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 likely be classified as an "aggravated felony," a "crime involving moral turpitude," or 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 focuses on whether certain convictions should be avoided. Unfortunately, very little in "crimmigration" 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 and analysis may vary widely between different 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 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; 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.[2] If you find recent case law that you think changes the analysis, please email 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/Oakdale that support or contradict the analysis in this guide. We would love to incorporate as much on-the-ground experience from practitioners as possible.

Other resources: Useful guidance for analyzing these issues is available through similar guides posted by the National Immigration Project (www.nationalimmigrationproject.org), the Immigrant Defense Project (www.immigrantdefenseproject.org), and the Immigrant Legal Resource Center (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:

ACCA: Armed Career Criminal Act of 1984 – creates sentencing enhancements in the federal system for crimes of involving weapons where there are previous convictions for a "violent felony." The definition of "violent felony" under the ACCA, 18 U.S.C. §924(e)(2)(B) is nearly identical to the definition of "crime of

[1] 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.

[2] Note that BIA cases are classified as "administrative materials" rather than "cases" in Lexis.

violence" as used in the immigration system, so much of the case law overlaps.

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

BIA: Board of Immigration Appeals.

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 "not arising out of a single scheme."

COV: Crime of violence, which is an AGF if the sentence imposed is one year or more. Note that the definition of COV changed on 4/17/18 when the Supreme Court issued the opinion in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) holding that the "residual clause" definition of a COV pursuant to 18 U.S.C. §16(b) is unconstitutionally vague. A COV is now defined only as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. §16(a). This is a huge change, because most COV crimes were designated under 16(b), not (a).

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.

IJ: Immigration judge.

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 provides a more detailed discussion of Crime of Violence.

Appendix B 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. Logically, this should not be a CIMT under a categorical analysis because it encompasses conduct such as being out after curfew with a minor. The case law on this crime is mostly bad, but it's distinguishable because a) none of it applies the modern categorical approach, and b) almost all of it deals with sexual acts. *See Matter of Imber*, 16 I&N Dec. 256 (BIA 1977)(list of cases where contributing was found to be a CIMT); *Matter of C--*, 5 I.&N. Dec. 65 (BIA 1953)(where the ROC shows "lewd and lascivious acts," the crime is a CIMT); *Matter of F---*, 2 I&N Dec. 610 (BIA 1946)(general, non-sexual contributing to delinquency would not involve moral turpitude); *Matter of P---*, 3 I&N Dec. 290 (BIA 1949)(assistance of a prostitute is a CIMT).

39-11-403, Facilitation of a felony

AGF: In general, 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). *But see Unites States v. Elliott*, 757 F.3d 492 (6th Cir. 2014)(facilitation of robbery is a COV under the ACCA).

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, faciliation 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: Only if the underlying offense is a CIMT. *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011); *see also Matter of Mendez*, 27 I&N Dec. 219 (BIA 2018)("accessory after the fact … may be a crime involving moral turpitude only if the underlying felony is a crime involving moral turpitude").

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 9th 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, a COV analysis is irrelevant 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. The statute is probably 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). *But see State v. Hammonds*, 30 S.W.3d 294, 298 (Tenn. 2000)(referring to the three types of simple assault as mere "means or theories" that needn't be distinguished in an indictment). Note that if the statute as a whole is found to be not divisible, then none of it is a CIMT or DVO. Unfortunately, recent changes to TCA 39-13-111 ascribe different penalties to DV assault depending on whether the convictions fall under TCA 39-13-101(a)(1) or (a)(2) – which makes it harder to argue the two subsections are the same crime. Note also that subsection (b) creates a different fine for any assault "committed against a law enforcement officer," and "assault of officer" is charged as such in local warrants (at least in Davidson County

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 (6th 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 5th 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*, 828 F.3d 323 (5th 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 5th Circuit, this may be charged as a CIMT, though there are good arguments against that classification. Historically, simple assault was not considered a CIMT (*See Matter of Fualaau*, 21 I. & N. Dec. 475 (BIA 1992)), but, twice recently the 5th 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 6th Circuit (in Memphis immigration court), a general simple assault conviction, even under (a)(2), is unlikely to be charged as a CIMT.

Assault of Officer: Arguably, this is not a divisible subsection of TCA 39-13-101, but factually, ICE and

local law enforcement treat it as a different crime. In Davidson County, judgments indicate

DVO: Not unless there is a domestic relationship between the parties. 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. *See Matter of H. Estrada*, 26 I&N Dec 749 (BIA 2016). *Estrada* clarifies that *U.S. v. Hayes*, 555 U.S. 415 (2009), does apply to the immigration context. *See also Bianco v. Holder*, 624 F.3d 265, 272-73 (5th Cir. 2010). <u>See further discussion below under TCA §39-13-111 (domestic violence).</u>

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. Not a Crime of Violence and the maximum sentence is under a 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 (6th 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); <u>*see*</u> <u>*also*</u> *Esparza-Rodriguez v. Holder*, 699 F.3d 821, 824 (5th 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"); <u>*see*</u> <u>*also*</u> *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(a)(1)(A), Aggravated Assault (C felony)

AGF: Yes (but subsections (i) and (ii) may not be in the 5th Circuit):
● Sixth Circuit – C felony Agg Assault under (a)(1)(A) is definitely a §16(a) COV under Sixth Circuit law (and thus agg fel) because there is a volitional mens rea and actual or threatened violent force is an inherent element of each subsection. *See Matter of Cervantes Nunez*, 27 I&N Dec. 238 (BIA 2018); *see also Hollom v. United States*, 2018 U.S. App LEXIS 14223 (6th Cir. May 30, 2018) (unpublished) (use of display of a deadly weapon constitutes the use of violent force); *United States v. Verwiebe*, 874 F.3d 258, 261 (6th Cir. 2017) ("crimes requiring proof of serious physical injury necessarily require proof of violent physical force" and are thus COVs); *United States v. Patterson*, 853 F.3d 298 (6th Cir. 2017) (display of a gun during a theft requires implied threat of physical harm, which satisfies the elements clause).
● Fifth Circuit – Subsections (i) and (ii) may NOT be COVs in the Fifth Circuit because they could, in theory, be accomplished without violent force (the poison hypothetical). *See Matter of Guzman-Polanco*, 26 I&N Dec. 806 (BIA 2016); *United States v. Burris*, 896 F.3d 320 (5th Cir. 2018) (Texas robbery statute is not a COV because "a person can 'cause bodily injury' without using force). The concern is that, even

the Fifth Circuit, an IJ or the BIA would apply Sixth Circuit law to an analysis of a Tennessee statute.

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.*

PSC: Probably. *See Matter of G---G---S---*, 26 I&N Dec. 339 (BIA 2014)(CA agg assault is a PSC even though it only has a general intent requirement. Also, the defendant's MH problems were irrelevant to the PSC analysis).

39-13-102(a)(1)(B), Reckless Aggravated Assault (D felony)

AGF: Probably – the reckless mens rea probably doesn't make this any different from regular agg assault. Mens Rea analysis: Historically, a reckless mens rea was insufficient for COV, but this is changing. *See United States v. Portela*, 469 F.3d 496 (6th Cir. 2006) ("a crime requiring only recklessness does not qualify as a 'crime of violence'"); *United States v. McMurray*, 653 F.3d 367 (6th Cir. 2011) (TN reckless agg assault is not a COV). There is recent BIA case law holding that recklessness is insufficient, but the Fifth and Sixth Circuits have now clearly ruled that recklessness does count (in ACCA cases). *Matter of Cervantes Nunez*, 27 I&N Dec. 238 (BIA 2018) (CA voluntary manslaughter "is not categorically a crime of violence because it encompasses … reckless acts"); *but see United States v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017) (recklessness suffices for a crime of violence under the ACCA and USSG); *United States v. Mendez-Henriquez*, 847 F.3d 214 (5th Cir. 2017) ("use of force" only requires that the action be volitional as opposed to accidental – USSG case). My guess is that an IJ in a 5th or 6th Circuit §16(a) case will defer to the circuit court view of recklessness.

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.*

PSC: Probably. *See Matter of G---G---S---*, 26 I&N Dec. 339 (BIA 2014)(CA agg assault is a PSC even though it only has a general intent requirement. Also, the defendant's MH problems were irrelevant to the PSC analysis).

39-13-102(c), Aggravated Assault – Restraining order

AGF: YES. 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 (6th Cir. 2014)(unpublished). Needs further research

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.*

PSC: Probably. *See Matter of G---G---S---*, 26 I&N Dec. 339 (BIA 2014)(CA agg assault is a PSC even though it only has a general intent requirement. Also, the defendant's MH problems were irrelevant to the PSC analysis).

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: Probably. See discussion under Reckless Agg Assault.

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: Almost certainly. In 2006, the Sixth Circuit held that this Tennessee offense is not a COV because the mens rea required is mere recklessness, *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006), but *Portela* was implicitly overruled by *United States v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017) (recklessness suffices for a crime of violence under the ACCA and USSG). In the Fifth Circuit, *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001)(Tx DWI with injury is not a COV) has been implicitly overruled by *United States v. Mendez-Henriquez*, 847 F.3d 214 (5th Cir. 2017). Recklessness is sufficient for a COV under both Fifth and Sixth Circuit law. *But see Matter of Cervantes Nunez*, 27 I&N Dec. 238 (BIA 2018) (CA voluntary manslaughter "is not categorically a crime of violence because it encompasses … reckless acts"). In the Sixth Circuit, the SBI alone is enough to find use of physical force for a COV. *See United States v. Verwiebe*, 874 F.3d 258, 261 (6th Cir. 2017) ("crimes requiring proof of serious physical injury necessarily require proof of violent physical force" and are thus COVs). The Fifth Circuit will also find this to be a COV because there's not a realistic probability that a car crash causes injury through any non-forceful means (there's no poison in a car crash). *See United States v. Johnson*, 880 F.3d 226 (5th Cir. 2018) (no realistic probability that statute would result in conviction for behavior that didn't involve violent force); *United States v. Moore*, 711 F. App'x 757, 760-61 (5th Cir. 2017) (unpublished case) ("We have been increasingly skeptical of arguments … that rely on theoretical possibilities rather than actual applications of state statutes.").

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 sufficent 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 may be

charged as a COV under 16(a). There are good arguments that DV assault under §39-13-101(a)(1) is not a COV because of the inclusion of reckless mens rea. There is also an argument that the statute does not require the "use of physical force" simply because it requires injury. *See Matter of Guzman-Polanco*, 26 I&N Dec. 806 (BIA 2016)(discussion of circuit split on this issue).

CMT: Will likely be charged as one by DHS, and thus is a risky plea even though there are good arguments against this classification. Simple assault shouldn't be a CIMT, but the question is whether the addition of a domestic component elevates this crime to CIMT-level. *See Matter of Sanudo*, 23 I&N Dec. 968, 971-72 (BIA 2006). "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); *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); *Adalpe-Garcia v. Holder*, 472 Fed. Appx. 304 (5th Cir. 2012). There are good arguments against CIMT classification, but this may require litigation (and thus be useless to an indigent client stuck in immigration detention).
Subsection (a)(1): The inclusion of reckless mens rea means this type of assault isn't a CIMT, and, arguably, a domestic relationship shouldn't change that. The BIA issued a recent unpublished decision overturning a Memphis IJ and holding that a conviction under TCA §39-13-111 (referring to (1)(a)) is not a CIMT because it includes reckless mens rea. *Ivan Diego Rodriguez-Casarin*, (BIA Oct. 27, 2017). Unfortunately, unpublished cases are not controlling in immigration courts. Note that in *Sanudo*, the DV statute was not a CIMT because it didn't require actual injury (more like our offensive contact statute).
Subsection (a)(2): Where a statute just requires "force," without any showing of injury, domestic battery may not be a CIMT. *See Galeana-Mendoza v. Gonzales*, 465 F.3d 1054 (9th Cir. 2006). A domestic relationship does not raise an assault to the level of a CIMT unless there is actual or intended bodily injury. *Matter of Sanudo*, 23 I&N Dec. 968, 972-973 (BIA 2006).
Subsection (a)(3)(offensive contact): NOT a CIMT. *Matter of Sanudo*, 23 I&N Dec. 968, 972-973 (BIA 2006).

DVO: Will almost definitely be charged as one by DHS, and thus is a very risky plea (except for B misd DV). *See United States v. Castleman*, 134 S.Ct. 1405 (2017); *see also Ramirez-Barajas v. Sessions*, 2017 U.S. App LEXIS 25377 (8th Cir. Dec, 15, 2017). The issue here is whether the assault statute (or each individual subsection) is categorically a crime of violence. If not a COV, then not a DVO. There is good case-law indicating that assault statutes requiring simply "harm" or "bodily injury" (such as ours) do not qualify as crimes of violence because "[t]here is … a difference between a defendant's causation of injury and the … use of force." *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006). *See also Matter of Guzman-Polanco*, 26 I&N Dec. 806 (BIA 2016)(noting a circuit split on this issue, but indicating the 5th as a circuit holding our way); *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015). In spite of this caselaw, I hear that DHS and many IJs still automatically treat simple DV as a DVO.

Subsection (a)(3)(offensive contact): NOT a DVO because not a "crime of violence." See further discussion above under Offensive Contact Assault.

Note: simply pleading a DV charge as 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. *See Bianco v. Holder*, 624 F.3d 265, 272 (5th Cir. 2010); *see also Matter of H. Estrada*, 26 I&N Dec. 749 (BIA 2016).

Strategy: Settle for offensive contact DV wherever possible. Remember that, purusant to TCA §40-35-303(c)(2)(B) & (C), a B misd DV can be supervised by probation for up to two years. For example, B misd DV assault with 6 months suspended sentence and 11/29 probation.

39-13-113, Order of Protection Violation

AGF: No, because the max sentence is under a year.

CMT: Probably not. While there are no circuit court or published BIA decisions on this issue, an unpublished BIA decision from 2007 holds that OPV is not a CIMT because a no-contact order can be violated without the "requisite evil intent." Jose Luis Juarez-Ceja, A48-130-025 (BIA Feb. 5, 2007), 2007 Immig. Rptr. LEXIS 26113.

DVO: YES – as long as the order "involves protection against credible threats of violence, repeated harassment, or bodily injury." Note that even without a conviction, this is a DVO that triggers deportability if a court has determined that the person violated an OP relating to a threat of harm. *See Matter of Obshatko*, 27 I&N Dec. 173 (BIA 2017)(The categorical approach does not apply, so the IJ should look to "all the probative and reliable evidence"); *see also Gabriela Rodriguez v. Sessions*, 876 F.3d 280 (7th Cir., 2017)(holding that because a conviction is not required under INA §237(a)(2)(E)(ii), the categorical approach does not apply).
WARNING: the DVO can be triggered even if there isn't a conviction. All that's needed is a state court finding that the OP was violated.

39-13-115, Aggravated Vehicular Assault

AGF: No. Vehicular assault becomes aggravated based on prior convictions. Where the original statute does not have the requisite mens rea to constitute a COV, the presence of additional convictions does not convert it to a COV. Aggravated vehicular assault still only requires a reckless mens rea, so cannot be a COV. See further discussion under TCA 39-13-106.

CIMT: Yes. See discussion under TCA 39-13-106.

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). *United States v. Jackson*, 655 F. App'x 290, 292-93 (6th Cir. 2016) (GA Voluntary Manslaughter requiring causing "the death of a human being under circumstances which would otherwise be murder" due to "serious provocation" = ACCA violent felony).

39-13-212, Criminally Negligent Homicide

AGF: Probably not, 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 in the Sixth Circuit (yet). *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). The Sixth Circuit in *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017) ruled that the use of physical force only requires the active employment of volitional conduct, which can be reckless. I have found no cases where criminal negligence has sustained a COV in the Sixth Circuit. But the Fifth Circuit has gone farther than the Sixth Circuit in ruling that, post-*Voisine v. United States*, there is no mens rea requirement for a COV via use of force as long as the conduct is done volitionally, not involuntarily. *See United States v. Mendez-Henriquez*, 847 F.3d 214, 222 (2017). However, the statute may still be overbroad in the Fifth Circuit because it likely includes indirect force such as poison, which does not support a COV in the Fifth Circuit. *See United States v. Rico-Mejia*, 859 F.3d 318, 321-23 (5th Cir. 2017) (can cause physical harm without physical force). Given that this is a homicide, however, I'm worried this won't hold under 5th Circuit precedent, given the upcoming rehearing in *Reyes-Contreras*. *See United States v. Reyes-Contreras*, 882 F.3d 113, 122-23 (manslaughter not a COV), ***petition for rehearing granted.***

CMT: No. A CIMT requires "reprehensible conduct" plus "some form of 'scienter' such as specific intent, knowledge, wilfullness, 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)); *see also Matter of Tavdidishvili*, 27 I&N Dec. 142 (BIA 2017) (NY crim negligent homicide is not a CIMT) (note that the TN definition of criminal negligence, as found in TCA 39-11-302(d), is very similar to the NY definition).

39-13-213, Vehicular Homicide

AGF: Probably yes, because reckless conduct supports a COV due to use of force in both the Fifth and Sixth Circuits. *See United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017); *United States v. Mendez-Henriquez*, 847 F.3d 214, 222 (2017). It is unclear whether the Fifth Circuit would view a death proximately caused by a vehicle as the sort of direct, violent force required for a COV in that circuit. *See United States v. Villegas-Hernandez*, 426 F.3d 874, 878-79 (5th Cir. 2006) ("caus[ing] bodily injury" not the same as using physical force; *see also United States v. Rico-Mejia*, 859 F.3d 318, 322-23 (5th Cir. 2017) (reaffirming *Villegas-Hernandez*).

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 yes, because reckless conduct supports a COV due to use of force in both the Fifth and Sixth Circuits. *See United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017); *United States v. Mendez-Henriquez*, 847 F.3d 214, 222 (2017). However, the statute may still be overbroad in the Fifth Circuit because it likely includes indirect force such as poison, which does not support a COV in the Fifth Circuit. *See United States v. Rico-Mejia*, 859 F.3d 318, 321-23 (5th Cir. 2017) (can cause physical harm without physical force). Given that this is a homicide, however, I'm worried this won't hold under 5th Circuit precedent, given the upcoming rehearing in *Reyes-Contreras*. *See United States v. Reyes-Contreras*, 882 F.3d 113, 122-23 (manslaughter not a COV), ***petition for rehearing granted.***

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: Unclear. 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. This crime is a wild-card.

CMT: Seems likely. My guess is that immigration courts would consider assisting in the death of another to be "reprehensible conduct."

39-13-218, Aggravated Vehicular Homicide

AGF: Probably yes, for the same reason that Tennessee Vehicular Assault and Vehicular Homicide are COV. 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, because the sentence is under a year. Unclear whether this would be a COV, but irrelevant since the maximum sentence is 11/29.

CMT: Avoid. There are arguments as to why this should not be a CIMT, but it's a risky plea. *See Patel v. Holder*, 333 Fed. Appx. 947, 948 (6th Cir. June 11, 2009) (background to case is that alien pleaded guilty to simple assault and false imprisonment in 2004 and was then deemed removable as having committed a CIMT. The IJ's CIMT designation was not challenged on appeal.) 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. Arguably, it should not be a CIMT because there is no requirement of malice or ill intent. *See 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). On the other hand, unlike the CA statute, the TN statute requires a knowing mens rea and must be committed by force threat or fraud. 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). In *Hamdan v. INS*, 98 F.3d 183 (5th Cir. 1996), the Fifth Circuit finds that Louisiana's simple kidnapping statute includes provisions that are not CIMTs. While the court declines to decide which subsections are or are not CIMTs, the language used indicates that the non-turpitudinous subsections were those involving parental custody – which is not an aspect of the TN law.

39-13-303, Kidnapping

AGF: Shouldn't be, but there's no clear case law. Pre-*Dimaya*, this was an AGF as a Crime of Violence under §16(b), but now the question is whether "circumstances exposing the other person to substantial risk of bodily injury" arises to the level of "use or threatened use of physical force" under §16(a). Logically, the presence of dangerous circumstances shouldn't be considered the "use of force," but these days, logic doesn't seem to apply. It is unclear whether the risk of simple "bodily injury" (vs serious bodily injury) as defined by Tennessee law is sufficient to find the use of force. It has found physical force for Tennessee aggravated assault requiring *serious* bodily injury. *United States v. Gloss*, 661 F.3d 317, 318-19 (6th Cir. 2011). However, I have found no Sixth Circuit case law considering whether **bodily injury** under Tennessee law is sufficient for the use or threatened use of physical force under 16(a). Regardless, it seems unlikely the risk of bodily injury would be able to sustain physical force or the threatened use of physical force.

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). In *Hamdan v. INS*, 98 F.3d 183 (5th Cir. 1996), the Fifth Circuit finds that Louisiana's simple kidnapping statute includes provisions that are not CIMTs. While the court declines to decide which subsections are or are not CIMTs, the language used indicates that the non-turpitudinous subsections were those involving parental custody – which is not an aspect of the TN law.

39-13-304, Aggravated Kidnapping

AGF: Depends on the subsection. Pre-*Dimaya*, this was an AGF as a Crime of Violence under §16(b). Nowadays, DHS would have to prove that the statute contains, as an *element*, the attempted, threatened, or actual use of physical force.

- (a)(1) & (2) Shouldn't be a COV / AGF designation – because nothing to do with force.
- (a)(3) – Risky. This subsection addresses *intent* and also includes terrorizing -> so there is a good argument that this is overbroad as to use of physical force. Though there's a good chance this subsection gets charged as a COV.
- (a)(4) – Probably yes in the 6th Circuit – but maybe not in the 5th Circuit. There is a circuit split re whether "physical injury" necessarily means the use of "physical force." *Matter of Guzman-Polanco*, 26 I&N Dec. 806 (BIA 2016). In the 5th Circuit, this shouldn't be a COV, but that's not certain. *See US v. Villegas-Hernandez*, 468 F.3d 874, 879-82 (5th Cir. 2006)(under TX law, causation of injury is not equivalent to the use of force)(note that there's some risk that the 5th Circuit could limit this holding to convictions under Texas law) *see also United States v. Burris*, No. 17-10478, ___F.3d___, 2018 WL

3430086 (5th Cir. July 16, 2018) (*Castleman* doesn't overturn prior precedent on this issue). In general, the Sixth Circuit defines physical force by looking to the amount of harm required under the statute (even without an independent force element). *See United States v. Anderson*, 695 F.3d 390, 400 (6th Cir. 2012) ("[T]he degree of injury has a logical relation to the use of physical force."). For instance, the court has found physical force in Ohio statutes involving "physical harm." *See, e.g.*, *United States v. Evans*, 699 F.3d 858,863 (6th Cir. 2012). It has found the same for Tennessee aggravated assault requiring *serious* bodily injury, but there's no case law addressing simple bodily injury. *United States v. Gloss*, 661 F.3d 317, 318-19 (6th Cir. 2011).

● (a)(5) – Likely. Threatening the use of a deadly weapon is almost certainly "physical force," but merely being in possession might not be. If the statute is not considered divisible (and it shouldn't be), then there's a good argument that this isn't a COV. Be careful, though, because either the Fifth or Sixth Circuits could find that there's no realistic possibility of a conviction under this statute without the use of "physical force." *See United States v. Johnson*, 880 F.3d 226, 235 (5th Cir. 2018) (Mississippi armed carjacking which required being "armed with or having readily available" a weapon counts as involving the threatened use of force because Mississippi state court opinions made clear that the weapon must have been used); *United States v. Patterson*, 853 F.3d 298, 302-03 (6th Cir. 2017) (court relied on state law opinions to show that there is no realistic probability of conviction for Ohio aggravated robbery, which involves "the display, brandishing, use, or indication that one possesses" a weapon, based on mere possession (not use) of the weapon).

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: Depends on the subsection. Pre-*Dimaya*, this was an AGF as a Crime of Violence under §16(b). Nowadays, DHS would have to prove that the statute contains, as an *element*, the attempted, threatened, or actual use of physical force. Unfortunately, this is now defined very broadly.

● (a)(1) – risky. See discussion of (a)(5) in section above. The "accomplished with a deadly weapon" part will almost certainly be found a COV, but there's an argument that the subsection is not divisible and that mere display of something that just looks like a weapon is insufficient.

● (a)(2) – nope. No physical force required

● (a)(3) – nope.

● (a)(4) – Yes in the 6th Circuit, but maybe not in 5th Circuit, unclear in 6th. *See United States v. Gloss*, 661 F.3d 317, 318-19 (6th Cir. 2011) (physical force is inherent as an element when serious bodily injury is an element). See discussion of (a)(4) in section above – Agg Kidnapping.

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. The statute is divisible between the "fear prong" and the "violence" prong, but both count as COVs under 16(a). *See United States v. Mitchell*, 743 F.3d 1054 (6th Cir. 2014)(both prongs of TN robbery statute qualify as a "violent felony" under elements clause of the ACCA). Robbery is also 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 – as a theft offense under 8 USC § 1101(a)(43)(G). *Matter of Ibarra*, 26 I&N Dec. 809 (BIA 2016)(CA robbery is a generic theft offense because "coerced consent" is the same as "without consent"). Carjacking also counts as a Crime of Violence under §16(a). Even mere intimidation counts as a physical-force COV. *See United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016)("a taking by intimidation … involves the threat to use physical force.")

CMT: Yes. *See Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016); *see also Matter of Ibarra*, 26 I&N Dec. 809 (BIA 2016)

39-13-502, Aggravated Rape

AGF: Yes. Pursuant to 8 U.S.C. § 1101(43)(A). The TN agg rape statute matches the generic defintition 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. INA § 101(a)(43)(A)

● Note for subsection § 39-13-503(4) - 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* previously held that (a)(4) rape by fraud was a COV under the now abrogated residual clause. However, the Sixth Circuit has cited with approval the Seventh Circuit in *De Leon Castellanos v. Holder*, which held that "deceit or fraud on the will of a victim which causes serious bodily injury is 'equivalent' to the use of physical force." *United States v. Anderson*, 6985 F.3d 390, 400 (6th Cir. 2012) (quoting *De Leon Castellanos v. Holder*, 652 F.3d 762, 764 (7th Cir. 2011)). 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: Depends on the subsection..
● (a)(1) – yes under the force+weapon version of the offense. *See Hollom*, 2018 WL 2438155, at *4. Likely under the coercion+weapon version as well, but less directly on-point precedent. *See United States v. Patterson*, 853 F.3d 298, 302-03 (6th Cir. 2017) (robbery by display or brandishing weapon = COV).
● (a)(2) – Very likely. This subsection requires "bodily injury" and therefore may constitute physical force. It is unclear whether "bodily injury" as defined by Tennessee law is sufficient to find the use of force. It has found physical force for Tennessee aggravated assault requiring *serious* bodily injury, but it's unclear whether this extends to simple bodily injury. *United States v. Gloss*, 661 F.3d 317, 318-19 (6th Cir. 2011).
● (a)(3)(A) – Unclear. This subsection requires force or coercion, but lacks a weapon requirement. Either the Fifth or Sixth Circuits could find that there's no realistic possibility of a conviction under this statute without the use of "physical force." *See United States v. Johnson*, 880 F.3d 226, 235 (5th Cir. 2018) (Mississippi armed carjacking which required being "armed with or having readily available" a weapon counts as involving the threatened use of force because Mississippi state court opinions made clear that the weapon must have been used); *United States v. Patterson*, 853 F.3d 298, 302-03 (6th Cir. 2017) (court relied on state law opinions to show that there is no realistic probability of conviction for Ohio aggravated robbery, which involves "the display, brandishing, use, or indication that one possesses" a weapon, based on mere possession (not use) of the weapon).
● (a)(3)(B) – Shouldn't be. This subsection likely is not a COV due to use of force since it rests on knowledge of the status of the defendant (i.e. mental infirmity or physical helplessness) and
● (a)(4) – Shouldn't be. This subsection concerns age and therefore lacks a force requirement.

CMT: Yes.

39-13-505, Sexual Battery

AGF: Depends on the subsection as to whether it is a COV. 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).
● (a)(1) – May be a COV. May be overbroad depending on whether or not the court finds that coercion without physical force constitutes the threatened use of physical force when coercion is used for purposes of unlawful sexual contact. If not, (a)(1) may be overbroad if force and coercion are means not elements of (1)(1).
● (a)(2) – should NOT be a COV. This subsection could apply to behavior like touching of a person who is asleep or passed out. Those do not require physical force.
● (a)(3) – Should NOT be a COV. Knowledge of some defective mental state of the victim has no bearing on use of force. Therefore, only a COV if unlawful sexual contact already involves physical force.
● (a)(4) – Should NOT be a COV. Fraud can implicate physical force, but only where there's a requirement of injury. The Sixth Circuit has cited with approval the Seventh Circuit in *De Leon Castellanos v. Holder*, which held that "deceit or fraud on the will of a victim which causes serious bodily injury is 'equivalent' to the use of physical force." *United States v. Anderson*, 6985 F.3d 390, 400 (6th Cir. 2012) (quoting *De Leon Castellanos v. Holder*, 652 F.3d 762, 764 (7th Cir. 2011)).

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 (and most likely will) be an aggravated felony. *See Correa-Diaz v. Sessions*, 881 F.3d 523 (7th Cir. 2018)(Indiana statute prohibiting sex w person aged 14 or 15 constitutes a "sexual abuse of a minor" agg fel).

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 (9th 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, 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 misdemeanant conduct.

CMT: Depends on the subsection:
Subsection (a)(1)(A) (standard B misd version) – probably not a CIMT. This subsection is probably not divisible as to (a)(1)(A)(ii) (based on pattern instructions and how warrants are written up). Case law hinges on whether there is a "lewd" intent. Our statute encompases mere exposure that is offensive, so should be deemed over-inclusive using the categorical approach. The subsection involving gratification/arousal is almost definitely a CMT. *See In re Medina*, 26 I. & N. Dec. 79 (BIA 2013)(exposure without the purpose of sexual gratification – i.e. "lewd" intent – is not turpitudinous); *see also Matter of H---*, 7 I&N Dec. 301 (BIA 1956). NOTE – if the statute is deemed divisible, then a conviction under (a)(1)(A)(ii)(b) would be a CIMT.
Subsection (a)(1)(B) – involves children and sexual gratification and thus is definitely a CIMT. Similarly, a conviction under (a)(1)(A) that involves a minor, and is thus enhanced to an A misd or E felony, will likely be a CIMT

39-13-513, Prostitution

AGF: No.

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

AGF: No.

CMT: Yes. Explicitly held so in *Rohit v. Holder*, 670 F.3d 1085 (9th Cir. 2012). Adopted by the 10th Circuit in *Florentino-Francisco v. Lynch*, 2015 U.S. App. LEXIS 8719 (10th Cir. May 27, 2015). Adopted by the 6th Circuit in *Jose Dolores Reyes v. Lynch*, (6th 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 5th or 6th Circuits) *But see Amador-Palomares v. Ashcroft*, 382 F.3d 864, 867 (8th Cir. 2004)(a single act of attempting to solicit a prostitute rendered defendant statutorily ineligible for a GMC finding)

39-13-515, Promoting Prostitution

AGF: Probably – if the plea is pursuant to the definition in TCA §39-13-512(4)(A)(i) or (ii), DHS will almost certainly charge this as an Agg Fel 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"). If the plea or ROC indicate the conviction is under subsection (4)(A)(iii), (iv), (v), or (vi), then it's a bit less clear. *See Matter of Ding*, 27 I&N Dec. 295 (BIA 2018)(section (a)(43)(K)(i) "encompasses offenses relating to the operation of a business that involves engaging in, or agreeing or offering to engage in, sexual conduct for anything of value"). Note that the expansive definition in *Matter of Ding* is a departure from prior caselaw. *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 activities such as lap dances, so even after *Matter of Ding*, there may be some argument that the TN statute is too broad. *See State ex rel. Gibbons v. Jackson*, 16 S.W.3d 797, 802 (Tenn. App. 1999). *See also Matter of Gonzalez- Zoquiapan*, 24 I&N Dec. 549 (BIA 2008)(prostitution for purposes of 22 C.F.R. § 40.24(b) is limited to acts involving sexual intercourse), *Familia Rosario v. Holder*, 655 F.3d 739 (7th Cir. 2011)(federal conviction for importing a person for prostitution is not an agg fel).

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

39-13-517, Public Indecency

AGF: No, as long as it's a misdemeanor.

CIMT: No, unless it's the E felony version. *See In re Medina*, 26 I. & N. Dec. 79 (BIA 2013)(exposure without the purpose of sexual gratification is not turpitudinous);

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: Not in the 5th Circuit. Probably not in 6th, but unclear. In general, solicitation is an AGF because it counts as "sexual abuse of a minor" pursuant to 8 U.S.C. § 1101(a)(43)(A), but the TN statute is overbroad because it defines "minor" as anyone under 18. In *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017), the Supreme Court held that, in the context of statutory rape, the generic federal definition of "sexual abuse of a minor" requires that the minor be less than 16. Statutes defining "minor" as 16 or older were thus overbroad. In *Shroff v. Sessions*, __ F.3d ___ (5th Cir. 5/15/18), the Fifth Circuit applies the *Esquivel-Quintana* rule to Solicitation of a Minor, and holds that because the TX statute defines minor as under age 18, the statute is overbroad and thus not an AGF. Note that whether the alleged minor is actually an undercover cop is not part of the analysis. *See United States v. Rivas*, 836 F.3d 514 (5th Cir. 2016)(if the defendant believes the person is underage, then it counts as an attempted sexual abuse, which is still an agg felony).

CMT: Yes.

CAC: Probably.

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

AGF: Probably not, using the same analysis as for Solicitation of a Minor, unless it's the C felony version. Note that the main text of the statute does not define "minor," though based on subsections (b)(3) and (4) it can be reasonably inferred that a minor is anyone under the age of 18. The statute is divisible under subsection (f) between minors over and under age 13. Where the minor is under 13, this will be an AGF. -- Except for the age issue, this would be an AGF as "Sexual Abuse of a Minor" (or attempt) under 8 U.S.C. § 1101(a)(43)(A). 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 even absent physical contact). 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 Gattem 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)(this holding is in doubt after *Esquivel-Quintana*).

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. Sessions*, 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). Most recent BIA definition of "generic theft": the "taking of property or an exercise of control over property *without consent* with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Matter of Delgado*, 27 I&N Dec. 100 (BIA 2017) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189, 127 S. Ct. 815, 166 L. Ed. 2d 683 (2007)).

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: Probably. There is a circuit split and no published BIA precedent on whether "theft of services" counts as a "theft offense" pursuant to §101(a)(43)(G). *Matter of V-Z-S-*, 22 I. & N. Dec. 1338 (BIA 2000) would seem to indicate that "generic theft" applies only to the taking of property, but several circuits have found that because §101(a)(43)(G) refers to "a theft *offense*," it encompasses theft of services. *See De Lima v. Sessions*, 867 F.3d 260 (1st Cir. 2017); *Almeida v. Holder*, 588 F.3d 778 (2nd Cir. 2009); *Ilchuk v. AG of the United States*, 434 F.3d 618, 622, (3rd Cir 2006). The Fifth Circuit held that theft of services does NOT count, but only in an unpublished decision. *United States v. Juarez-Gonzalez*, 451 Fed. Appx. 387, 391 (5th Cir. 2011); *see also Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003)("theft offense" does not include theft of services). The BIA has no published decisions on the matter, but all the unpublished

decisions (except the ones from 9th Circuit areas) hold that theft of services is an agg fel. *See* In re Roseller Osicos Nolos, 2008 Immig. Rptr. LEXIS 8423 (BIA July 30, 2008), In re Franklin Adames in Removal Proceedings, 2007 BIA LEXIS 51 (B.I.A. February 27, 2007); *but see* In re Benyiahia Hebbar, 2012 Immig. Rptr. LEXIS 5302, (BIA June 11, 2012)(AZ-based BIA panel finds NV theft of service law not generic theft offense).
Note that a conviction under this statute may be an AGF as an offense involving "fraud or deceit" if the record shows a loss of over $10,000. *See* 8 U.S.C. § 1101(a)(43)(M).

CMT: Yes. *Matter of Mendez*, 27 I&N Dec. 219 (BIA 2018)("dishonest and deceitful behavior" is morally turpitudinous). 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 statue 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). *See In re Aldebesh*, 22 I. & N. Dec. 983 (BIA 1999). *See also Williams v. Att'y Gen.*, 2018 U.S. App. LEXIS 1253 (3rd Cir. 1/19/18)(GA forgery statute is sufficiently "related to" generic forgery to qualify as an agg fel); *but see Vizcarra-Ayala v. Mukasey*, 514 F.3d 870 (9th Cir. 2008).

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); *see also Matter of Mendez*, 27 I&N Dec. 219 (BIA 2018)("dishonest and deceitful behavior" is morally turpitudinous).

*** Note for defense attorneys: CrimSim is often wrongfully used against immigrants who have fake SS or ID cards. There's clear case law that being in possession of a false SS card and DL is NOT sufficient evidence for CrimSim, but rather should be charged as criminal impersonation (TCA 39-16-301) or using a false ID (TCA 39-16-303). *See State v. Walker*, 2002 Tenn. Crim. App. LEXIS 584 (Tenn. Crim. App. Dec. 12, 2001); *see also State v. Sweet*, 2011 Tenn. Crim. App. LEXIS 923 (Tenn. Crim. App. Dec 16, 2011).

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

AGF: It depends. Subsection (a) is almost always prosecuted as a misdemeanor and thus would not be an agg fel. Subsection (b) will probably be charged by DHS as a "theft offense" agg fel if the sentence is one year or longer (i.e. a felony). There is an argument that the statute is over-broad and does not qualify as a theft offense because it includes the taking of services. (see discussion of Theft of Services above).
Note that if the amount of loss is over $10,000, it could also be an agg fel as a fraud offense (even if it's pled down to a misdemeanor).

CMT: Subsection (a) should not be a CIMT because there is no element of fraud or theft. *See Matter of Serna*, 20 I&N Dec. 579 (BIA 1992)(illegal possession of a document or instrument is not a CIMT absent an element requiring intent to use it).
Subsection (b) is almost certainly a CIMT because it is essentially a theft crime. *See Villegas-Sarabia v. Duke*, 874 F.3d 871, 878 (5th Cir. 2017)("if a crime's essential element 'involves fraud or deception,' or 'includes dishonesty or lying,' it is a CIMT"); *see also Matter of Mendez*, 27 I&N Dec. 219 (BIA 2018)("dishonest and deceitful behavior" is morally turpitudinous).

39-14-121, Worthless checks

Note that there is inconsistent case law 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 CMT); *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 explan 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(b), Identity theft

AGF: Probably. If the record of conviction shows the loss as over $10,000, this will almost certainly be found an agg fel as a crime involving fraud or deceit under INA §101(a)(43)(M)(i). *See Inyang v. Holder*, 2014 U.S. App LEXIS 9011 (6th Cir. Mar. 12, 2014)(federal ID theft (similar elements to our statute) is a "deceit" agg fel and the circumstance-specific approach can be used to determine the amount of loss); *see also* Eke v. Mukasey, 512 F.3d 372, (7th Cir. 2008)(IL statute counts as fraud). In the CIMT context, both the 5th and 6th Circuits have found that ID theft-type crimes inherently involve deceit. Presumably this deceit means the crimes are agg felonies where there is sufficient loss. *See Yeremin v. Holder*, 738 F.3d 708 (6th Cir. 2013)(in a CIMT analysis, the court found that possession of IDs with "the intent to use or transfer unlawfully" involves deceit); *Yang v. Holder*, 570 Fed. Appx. 381, 384 (5th Cir. 2014)(knowing possession, transfer, or use of another's ID without authority involves deceit and is a CIMT).
Where no loss > 10K: Unclear (but of course still risky). The courts in *Yeremin* and *Yang* didn't conduct an agg felony analysis when there wasn't loss over 10K, thus implying there's no other agg felony category that would apply. The most recent BIA definition of "generic theft" for purposes of INA §101(a)(43)(G) is the "taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Matter of Delgado*, 27 I&N Dec. 100 (BIA 2017) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189, 127 S. Ct. 815, 166 L. Ed. 2d 683 (2007)). Arguably, personal identifying information is not "property." Also, the ID theft elements could be met without any deprivation of rights or benefits to the owner. Random case law: *United States v. Mejia-Barba*, 327 F.3d 678 (8th Cir. Neb. 2003)(Iowa statute is

a "theft offense," but pre-categorical approach); *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); *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: Almost certainly. The argument comes down to whether the TN statute encompasses behavior that is not fraudulent or deceitful. The 6th Circuit has held that "the knowing use, without lawful authority, or another's means of identification" is an act of deceit, which implies a CIMT. *Inyang v. Holder*, 2014 U.S. App LEXIS 9011 (6th Cir. Mar. 12, 2014)(finding crime to be an agg fel). *See also Yeremin v. Holder*, 738 F.3d 708 (6th Cir, 2013)(possession of IDs with "the intent to use or transfer unlawfully" involves deceit and thus is a CIMT); *Yang v. Holder*, 570 Fed. Appx. 381, 384 (5th Cir. 2014)(knowing possession, transfer, or use of another's ID without authority involves deceit and is a CIMT). In theory, you could argue that since our statute doesn't require loss or taking something of value, it's overbroad and not categorically a CIMT, though this is unlikely to win in the 5th or 6th circuits. *See Juarez-Romero v. Holder*, 359 Fed. Appx. 799 (9th 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 (9th 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).

39-14-150(c), Identity theft trafficking

AGF: Unclear. See analysis for regular ID theft. The biggest risk is when the record of conviction indicates a loss of over $10,000. If the statute is indivisible as to action (sell, transfer, give, etc), then there's a good argument that the statue is too broad to categorically qualify as a theft offense (INA §101(a)(43)(G)).

CIMT: Yes. *See Yeremin v. Holder*, 707 F.3d 616 (6th Cir. 2013)(federal statute for trafficking of identification documents is a CIMT because it inherently requires fraud or deception); *Yang v. Holder*, 570 Fed. Appx. 381, 384 (5th Cir. 2014)(knowing possession, transfer, or use of another's ID without authority involves deceit and is a CIMT). Note that there is at least some argument that a conviction under subsection (c)(1)(B) isn't a CIMT because it requires only that the person "should have known" the IDs would be used unlawfully.

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: Yes. Burglary is listed as an aggravated felony in 8 U.S.C. § 1101(a)(43)(G). "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). The Sixth Circuit has held that D felony burglary under the TN statute matches the definition of "generic burglary." *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015)(subsections (a)(1), (2), and (3) qualify as generic burglaries and thus are aggravated felonies for purposes of the ACCA enumerated-offenses clause); *but see United States v. Herrold*, __ F.3d __ (5th Cir. 2/20/2018)(The TX equivalent of subsection (3) is not a categorical match to generic burglary under the ACCA because it does not require intent upon entry. Furthermore, under TX state law, subsections (1) and (3) are indivisible, so neither qualify as generic burglary.)

Motor Vehicle - Probably. If the statute is divisible, it is an "attempted theft offense" agg fel where the ROC shows an intent to commit theft and the sentence is at least a year. *Garcia v. Holder*, 756 F.3d 839 (5th Cir. 2014) (BMV with intent to steal is an "attempted theft offense" under the agg felony definition) (similar holdings in 7th, 9th, and 10th circuits); *see also Pulido-Alatorre v. Holder*, 381 Fed. Appx. 355, 358 (5th Cir. 2010) (applying the categorical approach, the BIA's determination that BMV is a CIMT is reasonable). 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, thus rendering the statute divisible. *See T.P.I Crim. § 14.01*. Note that BMV is not an aggravated felony under the "burglary" definition in 8 U.S.C. § 1101(a)(43)(G). *See United States v. Priddy*, 808 F.3d 676, 685 (6th Cir. 2015)(burglary under subsection (a)(4) is not a generic burglary because it does not apply to structures or buildings).

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 § 14.01), 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 "assualt," then there's a good argument that the conviction is NOT categorically a CIMT. The terms

"felony" and "assault" 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. The TX burglary statute, which is functionally identical, has been found to be not divisible as to intended crime. *United States v. Herrold*, __ F.3d __ (5th Cir. 2/20/2018).

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 (5th 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)(43)(G), 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 (6th Cir. 2007) (holding that TN agg burglary is generic burglary and thus qualifies as a violent felony under the ACCA enumerated offenses clause); *see also United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015)(reaffirms *Nance*).

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 (4th 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. See discussion above.

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 turpitudinous crime. *Matter of Esfindiary*, 16 I. & N. Dec. 659 (BIA 1979). More recently, *see Jimenez v. Sessions*, 893 F.3d 704 (10th Cir. 2018)(trespass with intent to commit a crime is not a CIMT unless the intended crime is both an element and a CIMT); *Matter of J-G-D-F-*, 27 I&N Dec. 82 (BIA 2017)(referring back to *Matter of M-*, 2 I&N Dec. 721 (BIA, A.G. 1946)).

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: Should not be.
B misd ACT (not a habitation): shouldn't be a CIMT. Trespass is lumped in with burglary (i.e. breaking and entering) in case law. The BIA is consistent that (non-habitation) burglary is a CIMT only if the intended crime is turpitudinous. *Matter of J-G-D-F-*, 27 I&N Dec. 82 (BIA 2017)(referring back to *Matter of M-*, 2 I&N Dec. 721 (BIA, A.G. 1946)). Thus, the mere fact of "entering or remaining" on property is not a CIMT.

- Subsection (a)(2) doesn't add any turpitudinous behavior because it includes recklessness as a mens rea and does not involve serious risk or harm. *See Gomez-Perez v. Lynch*, 828 F.3d 323 (5th Cir. 2016); *Lovano v. Lynch*, 846 F.3d 815, 818 (6th Cir. 2017). Also note that recklessly causing fear is not a crime in TN, so this prong doesn't count as trespass with intent to commit a crime.
- Subsection (a)(3) is very rarely charged. The form of the list of options indicates these are probably "means" rather than "elements," and thus the list should be indivisible. If indivisible, then absolutely not a CIMT. Even if divisible, probably not a CIMT, for the same reason that vandalism isn't.

A misd ACT (in habitation, hospital, campus, school): This gets a little risker because the courts are extra protective of homes, so the usual burglary analysis doesn't apply. *See Matter of Louissaint*, 24 I&N Dec. 754, 759 (BIA 2009)("unlawful entry into the dwelling of another with the intent to commit *any crime* therein is a crime involving moral turpitude")(emphasis in original). However, the TN statute doesn't require intent to commit a crime per se.

- Subsection (a)(2) – recklessly causing fear is not a crime in TN. Thus, this prong cannot count as trespass with intent to commit a crime for purposes of a *Louissant* analysis.
- Subsection (a)(3) is very rarely charged. The form of the list of options indicates these are probably "means" rather than "elements," and thus the list should be indivisible. If indivisible, then absolutely not a CIMT. If divisible, then could possibly be a CIMT where the action comprises a crime (destroys, cuts, or vandalizes). To be extra safe, make sure the ROC shows that the action is mere removal of the lock or whatever.

39-14-407, Trespass by motor vehicle.

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

39-14-408, Vandalism

AGF: Probably not. If the sentence is under a year, then definitely not an agg fel. Pre-*Dimaya*, there was a concern that this could be categorized as a §16(b) Crime of Violence, but now this shouldn't be an issue.

CMT: Probably not, but unclear. There's very little case law on this, but the BIA 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 destruction 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 Matter of S- I- K-*, 24 I. & N. Dec. 324 (BIA 2007).

CMT: Yes. *See generally Matter of 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: Probably not. The statute does not include any gradations for the age of the other party, so there's no argument for divisibility regarding whether the other party was a minor.

CMT: Unclear. It will likely be charged as a CMT. *See Matter of Lopez-Meza*, 22 I. & N. Dec. 1188 (BIA 1999)(citing incest as an example of a crime that is a CIMT even with no evil intent); *see also* . 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); *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 517 (BIA 2008)(CAC includes "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being.")

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); *see also Pierre v. Att'y Gen.*, (11th Cir. 1/18/18)(knowing projection of blood, urine, or feces at a child is a CIMT in part because it involves a vulnerable victim). 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)(1) is likely a CMT because a subsection (a) offense includes, as an element, an intent to injure or defraud. Arguably, a subsection (a)(2) 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 (a)(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 CIMT). 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. "Courts have long held that concelament offenses are crimes involving moral turpitude." *Matter of Mendez*, 27 I&N Dec. 219, 221 (BIA 2018)(holding that concealment of a felony is a CIMT even when the underlying felony is not turpitudinous, because the act of concealment is "dishonest and deceitful behavior".)

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*, (6th 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 (10th 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 (5th 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, (7th Cir. 2004) (Illinois statute); *Ruiz-Lopez v. Holder*, 682 F.3d 513 (6th Cir. 2012) (Washington statute); *Cano-Oyarzabal v. Holder*, 774 F.3d 914 (7th Cir. 2014) (Wisconsin statute); *Medina-Nunez v. Lynch*, 607 Fed. Appx. 701 (9th Cir. 2015) (CA statute); *Pulido-Alatorre v. Holder*, 381 Fed. Appx. 355 (5th Cir. 2010)(TX statute)

FAO: No.

39-16-603(b)(1), Evading arrest with Motor Vehicle (without risk)

AGF: Unclear. Arguably, 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 (6th 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. Coronado-Cura*, 713 F.3d 597 (11th Cir. 2013)(FL's "simple vehicle flight" statute is a COV agg fel); *United States v. Christian*, 214 Fed. App'x 337 (4th Cir. 2007)(TN evading arrest w/o risk DOES count as a COV under the USSG "otherwise" clause because evading with a vehicle inherently creates a "serious potential risk of physical injury")(unpublished).

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 (5th 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 (6th Cir. 2012). On the other hand, in *Ramirez-Contreras v. Sessions*, 858 F.3d 1298 (9th Cir. 2017), the Ninth Circuit found that the equivalent CA statute is not categorically a CIMT because it encompases 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: Probably not. Pre-*Dimaya*, this was an AGF as a Crime of Violence under §16(b). Nowadays, DHS would have to prove that the statute contains, as an *element*, the attempted, threatened, or actual use of physical force. All the case law regarding evading as a COV found it to qualify under 16(b), not 16(a). *See United States v. Martin*, 378 F.3d 578 (6th Cir. 2004) (Michigan evading w/ wreck is a COV, but only under the residual clause). *See also United States v. Brown*, No. 12-5357, 2013 U.S. App. LEXIS 4088, *7-8 (6th 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 (10th Cir., Sept 19, 2016)(BIA found a FL "evading with risk" statute to be a COV only under the residual clause).

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 (5th 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 (6th 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: No. Doesn't require "physical force" so not a COV, and doesn't fall under any other AGF definitions. *See Matter of Alcantar*, 20 I&N Dec. 801, 810 (BIA 1994)(dicta example that escape encompasses both violent and non-violent means).

CMT: No. *See Matter of J---*, 4 I&N Dec. 512 (BIA 1951)(escape is not a CIMT because it is a malum prohibitum crime); *see also Matter of B---*, 5 I&N Dec. 538 (BIA 1953)(aiding escape is not a CIMT).

39-16-609, Failure to appear

AGF: Depends on the underlying crime. If the underlying crime is a misdemeanor, then the FTA cannot be an agg fel. If the underlying crime is a felony, then the FTA could be an agg fel if the conviction is pursuant to subsections (a)(1) (summonses) or (a)(3) (citations). "Failure to appear before a court" is an enumerated agg fel in the INA, so the issue is whether the TN statute matches the definition in 8 USC §1101(43)(T). In *Matter of Garza-Olivares*, 26 I&N Dec. 736 (BIA 2016), the BIA held that the categorical approach must be used regarding a "failure to appear" and "before a court," but that the other three components of (43)(T) can be analyzed using the circumstance-specific approach (i.e. looking at the ROC). Assuming the TN statute is divisible as to subsections (a)(1) through (a)(5), only subsections (a)(1) and (a)(3) are a categorical match to the "before a court" component. For these subsections, an IJ would look to the ROC to determine if the FTA was a) pursuant to a court order, b) on a felony charge, and c) could trigger a sentence of 2 years or more. (Note that under TN law, b. and c. are duplicative). *See Garza-Olivares.* Subsection (a)(1) – which deals with summonses – will likely be an agg fel if the ROC shows that the summons was issued by a magistrate (i.e. the court) regarding a felony charge. Subsection (a)(3) – dealing with citations – seems much safer, as DHS would have to show that a state citation, which is issued by a police officer absent any court or magistrate review, qualifies as a court order. *But see Renteria-Morales v. Mukasey*, 551 F.3d 1076 (9th Cir. 2008)(the crime of bail jumping may be an agg fel under (43)(S) (obstruction of justice) even where it doesn't categorically match with (43)(T)).
Failure to appear to serve a sentence – This is a separate agg felony enumerated by 8 USC §1101(43)(Q). TN has no specific statute for this, and any prosecution would come under TCA 39-16-609(a)(4). There is very little case law on this, but it is unlikely the TN statute would be considered an agg fel under this

ground. *See Matter of Adeniye*, 26 I&N Dec. 726 (BIA 2016)(the relevant inquiry is whether the offense was *punishable* by 5 or more years, not the actual sentence received).

CMT: Unlikely. There is a paucity of case law relating to whether FTA is a CIMT, but the statute does not involve the type of "base, vile, or depraved" behavior or "reprehensible conduct" that is typically deemed a CIMT. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 833 (BIA 2016).

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)(S).

CMT: Yes. *See Matter of Martinez-Recinos*, 23 I&N Dec. 175, 178 (BIA 2001)(finding perjury to be a CIMT without any discussion of rationale); *see also Omagah v. Ashcroft*, 288 F.3d 254, FN 8 (5th Cir. 2002)(citing list of cases as turpidinous, including old perjury cases); *Zaitona v. INS*, 9 F.3d 432 (6th Cir. 1993)(conviction for making a false statement is a CIMT, even if it doesn't rise to the level of perjury).

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, wilfullness, or recklessness." *Matter of Hernandez*, 26 I.&N. Dec. 464 (BIA 2015).

39-17-308, Harassment

*Note that this statute has changed considerably over the years – so for old convictions, you will need to do an assessment for the statute as it existed at that time. This analysis is for the post-7/1/2016 version of the law.

AGF: Probably not. A conviction under subsection (a) is never an agg fel / COV because the max sentence is less than a year. A conviction pursuant to subsection (b), *shouldn't* be a COV, but there's no case law to fall back on. The minimum conduct under (b) is offensive or inconvenient contact that will "annoy" the victim. It's hard see how behavior that is merely annoying, offensive, or inconvenient could "by its nature involve a substantial risk" of physical force. Note that the elements of the harrassment statute at issue in *In re Malta-Espinoza*, 23 I. & N. Dec. 656, 659 (BIA 2004) and *Matter of Singh*, 25 I&N Dec. 670 (BIA 2012) are very different than in the TN statute.

CMT: Probably. This is probably a divisible statute, so each subsection must be examined separately, and unfortunately there is no immigration case law dealing with the TN statute. Subsections (a)(1) and (a)(4) are almost certainly CIMTs because of the intentional threat of harm. *See Matter of Ajami*, 22 I&N Dec. 943 (BIA 1999)("intentional transmission of threats" is a CIMT, though the statute at issue is distinguishable from ours); *see also Matter of Singh*, 25 I&N Dec. 670 (BIA 2012)(stalking based on harassment is uncontested as a CIMT). Subsection (a)(2) is less likely to be a CIMT because it merely requires annoying or offensive behavior. If offensive contact doesn't count as a CIMT, then, arguably, neither should offensive behavior. *See Matter of Solon*, 24 I. & N. Dec. 239, 241-42 (BIA 2007). If you have to do a plea for harassment, try to get it pursuant to (a)(2) (put that subsection on the jmt sheet, regardless of the allegations.) Subsection (a)(3) is unclear, but arguably not a CIMT because there's no requirement of actual emotional distress or harm.

DVO: Probably not. Realistically, most states conflate harassment and stalking, but the former is <u>not</u> 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: Depends on the subsection whether it's a COV or not. In general, the TN definition of stalking (TCA 39-17-315(a)(4)) does not require, as an element, any physical harm or fear, so should not be a crime of violence AGF. *See Matter of Sanchez-Lopez*, 27 I&N Dec. 256, 258 (BIA 2018) (the CA stalking statute can cover behavior causing a victim to fear *nonphysical* injury). *See also See United States v. Insaulgarat*, 378 F.3d 456, 470 (5th Cir. 2004)(FL's agg stalking statute – repeated harassment after court injunction – does not require violent force and thus is not a COV); *United States v. Johnson*, 707 F.3d 655 (6th Cir. 2013) (KY stalking statute - requiring threat causing fear of sexual contact, serious physical injury, or death – is NOT a COV because fear of sexual contact doesn't require physical force).

- Subsection (b)(2) (misd): NO – Can't be a COV AGF because the sentence is less than a year.
- Subsection (b)(3) (E felony): Probably not, but realistically, the crime putting the person on the SOR is most likely an agg fel.
- Aggravated Stalking (E felony): most likely divisible as to the individual subsections. If not divisible, then not a DVO because overbroad.
    - Subsection (c)(1)(A): Probably YES. *See United States v. Patterson*, 853 F.3d 298 (6th Cir. 2017) (display of a gun during a theft requires implied threat of physical harm, which is enough to find COV under the elements clause).
    - Subsection (c)(1)(B): Probably NO. The aggravating factor is age difference, so there's no

additional element relating to physical safety. See general analysis above.

■ Subsection (c)(1)(C): Probably NO. The aggravating factor here is a previous conviction, which shouldn't implicate physical safety. See general analysis above.

■ Subsection (c)(1)(D): YES. This language is almost identical to the definition of generic stalking in *Matter of Sanchez-Lopez*.

■ Subsection (c)(1)(E): Probably not. "The existence of a previous injunction against domestic violence does not turn [subsequent] acts" *See United States v. Insaulgarat*, 378 F.3d 456, 470 (5th Cir. 2004)(FL's agg stalking statute – repeated harassment after a court injunction - does not require physical risk or harm).

● Especially Aggravated Stalking (C felony): most likely divisible between its subsections.

■ Subsection (d)(1)(A): Shouldn't be (but DHS may charge).

■ Subsection (d)(1)(B): YES – because of the serious bodily injury element.

CMT: Unclear, but risky. There are good arguments why this should not be a CIMT, but it's likely that DHS will charge it as one. The TN statute is fairly broad because it includes behavior that causes the target to feel harassed (emotional distress) or molested. There is a realistic probability that prosecution under the TN statute will encompass behavior that does not involve any threat of *physical* harm, and thus there's an argument the statute includes non-turpitudinous behavior. *See State v. Flowers*, 512 S.W.3d 161, 166 (Tenn. 2016) ("placing disparaging signs at one's place of employment" could cause significant emotional distress as required for feeling harassed, though conviction was overturned because there was no evidence of *subjective* emotional distress in this case). In *Matter of Ajami*, 22 I. & N. Dec. 949 (BIA 1999), the BIA found the Michigan agg stalking statute to be a CIMT, but that statute has as an element the making of a "credible" threat to kill or cause physical injury. *See also Latter-Singh v. Holder*, 668 F.3d 1156, 1161 (9th Cir. 2012) (California stalking statute is categorically CMT where the statute encompasses only statements that threaten death or great bodily injury). *But see Matter of U. Singh*, 25 I&N Dec. 670 (BIA 2012) (it is conceded by all parties that CA stalking is a CIMT). Note that there also a mens rea argument. In the TN statute, the "course of conduct" must be "willful," but there's no mens rea as to the effect of the acts (i.e. creating fear etc). *See In re Daria Shaban*, 2018 WL 3045823 (BIA, May 1, 2018) (Minn statute does not require any specific intent regarding the outcome of the actions and thus IJ reasonably found it to not be a CIMT).

DVO: Will probably be charged as such (but shouldn't necessarily be); stalking is specifically listed as a DVO (and thus triggers deportability). 8 U.S.C. § 1227(a)(2)(E)(i). The BIA has held that generic stalking includes "the intent to cause [the victim] or a member of his or her immediate family to be placed in fear of bodily injury or death." *Matter of Sanchez-Lopez*, 27 I&N Dec. 256, 258 (BIA 2018) (the CA stalking statute can cover behavior causing a victim to fear *nonphysical* injury, and thus is overbroad and not a "crime of stalking" under the INA).

● Misd stalking – subsection (b)(1)(2): NO – as defined in TCA 39-17-315(a)(4), simple stalking includes behavior causing the target to feel "molested" or "harassed," neither of which necessitate fear of physical harm. *See State v. Flowers*, 512 S.W.3d 161, 166 (Tenn. 2016) ("placing disparaging signs at one's place of employment" could cause significant emotional distress as required for feeling harassed, though conviction was overturned because there was no evidence of *subjective* emotional distress in this case).

● Stalking as a sex offender (E felony), subsection (b)(3): Probably not, unless the courts decide that being on the sex offender registry somehow adds an element of risk of physical harm.

● Aggravated Stalking (E felony): most likely divisible, so would need to be analyzed based on subsection. If not divisible, then not a DVO because overbroad.

■ Subsection (c)(1)(A): YES, because the display of a deadly weapon can be inferred to relate to physical (vs non-physical) safety.

■ Subsection (c)(1)(B): Probably NO. The aggravating factor is age difference, so there's no additional element relating to physical safety. The analysis should be the same as for misdemeanor stalking.

■ Subsection (c)(1)(C): Probably NO. The aggravating factor here is a previous conviction, which shouldn't implicate physical safety. The analysis should be the same as for misdemeanor stalking.

■ Subsection (c)(1)(D): YES. This language is almost identical to the definition of generic stalking

in *Matter of Sanchez-Lopez*.

■ Subsection (c)(1)(E): Probably, as a violation of an order of protection, which is also enumerated as a DVO in INA § 237(a)(2)(E)(ii). The defense would be that this statute doesn't require the order of protection to relate to "credible threats of violence, repeated harassment, or bodily injury."

● Especially Aggravated Stalking (C felony): most likely divisible between its subsections.

■ Subsection (d)(1)(A): Shouldn't be (but DHS may charge).

■ Subsection (d)(1)(B): YES – because of the serious bodily injury element.

Issue now → can TN law be construed to cover fear of safety beyond physical safety.

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

AGF: Almost certainly. First, note that subsections (a)(1) through (a)(4) will be treated as elements, not means, so the statute is divisible. *See T.P.I. Crim 31.01* (act and drug are individually identified in jury instructions); *Spaho v. U.S. Att'y Gen.*, 837 F.3d 1172 (11th Cir. 2016)(similar FL statute is divisible because sale, poss w/ intent, manufacturing, etc are elements of distinct crimes – not mere means). The drug AGF ground includes both "illicit trafficking" and "drug trafficking crime," which have been found to have different meanings. *See Matter of Sanchez-Cornejo*, 25 I&N Dec 273 (BIA 2010). "Illicit trafficking" means "trading or dealing" in a commercial transaction, so sale or attempted sale of drugs definitely counts. *See Spaho v. U.S. Att'y Gen*., 837 F.3d 1172 (11th Cir. 2016) (sale of cocaine and possession with intent to sell cocaine are both illicit trafficking). "Drug trafficking crime" is defined statutorily to include to knowingly or intentionally "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance." 18 USC § 924(c) and 21 USC § 841(a)(1). Thus subsection (1)(a) (manufacturing) is also clearly an agg fel. There is some slight argument that "distribute" does not include "deliver" as defined under TN law, but it's unlikely. *See U.S. v. Teran-Salas*, 767 F.3d 453 (5th Cir. 2014)(TX drug law prohibiting "delivering" counts as "distributing" per fed definition). Note that the line of cases dealing with Florida's drug law does not apply because FL's law has no mens rea as to the nature of the substance. *See Matter of L-G-H-*, 26 I&N Dec. 365 (BIA 2014).

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. *See* 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). Note that the statute is broken down into different subgroupings of the schedules, so it is unlikely that a *Mellouli* argument would prevail. Also, TCA 39-17-403(d) indicates that the TN schedules should primarily follow the fed drug schedules.

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/heroin provision of subsection (e).

CMT: No.

CSO: Probably, and will certainly be charged as one. There is an argument under *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015) that the statute is categorically over-inclusive because the TN scheduled drugs include substances that are not scheduled under federal law in 21 USC §802. This is a risky argument, however, because the immigrant may be required to show that prosecution of the "extra" controlled substance is a realistic probability. *See Matter of Fereira*, 26 I&N Dec. 415 (BIA 2014)(note that this was before *Mellouli*). Additionally, it is probable that the type of drug is an element rather than a means, and thus that the modified categorical approach would apply. TCA § 39-17-428 applies different minimum fines to simple possession convictions depending on whether the drug is Schedule VI or a different schedule. The pattern jury instructions also support an "elements" finding, because they require the identification of which drug was allegedly possessed. *T.P.I. Crim. 31.05*.
**Note: There is an exception carved out for a first offense simple possession of 30g or less of marijuana for personal use such that it does not trigger deportability. The conviction does, however, still trigger inadmissibility and disqualification for cancellation of removal. *See Barma v. Holder*, 640 F.3d 749 (7th Cir. 2011)(the marijuana exception does not apply in the cancellation context).

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: Usually not. If it is for simple possession or use of drug paraphernalia, then it should not be an AGF. 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).

CMT: Probably no, but remember that CSO is a separate ground for inadmissibility and deportability.

CSO: Probably. Paraphernalia statutes are generally deemed to be "related to a controlled substance" and thus CSOs. *See Mellouli v. Lynch*, 135 S.Ct. 1980 (2015). In *Mellouli*, the Supreme Court held that the Kansas paraphernalia statute was not a CSO (and thus not a deportable offense) because the list of scheduled drugs (controlled substances) in KS contained some drugs that were not included in the federal schedules under 21 USC §802. The Court found the KS statute to thus be overbroad and not categorically a CSO. The TN paraphernalia statute should not be divisible as to which drug is involved, so if lawyers find TN scheduled drugs that are not on the §802 schedules, a *Mellouli* argument could succeed. I am not, at this point, aware of any TN-law situations in which the *Mellouli* argument has been made to an IJ. *See also Madrigal-Barcenas v. Lynch*, 797 F.3d 643 (9th Cir. 2015); *Rojas v. Att'y Gen. of the U.S.*, 728 F.3d 203 (3rd Cir. 2013)(in a removal proceeding, the govt bears the burden of proving that the conviction related to §802). **Note – if the paraphernalia relates to under 30 grams of marijuana for personal use, then a first offense should not cause deportability (but still triggers inadmissibility). *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)); *see also Barma v. Holder*, 640 F.3d 749 (7th Cir. 2011)(the under 30g of MJ exception doesn't apply to an inadmissibility or cancellation analysis).

Please note – for the following Part 13 crimes, there is a good argument that the TN definition of "firearm," as given in TCA §39-11-106(a)(11), is NOT a match for the federal definition in 18 USC §921(a)(3). HOWEVER – DHS will charge convictions under the TN statute as FAOs. The federal statute explicitly excludes "antique firearm[s]." According to a 2015 TN Attorney General Opinion (No. 15-75), the TN statute does include antique and "black powder" firearms. This should mean that any TN firearm statute cannot be a categorical match to the federal system, but beware that the BIA may require a showing of "realistic probability." *See Matter of Chairez (Chairez I)*, 26 I&N Dec. 349, 356-57 (BIA 2014)("In light of *Moncrieffe*, we clarify that a State firearms statute that contains no exception for "antique firearms" is categorically overbroad relative to section 237(a)(2)(C) of the Act only if the alien demonstrates that the State statute has, in fact, been successfully applied to prosecute offenses involving antique firearms.")(this part of *Chairez I* was not overruled). I have not found any recorded TN prosecutions of antique firearms.

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. For each subsection:
(a) – NO. Not a COV and not an AGF because the maximum punishment is less than a year.
(b) – DEPENDS – assuming the TN definition of "firearm" is overbroad (see discussion above), then this is not a categorical match to 18 USC §922(g)(1). If the TN definition is not overbroad due to realistic probability issues, then this subsection IS INDEED an agg fel – same rational as given for subsection (c).
(c) – YES - it's an agg fel under INA 101(a)(43)(E)(ii) as an offense "described in" the federal felon-in-possession statute, 18 USC §922(g)(1). *See Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002)(state felon-in-possession offenses don't have to have the interstate commerce element in order to be a categorical match for the federal felon-in-possession law); *see also Hernandez v. Holder*, 592 F.3d 681 (5th Cir.

2009)(affirming the *Vasquez* decision and finding the TX felon-in-possession statute to be an agg fel). Note that because this subsection uses "handgun" instead of the broader "firearm," it should be a categorical match to the "firearm" in 18 USC §921(a)(3).
(d) – likely a COV and thus an AGF if the sentence is one year or more. – needs 16(a) analysis

CMT: It depends on the subsection. Mere possession of a firearm or weapon is not a CIMT. *See Matter of Granados*, 16 I. & N. Dec. 726 (BIA 1980); *see also Hernandez-Gonzalez v. Holder*, 778 F.3d 793, 799-800 (9th Cir. 2015)("no court has ever found possession of a weapon to be a crime involving moral turpitude"). The analysis is different when the possession is accompanied by the intent to commit a crime or use the weapon against a person. Subsection (d) is thus likely a CIMT. *See Matter of S–*, 8 I. & N. Dec. 344 (BIA 1974); *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992)(citing *Matter of S-*)

FAO: It depends. Where the statute clarifies a firearm or is divisible such that DHS can look to record, this will be a FAO. *See Matter of Flores-Abarca*, 26 I&N Dec. 922 (BIA 2017)(discussing expansive nature of the FAO definition). Analysis for each subsection:
(a) – Risky, and will almost certainly be charged as such. The 5th and 6th Circuits will probably find this to be a divisible statute (based on the jury instructions) and thus look to the ROC. *See TPI Crim 36.08*. If the ROC shows the weapon is a firearm, then it is a firearm offense. In my experience, these cases are charged as explicitly "firearm" or "club" in the warrant or indictment. Defense: TN firearm definition is overbroad. See discussion at start of Part 13 crimes.
(b) – Probably yes, and will almost certainly be charged as such. Defense: TN firearm definition is overbroad. See discussion at start of Part 13 crimes.
(c) – YES. Note that because this subsection uses "handgun" instead of the broader "firearm," it should be a categorical match to the "firearm" in 18 USC §921(a)(3).
(d) - not a firearms offense. But a conviction under subsection (d) could easily be deemed an AGF. Note that part (d)(2) is probably not divisible with regards to the definition of deadly weapon.
(f) - Probably yes, and will almost certainly be charged as such. Defense: TN firearm definition is overbroad. See discussion at start of Part 13 crimes.

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: Probably not, unless the statute is found to be divisible as to type of weapon, and the ROC demonstrates that the weapon was a firearm.

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, short barrel rifle, etc. *See* 26 U.S.C. § 5845 for list of federally prohibited weapons.

CMT: No.

FAO: Probably not, because the statute is probably not divisible as to the type of weapon.

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) if the person is convicted of failure to register under the federal statute – 18 USC § 2250. This provision does NOT apply to state convictions for failure to register.

AGF: No.

CMT: Probably (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 Totimeh v. AG of the United States*, 666 F.3d 109 (3d Cir. 2012); *Mohamed v. Holder*, 769 F.3d 885 (4th Cir. 2014); *Mata-Guerrero v. Holder*, 627 F.3d 256 (7th Cir. 2010); *Plasencia-Ayala v. Mukasey*, 516 F.3d 738 (9th Cir. 2008); *Efagene v. Holder*, 642 F.3d 918 (10th Cir. 2011). On the other hand, in the only 6th 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 5th 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 In re A-C-R*, 2016 Immig. Rptr. LEXIS 5931 (BIA August 29, 2016); *but see In re Nasir Ali Khan*, A059 549 769 (BIA April 26, 2017)(the comparable CA statute is not divisible and thus is not a CIMT). 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 5th Circuit precedent.

55-10-205, Reckless driving

AGF: No.

CMT: Probably not. *Matter of C–*, 2 I. & N. Dec. 716 (BIA 1947). Recklessness can be sufficient mens rea for a CIMT, but, at least so far, it must be combined with a "reprehensible act" such as "substantial risk of imminent death" or serious bodily injury. *Lovano v. Lynch*, 846 F.3d 815, 818 (6th Cir. 2017)(citing *Matter of Leal*, 26 I&N Dec. 20 (BIA 2012).) *See also 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.") Note that there is a TN AG opinion finding that TN Reckless Driving is NOT a CIMT because there is no aggravating factor. TN AG 08-108.

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

AGF: No, not even when it's a felony DUI. 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)); *see also U.S. v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001)(even pre-*Leocal*, TX agg DUI was not a COV because did not require intentional use of force); *Begay v. United States*, 553 U.S. 137 (2008) (holding that recidivist DUI is not a "violent felony" under the ACCA). 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)(a non turpitudinous crime like DUI does not become turpitudinous merely by repetition, so even multiple offense DUI is not a CIMT); *but see 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 6th Circuit in *Ruiz-Lopez v. Holder*). Notably, Tennessee lacks an offense, or an enhanced penalty, for committing a DUI on a suspended license.

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. Maximum sentence is under a year.

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. Max sentence is under a year.

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 amont 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

In the wake of *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), a Crime of Violence is defined only as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). The analysis under 16(a) tends to fall into two categories: what counts as an element and what is "use" of force.

Appendix B

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. (subsection (b) was found unconstitutionally vague in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018)).

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.