theft. *Matter of Esfindiary*, 16 I. & N. Dec. 659 (BIA 1979).

### **39-14-406, Aggravated criminal trespass**

AGF: No, because the maximum sentence is under a year. Moreover, it is not a “burglary” offense because there is no element of intent to commit a crime. See *United States v. Mahon*, 444 F.3d 530, 534 (6th Cir. 2006).

CMT: Probably not. If the ROC shows that the defendant intends or knows that his/her presence will cause fear under 406(a)(2), then the gov’t may charge this as a CIMT. This gets a little dicey but there’s a good argument it shouldn’t be a CIMT because there’s no actual injury. Still, the safest course is to specify that there’s only recklessness about the fear, or use subsection (a)(3).

### **39-14-407, Trespass by motor vehicle.**

Same as Criminal Trespass, § 39-14-405, *supra*. .

### **39-14-408, Vandalism**

AGF: Probably no. If the sentence is under a year, then definitely not an agg fel. If the sentence is a year or more, DHS could argue that it is a Crime of Violence under the 16(b) residual clause. There is no element of use of force nor apparent risk of injury to another, and there are no cases wherein vandalism has been found to be a COV. See *United States v. Mischuk*, 847 F. Supp. 2d 227 (D. Mass. 2012)(Mass. vandalism statute is not categorically a COV); see also *Brown v. Holder*, 763 F.3d 1141, 1146 (9th Cir. 2014)(DHS alleges vandalism is a CIMT, but not agg fel). The 5<sup>th</sup> Circuit has indicated that vandalism conviction could still be risky. See *United States v. Galvan-Rodriguez*, 169 F.3d 217, 220 (5th Cir. Tex. 1999)(finding that joyriding is a COV under 16(b) because there is a high risk the driver “will be involved in or will cause a traffic accident or expose the car to stripping or vandalism.”). Under a categorical analysis, vandalism does not, “by its nature,” involve a substantial risk of “physical force” against the “property of another” because it encompasses non-forceful acts such as graffiti. See *State v. Graves*, 1999 Tenn. Crim. App. LEXIS 127 (involving vandalism convictions for graffiti).

CMT: Probably no, but still risky. There’s not much case law on this, but the BIA recently found that vandalism with “planning, execution, and a malicious intent” along with a gang enhancement does qualify as a CIMT. *Matter of Hernandez*, 26 I&N Dec. 397 (BIA 2014). In *Hernandez*, the BIA notes that the IJ’s error was not in finding vandalism to not be a CIMT, but rather in failing to consider the gang enhancement in the analysis. Similarly, a New York district court held that “[i]n the context of property crimes, property damage is generally not considered a CIMT where the offense does not require an evil intent and a high degree of damage.” *Louisaire v. Muller*, 758 F. Supp. 2d 229, 237, (S.D.N.Y. 2010). See also *Matter of N-*,

8 I. & N. Dec. 466 (BIA 1959)(malicious and mischevious destruction of property is not a CIMT); *Matter of C-*, 2 I. & N. Dec. 716 (BIA 1947)(willful damage to personal property is not a CIMT where the value of the damage is low); *cf. Matter of R-*, 5 I. & N. Dec. 612 (BIA 1954)(“The crime of wanton and malicious destruction of property is a crime involving moral turpitude,” citing *Matter of M-*, 55830/408, 3, I. & N. Dec. 272, B.I.A. 1948.); *Matter of H-*, 9 I&N Dec. 460 (BIA 1961)(treats “malicious distruction of property” as a CIMT); *Brown v. Holder*, 763 F.3d 1141, 1146 (9th Cir. 2014)(DHS alleges vandalism is a CIMT, but not agg fel).

### **39-14-701, Possession of Burglary Tools**

AGF: No. Maximum sentence is under a year.

CMT: Usually no. If the ROC does not show that the crime intended to be committed during the intended burglary was a CMT, then it is not a CMT. Remember that burglary itself is not a CIMT – the issue is what crime is intended once inside. *Matter of S-*, 6 I. & N. Dec. 769 (1955). *See also Matter of Serna*, 20 I. & N. Dec. 579 (B.I.A. 1992) (“possession of burglary tools is not a crime involving moral turpitude unless accompanied by an intent to commit a turpitudinous offense such as larceny”).

### **39-14-702, Possession of explosive components.**

AGF: No, not punishable by a year or more.

CMT: No.

FAO: Yes.

### **39-14-903, Penalties for Money Laundering (incl. elements of offense).**

AGF: It depends. If the amount of funds exceeds \$10,000, then it is an AGF. 8 U.S.C. § 1101(a)(43)(D). *See generally In re S- I- K-*, 24 I. & N. Dec. 324 (BIA 2007).

CMT: Yes. *See generally In re Tejwani*, 24 I. & N. Dec. 97 (BIA 2007) (N.Y. money laundering conviction is categorical CMT).

### **39-15-301 – Bigamy**

AGF: No.

CMT: Yes. *Matter of E-*, 2 I. & N. Dec. 328 (BIA 1945) (applying Nevada bigamy statute).

### **39-15-302 – Incest**

AGF: It depends. If ROC establishes that the victim was a minor, then it almost certainly an AGF, either as a COV or a sexual-abuse-of-minor offense under 8 U.S.C. § 1101(a)(43)(A). *See In re Malta-Espinoza*, 23 I. & N. Dec. 656 (BIA 2004). Of course, if the ROC establishes the use or threatened use of force, and the sentence imposed is one year or more, then it is certainly a COV and an AGF. *But see generally United States v. Sawyers*, 409 F.3d 732, 741-42 (6th Cir. 2005) (declining to hold that every sex offense involving a minor is a “crime of violence” under a definition similar to that of 18 U.S.C. § 16). Otherwise, if the

ROC leaves open the possibility that the offense involved consensual sex between adults, it should not be deemed a COV or an AGF. *United States v. Hargrove*, 416 F.3d 486, 498-99 (6th Cir. 2005) (holding that an incest offense involving consenting adults is not a “violent felony” and expressing logic that would apply equally to the COV).

CMT: It depends. It will likely be charged as a CMT. *See In re Lopez-Meza*, 22 I. & N. Dec. 1188 (BIA 1999). But if the ROC fails to establish that this is *not* a case of intermarriage between an uncle/niece or aunt/nephew, then it is not a CMT. *Matter of B-*, 2 I. & N. Dec. 617 (BIA 1946).

### **39-15-401 – Child Abuse, Neglect, or Endangerment**

CAC: Yes – so causes deportability under INA 237(a)(2)(E)(i). All forms of this statute will cause deportation – even the misdemeanor levels. *See Matter of Soram*, 25 I.&N. Dec. 378 (BIA 2010) (even criminally negligent conduct resulting in no actual harm qualifies as a “crime of child abuse”), *See also Matter of Mendoza-Osorio*, 26 I&N Dec. 703 (BIA 2016)(NY’s child endangerment statute requiring a “likelihood” of harm to child is categorically a CAC).

AGF: Not necessarily. The TN statute is not categorically a COV because the neglect portion does not require use of violent force. *See United States v. Armstead*, 467 F.3d 943, 948 (6th Cir. Tenn. 2006). Basically, child abuse is a COV, but child neglect isn’t. *See United States v. Bass*, 315 F.3d 561 (6th Cir. Tenn. 2002)(if the plea or indictment indicates “abuse” instead of “neglect”, that is sufficient to find a COV). But be careful because statute is almost certainly divisible, so the record of conviction will come into play. Most cases involving child abuse find it is a COV based on the colloquy. *See United States v. Del Carmen Gomez*, 690 F.3d 194 (4th Cir. Md. 2012)(burned w/ a candle); *see also United States v. Lopez-Patino*, 391 F.3d 1034 (9th Cir. Cal. 2004)(spanking).

CMT: Probably. The foundation case is *Guerrero De Nodahl v. Immigration & Naturalization Service*, 407 F.2d 1405 (9th Cir. 1969), which holds that even where the mens rea is only “willful” (basically equivalent to knowing), inflicting “cruel or inhuman corporal punishment or injury resulting in a traumatic condition” to a child inherently involves moral turpitude. Although the CA statute contains language that’s not in ours (cruel or inhuman...), other courts mostly cite this opinion to show that infliction on a vulnerable target (i.e. a child) can raise simple assault to the level of a CIMT. *See Jaspal Singh Uppal v. Holder*, 605 F.3d 712, 717 (9th Cir. 2010). Neglect, on the other hand, may not be a CIMT.

### **39-16-102, Bribery of a Public Servant**

AGF: Avoid. This will probably be charged as an AGF. *See United States v. Ko*, 1999 U.S. Dist. LEXIS 19369 (S.D.N.Y. Dec. 20, 1999); *United States v. Couto*, 311 F.3d 179 (2d Cir. 2002). But as the *Ko* court pointed out, it arguably is not an AGF because it is not explicitly covered by either of the bribery provisions of 8 U.S.C. § 1101(a)(43).

CMT: Yes. *Matter of V-*, 4 I. & N. Dec. 100 (BIA 1950).

### **39-16-107, Bribery of a Witness**

AGF: Yes, assuming the term of imprisonment is at least one year. 8 U.S.C. § 1101(a)(43)(S).

CMT: Yes.

**39-16-108, Bribing a Juror**

AGF: Yes, assuming the term of imprisonment is at least one year. 8 U.S.C. § 1101(a)(43)(S).

CMT: Yes.

**39-16-201, Contraband in Penal Institution**

AGF: Yes, assuming the term of imprisonment is at least one year. 8 U.S.C. § 1101(a)(43)(S).

CMT: Almost certainly

CSO: Almost certainly. See *Matter of Esqueda*, 20 I. & N. Dec. 850 (B.I.A. 1994).

**39-16-301, Criminal Impersonation**

AGF: No, because the maximum punishment is less than one year.

CMT: Most likely yes. A conviction under subsection (a) is likely a CMT because a subsection (a) offense includes, as an element, an intent to injure or defraud. Arguably, a subsection (b) conviction is *not* a CMT because it does not include, as an element, an intent to defraud. DHS would likely argue, however, that the intent to defraud is implicit in subsection (b)(2). See *Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2008) (holding that intentionally lying to a police officer is not a CMT because it lacks the element of an intent to defraud); *but see Matter of H-*, 1 I&N Dec. 509 (BIA 1943) (holding that impersonating a police officer with the intent to defraud is a CMT). Consider § 39-16-303 (false identification – C misd) as long as the fraud was not occasioned on the United States.

**39-16-502, False Reports**

AGF: It depends. At least subsections (a)(1) and (a)(2) are AGF because they relate to the obstruction of justice and require a sentence of more than one year. 8 U.S.C. § 1101(a)(43)(S). Subsection (a)(3) might be charged as an obstruction of justice aggravated felony; if the ROC supports it, it might also be charged as a COV.

CMT: Yes, although under certain circumstances one might argue that is it not. See *Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2008) (holding that intentionally lying to a police officer is not a CMT because it lacks the element of an intent to defraud); see generally *Zaitona v. INS*, 9 F.3d 432, 437 (6th Cir. 1993). See also *Bobadilla v. Holder*, 679 F.3d 1052 (8th Cir. 2012) (giving false name to police officer not categorically morally turpitudinous).

**39-16-503, Tampering with or fabricating evidence**

AGF: Yes. 8 U.S.C. § 1101(a)(43)(S).

CMT: Yes.

**39-16-504, Destruction of and tampering with governmental records**

AGF: No.



CMT: Probably.

**39-16-507, Coercion of witness.**

AGF: Yes. 8 U.S.C. § 1101(a)(43)(S).

CMT: Yes.

**39-16-508, Coercion of juror**

AGF: Yes. 8 U.S.C. § 1101(a)(43)(S). Seek a disposition under § 39-16-509.

CMT: Yes.

**39-16-509, Improper influence of a juror**

AGF: No, not an AGF under 8 U.S.C. § 1101(a)(43)(S) because the sentence is less than one year.

CMT: Maybe not.

**39-16-510, Retaliation for past action**

AGF: Yes. This may be an AGF under 8 U.S.C. § 1101(a)(43)(S), for obstruction of justice offenses. Moreover, it will likely be a COV. *See United States v. Sawyers*, 409 F.3d 732, 742 (6th Cir. 2005) (holding that Tenn. Code Ann. § 39-16-510(a) retaliation conviction was a “violent felony,” for reasons that would likely entail that it is also a COV under 18 U.S.C. § 16).

CMT: Yes.

**39-16-602, Resisting stop, frisk, halt, arrest or search**

AGF: No because the maximum punishment is less than one year.

CMT: Probably not. If DHS charges it as a CIMT, there are good arguments against this classification. In general, action against a police officer qualifies as a CIMT only where it involves actual physical injury, use of a weapon, disregard for the lives or property of others, or the use of “violent force”. *See Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988); *Matter of Logan*, 17 I&N Dec. 367 (BIA 1980) (“The crime of interfering with a law enforcement officer is analogous to assault. Simple assault is not considered to be a CIMT” – but assault with a deadly weapon is); *Matter of Ruiz-Lopez*, 25 I&N Dec 551 (BIA 2011); *Cano v. U.S. Att’y Gen.*, 709 F.3d 1052 (11th Cir. 2013) (Florida resisting arrest is categorically CMT, but only where the statute incorporates use of violent force. The FL crime is a “felony in the third degree”, while ours is a B misdemeanor). *See also Jose Dolores Reyes v. Lynch*, (6<sup>th</sup> Cir. August 26, 2016)(conviction for resisting is not charged as a CIMT by DHS); *Partyka v. Att’y Gen. of the United States*, 417 F.3d 408 (3d Cir. 2005) (includes survey of BIA cases); *Zaranska v. United States*, 2005 U.S. Dist. LEXIS 17559 (E.D.N.Y. July 18, 2005). Although there is no case law directly on point, under a categorical analysis, the element of “force” as used in the TN statute is over-inclusive and encompasses behavior which does not qualify as a CIMT. *See Garcia-Meza v. Mukasey*, 516 F.3d 535 (7th Cir. 2008) (indicating that, if the ROC shows that the offense merely involved the offensive or insulting touching of an officer, it is not a CMT); *Vaquero-Cordero v. Holder*, 498 Fed. Appx. 760 (10<sup>th</sup> Cir. 2012) (Utah statute for obstructing justice is not a CIMT, even when there is “intentional use of force”). Note that, in an unpublished decision, the BIA recently held the Oklahoma resisting statute, which required “force or violence” is not categorically a CIMT - *AILA Doc.*

16093042, posted 9/30/16.

FAO: Will be a firearm offense if the ROC shows use of a firearm under subsection (d).

### **39-16-603(a), Evading arrest (not MV)**

AGF: No, because maximum penalty is less than one year.

CMT: No. *See Laryea v. Sessions*, 27 U.S. App LEXIS 17588 (5<sup>th</sup> Cir. Sept 12, 2017) (“We hold that fleeing from a police officer, without more, does not rise to the level of moral turpitude”) (addressing a Texas statute functionally similar to Tennessee’s). *Laryea* is the only case specifically addressing flight by foot (vs flight in a vehicle), but other courts, in addressing evading by vehicle, have indicated that without the danger inherent in a vehicle chase, evading would likely not be a CIMT. *See Mei v. Ashcroft*, 393 F.3d 737, (7<sup>th</sup> Cir. 2004) (Illinois statute); *Ruiz-Lopez v. Holder*, 682 F.3d 513 (6<sup>th</sup> Cir. 2012) (Washington statute); *Cano-Oyarzabal v. Holder*, 774 F.3d 914 (7<sup>th</sup> Cir. 2014) (Wisconsin statute); *Medina-Nunez v. Lynch*, 607 Fed. Appx. 701 (9<sup>th</sup> Cir. 2015) (CA statute); *Pulido-Alatorre v. Holder*, 381 Fed. Appx. 355 (5<sup>th</sup> Cir. 2010) (TX statute)

FAO: No.

### **39-16-603(b), Evading arrest with Motor Vehicle (without risk)**

AGF: It depends. An E-felony Evading w/ Motor Vehicle conviction should not be a COV, and thus should not be deemed an AGF, because it lacks the requisite risk of violence. *United States v. Foreman*, 436 F.3d 638 (6<sup>th</sup> Cir. 2006) (holding that Michigan fourth degree fleeing and eluding is not a “crime of violence” as defined by USSG § 2K2.1, under logic that would apply to COV under 18 U.S.C. § 16). *But see United States v. Christian*, 214 Fed. App’x 337 (4<sup>th</sup> Cir. 2007) (holding (b)(1) to be COV under the USSG’s “otherwise” clause but acknowledging (b)(1) does not meet the requirement of use of physical force against another).

CMT: Most likely. The Fifth Circuit upheld the BIA’s classification of simple evading with motor vehicle (ie no extra risk elements) as a CIMT. *Pulido-Alatorre v. Holder*, 381 Fed. Appx 355 (5<sup>th</sup> Cir 2010). The Sixth Circuit cited *Pulido-Alatorre* approvingly when it found that Washington’s evading statute qualifies as a CIMT. Under the WA statute, the driver must drive in a “manner indicating a wanton or willful disregard for the lives or property of others”, which is clearly not an element of the E-felony TN statute; however, the court later held that “intentionally fleeing from a police vehicle qualifies as the type of societally condemned, reprehensible conduct that is reasonably encompassed” by the definition of a CIMT. *Ruiz-Lopez v. Holder*, 682 F.3d 513 (6<sup>th</sup> Cir. 2012). On the other hand, in *Ramirez-Contreras v. Sessions*, 858 F.3d 1298 (9<sup>th</sup> Cir. 2017), the Ninth Circuit found that the equivalent CA statute is not categorically a CIMT because it encompasses conduct where the defendant did not flee “in an especially dangerous manner.” Implicit in this holding is the assumption that simply fleeing, without risk to others, does not rise to the level of a CIMT.

### **39-16-603(b)(3)(B), Evading arrest with Motor Vehicle WITH Risk**

AGF: Almost certainly. The D-felony Evading w/ Risk will almost certainly be deemed a COV because risk of injury is actually an element. *See United States v. Martin*, 378 F.3d 578 (6<sup>th</sup> Cir. 2004) (holding Michigan third degree fleeing and eluding is a similarly defined “crime of violence”). *United States v. Brown*, No. 12-5357, 2013 U.S. App. LEXIS 4088, \*7-8 (6<sup>th</sup> Cir. Feb. 26, 2013) (lesser-included Class D felony which includes the element of “flight or attempt to elude . . . [with] risk of death or injury,” is also a COV). *See*

*also U.S. v. Noah*, 401 Fed. Appx. 54 (6th Cir. 2010)(TN evading with risk is a COV under the ACCA residual clause); *Golicov v. Lynch*, 2016 U.S. App, LEXIS 17121 (10<sup>th</sup> Cir., Sept 19, 2016)(BIA found a FL “evading with risk” statute to be a COV before 10<sup>th</sup> Cir found the COV definition in INA void for vagueness). Note that this is subject to change depending on the outcome of *Dimaya*.

CMT: Almost certainly. The Fifth Circuit upheld the BIA’s classification of simple evading with motor vehicle (ie no extra elements) as a CIMT. *Pulido-Alatorre v. Holder*, 381 Fed. Appx 355 (5<sup>th</sup> Cir 2010). The Sixth Circuit cited *Pulido-Alatorre* approvingly when it found that Washington’s evading statute qualifies as a CIMT. *Ruiz-Lopez v. Holder*, 682 F.3d 513 (6<sup>th</sup> Cir. 2012). Under the WA statute, the driver must drive in a “manner indicating a wanton or willful disregard for the lives or property of others.” Because the TN statute does not include risk to property, it is even more “turpitudinous” than the WA statute, and is thus almost certain to be categorically a CIMT.

### **39-16-605, Escape from a penal institution**

AGF: Probably. But if prosecuted as a felony offense and the sentence imposed is one year or more, it will likely be considered an AGF because it will likely be considered a COV. *See United States v. Goodman*, 519 F.3d 310 (6th Cir. 2008) (holding Tennessee escape, even a walkaway offense, is a “crime of violence” under a similar definition). However, it is arguable that an escape offense – especially a walkaway offense – does not satisfy the 18 U.S.C. § 16 definition of a COV, and thus is not an AGF. *See Patel v. Ashcroft*, 401 F.3d 400 (6th Cir. 2005) (explaining that the type of “force” required by 18 U.S.C. § 16's definition of COV is force that would be used *as a means to complete* the intended offense); *see also United States v. Collier*, 493 F.3d 731 (6th Cir. 2007) (holding that some walkaway offenses do not even satisfy the relatively broad definition of a “violent felony”).

CMT: Yes.

### **39-16-702, Perjury**

AGF: It depends. It is an AGF if prosecuted as a felony and results in a sentence of one year or more. 8 U.S.C. § 1101(a)(43)(P).

CMT: Yes.

### **39-16-703, Aggravated perjury**

AGF: Yes, assuming a sentence of one year or more. 8 U.S.C. § 1101(a)(43)(S).

CMT: Yes.

### **39-16-705, Subornation of perjury**

AGF: It depends. It is an AGF if prosecuted as a felony and results in a sentence of one year or more. 8 U.S.C. § 1101(a)(43)(S).

CMT: Yes.

### **39-17-305, Disorderly Conduct**

AGF: No

CMT: Unclear. Most of the caselaw regarding DC involves statutes which define it as soliciting lewd acts. The lewd act version of DC is clearly a CMT, but there are no BIA opinions finding non-sexual disorderly conduct to be CMT. Old cases indicate the common definition of ‘disorderly conduct’ is not a CIMT. *Lewis v. Frick*, 189 F. 146, 150 (C.C.D. Mich. 1911). Subsection (a)(1) is a little concerning (“engages in fighting or in violent or threatening behavior”), but there’s no indication that DHS is treating it as a CIMT. \* Note – the pattern jury instructions include a mens rea of “reckless” for the actual action, though they note that this may be incorrect. This could be used to argue against any claim of CIMT

### 39-17-310, Public Intoxication

AGF: No.

CMT: No. A CIMT requires “reprehensible conduct” plus “some form of ‘scienter’ such as specific intent, knowledge, wilfulness, or recklessness.” *Matter of Hernandez*, 26 I.&N. Dec. 464 (BIA 2015).

### 39-17-308, Harassment

AGF: Depends. Not under subsection (a) because sentence is less than a year. Under subsection (b), it is unclear whether this qualifies as a COV. In *In re Malta-Espinoza*, 23 I. & N. Dec. 656, 659 (BIA 2004), the BIA found that a “course of conduct of harassment” under CA law qualified as a COV, but the CA law required a “credible threat” and “substantial emotional distress” – which is more analogous to our Stalking law. (note, the 9<sup>th</sup> Circuit overturned *In re Malta*, but in a subsequent case, *Matter of Singh*, 25 I&N Dec. 670 (BIA 2012), the BIA declined to follow that ruling outside of the 9<sup>th</sup> Circuit and reaffirmed the holding of *In re Malta* regarding harassment/stalking as a COV). To be safe, the felony version of Harassment should be avoided.

CMT: Probably. This is a divisible statute, so each subsection must be examined separately. Furthermore, there is no case law on whether misdemeanor harassing or stalking is a CIMT. Felony stalking by harassment was assumed to be a CIMT by the BIA in *Matter of Singh*, 25 I&N Dec. 670 (BIA 2012), but court did not directly address the issue. There is a good argument that subsection (a)(2) (anonymous phone calls) is not a CIMT, but it is safest to avoid the other subsections because of the specific intent required.

DVO: Probably not. Realistically, most states conflate harassment and stalking, but the former is not explicitly listed in INA §237(a)(2)(E)(i), while the latter is listed. For misdemeanors, this is a safer offense than stalking, because of the reduced likelihood of DVO (but don’t forget about the CIMT risk).

### 39-17-315, Stalking

AGF: Maybe. If the sentence is less than one year (i.e., if it is a misdemeanor prosecuted under subsection (b)), then it should not be an AGF because the sentence is too short to qualify as a COV. If the conviction is comes under subsections (c) or (d) and carries a sentence of a year or more, then the Government will likely charge it as a COV and thus as an AGF. See *In re Malta-Espinoza*, 23 I. & N. Dec. 656, 659 (BIA 2004) (holding that stalking in violation of a protective order is a COV). It is arguable that such an offense is not a COV under the holding of *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006). Nonetheless, a felony disposition under this statute must be avoided.

CMT: Probably, yes. Michigan’s aggravated stalking statute, which tracks Tennessee’s definition of “stalking”

under § (a)(4), is a CMT. *In re Ajami*, 22 I. & N. Dec. 949 (BIA 1999). *But see Latter-Singh v. Holder*, 668 F.3d 1156, 1161 (9th Cir. 2012) (Bybee, J.) (California stalking statute is categorically CMT but circumscribed only where the statute criminalizes only statements that threaten death or great bodily injury).

DVO: Yes, stalking is specifically listed as a DVO (and thus triggers deportability). 8 U.S.C. § 1227(a)(2)(E)(i). Even Tennessee's misdemeanor stalking offense, under subsection (b), would appear to satisfy the generic meaning of "stalking," at least in the view of the Second Circuit. *Arriaga v. Mukasey*, 521 F.3d 219, 2008 U.S. App. LEXIS 6415 (2d Cir. 2008). *See also In re Sanchez-Lopez*, 26 I. & N. Dec. 71 (BIA 2012) (same, California's misdemeanor stalking statute is a DVO under INA § 237(a)(2)(E)(i)).

### 39-17-417, Manufacture, deliver, sell, or possess with intent to distribute a controlled substance

AGF: Probably – DHS will definitely charge this as an agg felony crime of "illicit trafficking in a controlled substance", but there may be ways around this designation. INA §101(a)(43)(B). In the 5<sup>th</sup> Circuit, illicit trafficking requires "trading or dealing". *See Flores-Larrazola v. Lynch*, 2016 U.S. App LEXIS 19218 (5<sup>th</sup> Cir. Oct. 24, 2016). Illicit trafficking also usually must involve a "commercial transaction". *Matter of L—G—H—*, 26 I&N Dec. 365 (BIA 2014). This statute is almost certainly divisible as to the actus reus, so the modified categorical approach applies and the Record of Conviction will be used. *See Flores-Larrazola*; *see also Spaho v. U.S. Att'y Gen.* (11<sup>th</sup> Cir. Sept 19, 2016)(similar FL statute is divisible because sale, poss w/ intent, manufacturing, etc are elements of distinct crimes – not mere means). In an unpublished opinion from 11/8/16, the BIA noted that Board precedent "suggested" that manufacturing, delivery, or possession with intent to manufacture or deliver, are not "commercial transactions" or "trading or dealing" and thus are not aggravated felonies. *In re --*, 11/8/16, AILA Doc. 16111607. In the same unpublished opinion, the BIA concluded that even possession with intent to sell is not an "illicit trafficking" offense, because no actual transaction is involved. Note that in *Flores-Larrazola*, "delivery" was found to be trafficking, but only because it is statutorily defined in AR as involving the exchange for money or something of value. *But see Lopez v. Gonzales*, 549 U.S. 47, 127 S.Ct. 625 (2006).

**Strategy:** Craft the Record of Conviction such that the conviction is clearly for manufacture, delivery, or possession with intent to manufacture or deliver.

If the Tennessee's list of controlled substances is broader than the federal list, then a conviction under this provision might fail to be an AGF *when the ROC fails to identify the drug upon which the conviction is based*. *Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965); *Matter of Mena*, 17 I. & N. Dec. 38 (BIA 1979); *Matter of K- V- D-*, Int. Dec. 3422 (BIA 1999); *see Gousse v. Ashcroft*, 339 F.3d 91 (2d Cir. 2003). This is particularly true after *Moncrieffe* and *Nijhawan v. Holder*, 557 U.S. 29 (2009). But note that such a claim will not be likely to arise in Tennessee since its criminal code aims to keep its list of controlled substance the same as the federal list. Tenn. Code Ann. § 39-17-403(d).

CMT: Yes, *Matter of Khourn*, 21 I. & N. Dec. 1041 (BIA 1997), *reaff'd in Matter of Gonzales Romo*, 26 I&N Dec. 743, 746 (BIA 2016).

CSO: Yes. This is clearly a controlled substance offense and is thus grounds for deportation under INA §237(a)(2)(B) and inadmissibility under INA §212(a)(2)(A)(i)(II).

### 39-17-418, Simple Possession or Casual Exchange of controlled substance

AGF: Usually not – but beware felony simple possession & convictions on explicit "casual exchange" grounds.

Casual exchange: if the ROC establishes that the conviction is for "casual exchange," then it can be an AGF because federal law treats such an offense as a trafficking felony under 21 U.S.C. § 841(a). *Lopez v.*

*Gonzales*, 127 S.Ct. 625 (2006). If the “casual exchange” is without remuneration, it is likely not an AGF, according to the same logic in *Moncrieffe*, *supra*. So, you must ensure the ROC specifies that the offense is for “simple possession,” or at least that the ROC does not establish whether the conviction is for “simple possession” or for “casual exchange.” If there is small sales (<30 grams), make sure to avoid mention of remuneration in the ROC.

Simple possession: if the offense is for “simple possession,” then it will not be an AGF if incurred under subsections (a), (b), (c), or (d) because those offenses are not treated as felonies under federal law. *Lopez v. Gonzales*, 127 S.Ct. 625 (2006). This is the type of offense you should aim for, if incurring a conviction is necessary (because basically any conviction, except for simple possession of less than 30 grams of marijuana, will render the defendant deportable).

Felony simple possession – YES. Recidivist possession of a controlled substance is punishable as a felony under federal law, and thus counts as an AGF for immigration purposes. The Supreme Court held, however, that repeated simple possession convictions cannot be treated as recidivist AGF convictions unless the statute of conviction requires recidivism as an element. *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (U.S. 2010). The Fifth Circuit has cited *Carachuri-Rosendo* for the proposition that a plea under the recidivist statute always qualifies as an agg felony. *Espinal v. Holder*, 636 F.3d 703 (5th Cir. 2011).

Bottom line: If a conviction is necessary, seek one that is for “simple possession” and *not* imposed under the recidivism provision of subsection (e).

CMT: No.

CSO: Yes, unless it is the offender’s first drug offense and it involves possession for one’s own use of 30 grams or less of marijuana. Remember, though, that the 30 gram exception **ONLY** applies to deportability, not inadmissibility (though still eligible for the 212(h) waiver)

### **39-17-423, Counterfeit controlled substances.**

AGF: No. These should *not* be deemed AGF offenses because there is no felony analogue in the federal statute. *See Lopez v. Gonzales*, 127 S.Ct. 625 (2006); *Desai v. Mukasey*, 520 F.3d 762, 2008 U.S. App. LEXIS 6470 (7th Cir. March 28, 2008) (describing this argument). Furthermore, mere possession under the statute is not punishable by a year or more.

CMT: No, according to an unpublished decision of the BIA. *See Desai v. Mukasey*, 520 F.3d 762, 2008 U.S. App. LEXIS 6470 (7th Cir. March 28, 2008) (reporting this unpublished decision).

CSO: Questionable. According to the Seventh Circuit, such a trafficking offense is a CSO, and so a conviction under subsections (a), (b), or (c) will be a CSO. *Desai v. Mukasey*, 520 F.3d 762, 2008 U.S. App. LEXIS 6470 (7th Cir. March 28, 2008). But that decision is of questionable soundness, and could be rejected by the BIA or Sixth Circuit. Nonetheless, avoid it.

### **39-17-425, Drug paraphernalia,**

AGF: It depends. If the offense involves the sale, offer for sale, shipment, or import/export of drug paraphernalia, then it might be deemed an AGF since such an offense is a felony under federal law (21 U.S.C. § 863). *See Lopez v. Gonzales*, 127 S.Ct. 625 (2006). If it is for simple possession or use of drug paraphernalia, then it should not be an AGF.

CMT: Probably no.

CSO: The relevant inquiry for paraphernalia is whether the offense is deemed a “controlled-substance offense.” This will likely be deemed a CSO (and thus render the defendant deportable or inadmissible), but, if the paraphernalia is a marijuana pipe, it should be excluded (or allow for a waiver) under the exception for offenses “relating to” the possession of 30 grams or less of marijuana for personal use. *See Barraza v. Mukasey*, 519 F.3d 388 (7th Cir. 2008) (Easterbrook, C.J.); *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1686 n. 7 (2013) (citing *Matter of Castro Rodriguez*, 25 I. & N. Dec. 698, 703 (BIA 2012)). However, the defendant may still be ineligible for cancellation of removal under 8 U.S.C. § 1229b(b)(1) because the paraphernalia conviction can be construed as an “offense” under 8 U.S.C. §§ 1182(a)(2), 1227(a)(2), or 1227(a)(3). *Barma v. Holder*, 640 F.3d 749 (7th Cir. 2011). Even for non-MJ related paraphernalia, there is a good argument under *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015) that TN controlled substance law includes substances that are not on the federal schedule, and thus that the TN paraphernalia statute is not categorically a CSO.

### 39-17-1302, Prohibited weapons

AGF: It depends. Yes, an AGF if it involves a federally-prohibited weapon, namely, an explosive weapon, machinegun, short-barrel (*viz.*, sawed-off) rifle, shortbarrel shotgun, or firearm silencer. *See* 8 U.S.C. § 1101(a)(43)(E). No, if it involves a hoax device, switchblade, knuckles, or other nonfirearm implement. So ensure that the ROC indicates the offense is one of the latter category, or at least that the ROC does not indicate which type of weapon is involved.

CMT: It depends. Not a CMT unless the ROC shows an intent to use in an offense such as an assault. *Compare Matter of Granados*, 16 I. & N. Dec. 726 (BIA 1980) *with Matter of S-*, 8 I. & N. Dec. 344 (BIA 1974). *Cf. United States v. Amos*, 501 F.3d 524 (6th Cir. 2007) (holding that the categorically unlawful possession of a sawed-off shotgun does not necessarily involve a serious potential risk to another).

FAO: It depends. It is divisible in the same way described above for an AGF.

### 39-17-1303, Unlawful sale, loan or gift of firearm.

AGF: It depends. Arguably it is categorically *not* an AGF since it is merely a misdemeanor offense. In any event, if the ROC allows that the conviction pertains to a switchblade knife, it is not an AGF. Also, it arguably is not an AGF if it involved a mere gift. *Cf. Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (discussing “trafficking” definition). Unlawful receipt and possession of a firearm and unlawful transfer of firearm under federal law is not a COV. *Evans v. Zych*, 644 F.3d 447, 453 (6th Cir. 2011).

CMT: No.

FAO: It depends. It is an FAO if the ROC shows it involved a firearm, not a switchblade.

### 39-17-1305, Possession of firearm where alcoholic beverages are served.

Note: This statute was repealed effective June 4, 2010. Accordingly, conduct occurring after that date is not proscribed.

AGF: No.

CMT: No.

FAO: Yes.

**39-17-1306, Carrying weapon during judicial proceedings.**

AGF: No.

CMT: No.

FAO: It depends. If ROC shows the weapon is a firearm, then it is a FAO.

**39-17-1307, Unlawful carrying or possession of a weapon.**

AGF: It depends. A conviction under subsection (a) is not a COV and not an AGF because the maximum punishment is less than a year. A conviction under subsection (c) or (d) is likely a COV and thus an AGF if the sentence is one year or more.

CMT: It depends. This is not a CMT unless the ROC shows intent to use the weapon in an offense such as an assault. *Compare Matter of Granados*, 16 I. & N. Dec. 726 (BIA 1980) with *Matter of S-*, 8 I. & N. Dec. 344 (BIA 1974).

FAO: It depends.  
Part (a) – the 5<sup>th</sup> and 6<sup>th</sup> Circuits will probably find this to be a divisible statute and thus look to the ROC. If the ROC shows the weapon is a firearm, then it is a firearm offense. One could argue the statute is not divisible, but probably a losing argument.  
Part (b) and (c) – definitely a FAO  
Part (d) - not a firearms offense. But a conviction under subsection (d) could easily be deemed an AGF.

**39-17-1309, Carrying weapons on school property.**

AGF: It depends. This is not an AGF unless the ROC shows the weapon is a federally prohibited weapon, such as a machinegun, shortbarrel rifle, etc. *See* 26 U.S.C. § 5845 for list of federally prohibited weapons.

CMT: No.

FAO: It depends. If the ROC shows the weapon is a firearm, then it is a firearm offense.

**39-17-1311, Carrying weapons on public parks, etc.**

AGF: It depends. A conviction for this offense is not an AGF unless the ROC shows the weapon is a federally-prohibited weapon, such as a machinegun, shortbarrel rifle, etc. *See* 26 U.S.C. § 5845 for list of federally prohibited weapons.

CMT: No.

FAO: It depends. If the ROC shows the weapon is a firearm, then it is a firearm offense.

**39-17-1316, Sales of dangerous weapons.**



AGF: Yes.

CMT: Uncertain.

FAO: Yes.

### **39-17-1321, Possession of handgun while under the influence**

AGF: No.

CMT: No.

FAO: Yes.

### **40-39-208, Sex Offender Registration Violation**

NOTE: Independent ground for deportability pursuant to INA §237(a)(2)(A)(v)

CMT: Unclear (risky, but good arguments against being a CIMT). The BIA initially held that SORV is a CIMT because, even though it's a regulatory offense, sex abuse is just *so awful* that anything connected with it should be a CIMT. *Matter of Tobar-Lobo*, 24 I. & N. Dec. 143 (B.I.A. 2007). Most circuit courts, however, have rejected this approach and held that, as a regulatory offense, SORV is not a CIMT. *see Mata-Guerrero v. Holder*, 627 F.3d 256 (7th Cir. 2010); *Efagene v. Holder*, 642 F.3d 918 (10th Cir. 2011); *Totimeh v. AG of the United States*, 666 F.3d 109 (3d Cir. 2012); *Mohamed v. Holder*, 769 F.3d 885 (4th Cir. 2014). On the other hand, in the only 6<sup>th</sup> Circuit case addressing *Tobar-Lobo*, the court, in a very short unpublished opinion, upheld the BIA's determination that a SORV offense (unclear what state) is a CIMT. *Bushra Mussa Bushra v. Holder*, 529 Fed. Appx. 659, (6th Cir. 2013). The 5<sup>th</sup> Circuit has not addressed this issue.

### **55-10-101 Accidents Involving Death or Personal Injury**

AGF: Unlikely to have Aggravated Felony implications. A charge under 55-10-101(a) is not a felony, however a charged under 55-10-101(b)(2)(A) for failing to stop and comply with the requirements of (a) when the person knew or should reasonably have known that death resulted in the accident is a class E felony. It seems unlikely that this would be considered an Aggravated Felony for immigration purposes since it lacks a mens rea for the actual act of violence-the accident, while requiring knowledge or negligence for leaving the scene of the accident. No immediate case law found.

CMT: Likely to be charged as a CMT, though there are arguments against such classification. The BIA has issued a handful of non-precedential decisions in which it declared that leaving the scene of an accident was intentional, inherently depraved, and demonstrated an indifference to the duties owed between persons or to society in general. *In Re: Filogonio Garcia-McDonald*, WL 1739112, 1 (BIA, 2004) *see also Matter of A-C-R*, 2016 Immig. Rptr. LEXIS 5931 (BIA, 2016). The Circuit courts have generally followed this reasoning, but held the statutes analyzed so far to be divisible between failure to render aid and failure to comply with the regulatory requirements (giving DL info, etc). *Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007). Arguably, the TN statute is not divisible, and thus should not be a CIMT because the statute encompasses merely failing to provide the registration number. The TN statute has not been litigated. This argument is more likely to succeed in Memphis than in Louisiana due to the 5<sup>th</sup> Circuit precedent.

**55-10-205, Reckless driving**

AGF: No.

CMT: Probably not. *Matter of C-*, 2 I. & N. Dec. 716 (BIA 1947). At least so far, *Hernandez*, has not been expanded so that it would include reckless driving. *Matter of Hernandez*, 26 I. & N. Dec. 464, 466, 26 I. & N. Dec. 464 (B.I.A. 2015) “[R]ecklessly placing another in ‘imminent danger of serious bodily harm’ is ‘reprehensible conduct’ that constitutes a crime involving moral turpitude.”)

**55-10-401, -403, Driving under the influence**

AGF: No. Regardless the harm caused and the penalty imposed, this is not a COV and is not an AGF because, under Tennessee law, the offense has no *mens rea* component. *State v. Turner*, 953 S.W.2d 213, 215 (Tenn. Crim. App. 1996) (no *mens rea*); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (holding that, lacking a *mens rea* component, a DUI offense cannot be a crime of violence under either 16(a) or 16(b)). Also, the BIA specifically held that simple DUI is not a COV in *Matter of Ramos*, 23 I&N Dec 336 (BIA 2002).

CMT: No. This is not a CMT regardless the number of prior DUIs the offender has. *Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001); *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188, 1194 (BIA 1999) (en banc) (holding that DUI on a suspended license is a CIMT, where the DL issue is an element of the offense)(cited approvingly by 6<sup>th</sup> Circuit in *Ruiz-Lopez v. Holder*).; cf. *Begay v. United States*, \_\_\_ U.S. \_\_\_, 2008 U.S. LEXIS 3474 (April 16, 2008) (holding that recidivist DUI is not a “violent felony”). Notably, Tennessee lacks an offense, or an enhanced penalty, for committing a DUI on a suspended license. See *contra Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001) (holding that DUI on a suspended license is a CMT).

**55-10-416, Open container**

AGF: No.

CMT: No.

**55-10-616, Habitual Motor Vehicle Offender Violation (HMVO)**

AGF: No. Even though it’s a felony, there are no reasons for it to be aggravated.

CMT: Probably not. In general, “nonturpitudinous conduct is not rendered turpitudinous through multiple convictions for the same offense.” *In re Torres-Varela*, 23 I. & N. Dec 78, 86 (BIA 2001). On the other hand, DUI can be a CIMT when the defendant is driving on a suspended DL, because that action shows the requisite scienter. *In re Lopez-Meza*, 22 I. & N. Dec. 1188, 1194 (BIA 1999). Here, there is clearly a knowing *mens rea*, but the act itself would be hard to characterize as turpitudinous.

**55-50-504, Driving while license cancelled, suspended, or revoked**

AGF: No. Not a felony

CMT: No. Note that DHS has consistently taken a dismissive view of DL convictions – they do not count as “misdemeanor convictions” under DACA, DAPA, or PEP. They only count for TPS. See *also Benitez v. Dunevan*, 7 P.3d 99, (Ariz. 2000) (in a non-immigration context, driving on a DL revoked for a DUI is not

a crime of moral turpitude).

### **65-21-117 Interference with Emergency Calls (911)**

AGF: No. Not a felony

CMT: Unclear, but DHS will probably charge it as a CIMT. There is no BIA case law regarding this offense. It involves “intentional” mens rea, so the argument revolves around whether the conduct constitutes “a reprehensible act.” The analysis would be somewhat comparable to vandalism, since the offense involves property damage, but the element of intentionally rendering the phone unusable would probably qualify as showing “evil or malicious intent” (see vandalism section). While there are arguments as to why this should not be a CIMT, I would avoid. On the plus side, this is a fairly obscure crime, so DHS might just not look at it too closely.

### **71-5-2601 TennCare Fraud**

AGF: Yes, if the loss is over \$10,000. This crime will qualify as involving “fraud or deceit” under INA §101(a)(43)(M), and thus will be an agg fel if the loss is over 10K. Remember that the amount of loss is “circumstance specific,” meaning it doesn’t trigger a categorical analysis; DHS can look to the record of conviction to determine the amount of loss. *Nijhawan v. Holder*, 557 U.S. 29 (2009). If the value is \$10,000 or less, DHS may charge this as a theft offense, though there is good BIA case law indicating that fraud is distinct from theft, because it entails taking with consent obtained through fraudulent means (vs theft = without consent). *In re Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008)

CMT: Risky, but good arguments. DHS will probably charge this as a CIMT. Welfare fraud is a crime involving moral turpitude where it has as an element the intent to defraud. *Matter of Cortez Canales*, 25 I&N Dec. 301 (BIA 2010) (statute requires “intent to deceive”). The TN statute is not categorically a CIMT because it is overbroad and includes obtaining benefits both by “fraudulent means” and by “any manner not authorized” by the TennCare statute. Arguably, the statute is not divisible, because the different methods of obtaining benefits are different *means* of committing TennCare fraud – not elements of different crimes.

## **Appendix A**

### **Statutory Definitions**

#### **1. Aggravated felony. 8 U.S.C. § 1101(a).**

(43) The term "aggravated felony" means--

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act [21 USCS § 802]), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18, United States Code (relating to laundering of monetary

instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded \$ 10,000;

(E) an offense described in--

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

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

(iii) section 5861 of the Internal Revenue Code of 1986 [26 USCS § 5861] (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18, United States Code (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18, United States Code (relating to child pornography);

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

(K) an offense that--

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

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

(iii) is described in any of sections 1581-1585 or 1588-1591 of title 18, United States Code (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in--

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

(ii) section 601 of the National Security Act of 1947 [50 USCS 421] (relating to protecting the identity of undercover intelligence agents);

(iii) section 601 of the National Security Act of 1947 [50 USCS§ 421] (relating to protecting the identity of undercover agents);

(M) an offense that--

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

(ii) is described in section 7201 of the Internal Revenue Code of 1986 [26 USCS § 7201] (relating to tax evasion) in which the revenue loss to the Government exceeds \$ 10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 274(a) [8 USCS § 1324(a)(1)(A) or (2)] (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;

(O) an offense described in section 275(a) or 276 [8 USCS § 1325(a) of 1326] committed by an alien who was

previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

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

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

## **2. Crime involving moral turpitude.**

This is defined by case law. Generally, an offense involves moral turpitude if it contains elements of fraud, theft, intent to cause great bodily harm, and sometimes lewdness, recklessness or malice.

## **3. Crime of violence. 18 U.S.C. § 16.**

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.

## **4. Domestic violence offense. 8 U.S.C. § 1227(a)(2) / INA §237(a)(2)(E)**

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children [and].

(i) Domestic violence, stalking, and child abuse. Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against

a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders. Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

**5. Crimes Against Children, 8 U.S.C. § 1227(a)(2) / INA §237(a)(2)(E)**

See Domestic Violence Offenses

**6. Firearm offense. 8 U.S.C. § 1227(a)(2).**

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

**7. Controlled substance offense. 8 U.S.C. § 1227(a)(2)(B).**

(B) Controlled substances.

(i) Conviction. Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802, other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts. Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

