IMMIGRATION CONSEQUENCES: A PRIMER FOR TEXAS CRIMINAL DEFENSE ATTORNEYS IN LIGHT OF *PADILLA V. KENTUCKY*

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A noncitizen convicted of violating a Texas state criminal statute is subject to a variety of harsh immigration penalties including deportation from the United States. Multiple variables determine whether a state criminal offense will trigger immigration deportation proceedings. A parallel concern is the impact that a state criminal offense may have on routine offenses prosecuted in federal courts: illegal re-entries in violation of 8 U.S.C. Section 1326. The United States Supreme Court has made it constitutionally impermissible for a criminal defense attorney to recommend the entry of a guilty plea in the absence of a basic, working knowledge of how that guilty plea will affect the noncitizen's immigration status. This Article begins by introducing the reader to a survey of typical deportation-proceeding-invoking offenses (DPIOs) established by federal law. Part II illustrates, via examples, how immigration law's adoption of well-known criminal law terms does not necessarily require analogous definitions across both contexts. Part III then provides a brief overview of federal criminal sentencing enhancement law, on which much of immigration law relies, and closes by discussing the distinct character that immigration proceedings have from their antecedents in federal criminal sentencing. Part IV apprises the reader of select federal sentencing enhancements especially germane to noncitizens that unlawfully reenter the nation after having been deported. Finally, an attached appendix charts in detail, offense by offense, the immigration and federal sentencing consequences for select Texas criminal statutes.

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I. INTRODUCTION

This Article comes as the dust still settles in the aftermath of the United States Supreme Court's landmark decision in *Padilla v. Kentucky* making it an explicit professional duty[1] for criminal defense attorneys to advise noncitizen clients about immigration consequences that will clearly arise from pleading guilty to a particular offense.[2] Admittedly, the depth and breadth of that professional duty remains unclear, but what is clear is that some duty exists requiring a criminal defense attorney to seek out clear

[1] A year after *Padilla*, considerable judicial and academic debate lingers as to whether this duty existed before March 31, 2010. *Compare* United States v. Orocio, 645 F.3d 630, 640–42 (3d Cir. 2011) (ruling that *Padilla* is to be retroactively applied), *and* Zapata-Banda v. United States, Civil No. B:10-256, Crm. No. B:09-PO-2487, 2011 WL 1113586, at *4 (S.D. Tex. March 7, 2011) (same), *with* United States v. Chang Hong, No. 10-6294, 2011 WL 3805763, at *7 (10th Cir. Sept. 1, 2011) (ruling that *Padilla* is not to be retroactively applied), *and* Chaidez v. United States, 655 F.3d 684, 689–90 (7th Cir. 2011) (same), *and* Miller v. State, 11 A.3d 340, 352 (Md. Ct. Spec. App. 2010) (same).

[2] *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010). This opinion was announced on March 31, 2010. *Id.* at 1473. The United States government charged Padilla, a legal permanent resident, with transporting narcotics in the exercise of his employment as a truck driver. *See id.* at 1477. Padilla's attorney advised Padilla that he did not have to worry about the immigration consequences of his guilty plea. *See id.* at 1478. That advice proved to be incorrect after the Bureau of Immigration and Customs Enforcement initiated deportation proceedings against Padilla. *See id.* at 1477. This consequence was clear given Padilla's conviction. *Id.* at 1483. Padilla filed an ineffective-assistance-of-counsel claim against his attorney based on his attorney's failure to apprise him of the imminent immigration consequences of his guilty plea. *See id.* at 1478. The Supreme Court found that Padilla's attorney had failed to comply with established professional norms but remanded the case so that the trial court could determine if Padilla had suffered actual prejudice in light of that misinformation. *See id.* at 1486–87.

immigration consequences before representing to a client that a guilty plea will have no adverse immigration consequences.[3]

Defendants have already begun filing ineffective assistance of counsel claims against their criminal defense attorneys relying in part on *Padilla*.[4] Moreover, the fact that "[s]ome members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in [immigration law]" will no longer justify complete ignorance of otherwise certain immigration consequences.[5] *Padilla*'s holding is not limited to affirmative misadvice but instead places an independent duty to investigate on each attorney representing a noncitizen in criminal proceedings to at least attempt to elicit the clear immigration consequences.[6]

[3] *Id.* at 1483 ("Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice A[lito]), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." (footnote omitted)).

[4] *See, e.g.*, Parsley v. United States, 604 F.3d 667, 671 (1st Cir. 2010); Al Kokabani v. United States, No. 5:06-CR-207-FL, No. 5:08–CV–177–FL, 2010 WL 3941836, at *5–6 (E.D.N.C. July 30, 2010); United States v. Millan, Nos. 3:06cr458/RV, 3:10cv165/RV/MD, 2010 WL 2557699, at *1 (N.D. Fla. May 24, 2010); State v. Guerra, No. DBDCR020115814S, 2010 WL 3672255, at *1 (Conn. Super. Ct. Aug. 24, 2010); People v. Valestil, No. 2007KN010757, 2010 WL 2367351, at *1–3 (N.Y. Crim. Ct. June 14, 2010). Moreover, it is not entirely clear just how far advice must go after *Padilla*. *See* United States v. Bakilana, No. 1:10-cr-00093, 2010 WL 4007608, at *3 n.2 (E.D. Va. Oct. 12, 2010) (explaining that potential civil damages liability in a suit by a victim "simply does not rise to the same level as deportation in terms of its pervasive effects on a defendant's life"); Maxwell v. Larkins, No. 4:08 CV 1896, 2010 WL 2680333, at *10 (E.D. Mo. July 1, 2010); Brown v. Goodwin, Civil No. 09-211, 2010 WL 1930574, at *13 (D.N.J. May 11, 2010); United States v. Rose, ACM 36508 (f rev), 2010 WL 4068976, at *2 (A.F. Ct. Crim. App. June 11, 2010); People v. Gravino, 928 N.E.2d 1048, 1052–53 n.4 (N.Y. 2010).

[5] *Padilla*, 130 S. Ct. at 1483 (rejecting ignorance as an excuse and ruled that "when the deportation consequence is truly clear, as it was [here], the duty to give correct advice is equally clear").

[6] *Id.* at 1484 ("A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement. When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing

This Article aims at bridging the gap between the *Padilla* duty and the otherwise uninitiated Texas criminal defense attorney. In that spirit, the Article begins by introducing the reader to a survey of typical deportation-proceeding-invoking offenses (DPIOs) established by federal law. Part II illustrates, via examples, how transplanting common criminal law terms into the immigration law context without examining the precise definitions involved can have dire consequences. Part III then provides a brief overview of federal criminal sentencing enhancement law, on which much of immigration law relies, and closes by discussing the distinct character that immigration proceedings have from their antecedents in federal criminal sentencing. Part IV apprises the reader of select federal sentencing enhancements especially germane to noncitizens that unlawfully reenter the nation after having been deported.

II. THE OFFENSES: HISTORY AND OVERVIEW OF DEPORTATION-PROCEEDING-INVOKING OFFENSES

Several Texas criminal offenses will trigger deportation proceedings if they fit the definition of a DPIO as codified at 8 U.S.C. Section 1227(a)(2). Comparing a Texas criminal statute to a DPIO involves a process that forms the subject of a later part of this Article.[7] Nevertheless, before explaining that process, a brief and rudimentary survey of the most common DPIOs is warranted.

The most common DPIOs are aggravated felonies;[8] crimes involving moral turpitude;[9] crimes involving child abuse;[10] crimes involving violations of protective orders;[11] stalking-related crimes;[12] crimes involving

at all. Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so clearly satisfies the first prong of the *Strickland* analysis." (internal quotations omitted)).

[7] *See* discussion *infra* Part III.b.

[8] *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

[9] *Id.* § 1227(a)(2)(A)(i) ("Any alien who—(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.").

[10] *Id.* § 1227(a)(2)(E)(i).

[11] *Id.* § 1227(a)(2)(E)(ii).

firearm and destructive device convictions;[13] and controlled substances offenses.[14] The parts that follow provide a basic review of those DPIOs. Nevertheless, three atypical DPIOs are not addressed herein but do exist and should be considered if the facts of the subject case demand it.[15]

A. A Brief Overview of Aggravated Felonies

A noncitizen convicted of an aggravated felony is deportable.[16] The Anti-Drug Abuse Act introduced the term "aggravated felony" in 1988 to the immigration lexicon.[17] At its infancy the definition of aggravated felony included a short list of crimes largely consisting of drug and firearm trafficking crimes and murder.[18] Nonetheless, "virtually every major piece of immigration legislation since that time has expanded the definition of aggravated felony."[19] The clarity that 8 U.S.C. Section 1101(a)(43) arguably possessed at its infancy has been lost in light of the wide-ranging offenses now covered by the statute's definition.[20] The statutory definition of "aggravated felony" contains more than twenty subsections that include a wide range of various criminal categories as well as specific crimes.[21]

[12] *Id.* § 1227(a)(2)(E)(i).

[13] *Id.* § 1227(a)(2)(C).

[14] *Id.* § 1227(a)(2)(B).

[15] Specifically, offenses involving espionage, sabotage, treason, and other crimes are not considered herein but are codified at 8 U.S.C. Section 1227(a)(2)(D); nor does this Article address the failure to register as a sex offender as codified at 8 U.S.C. Section 1227(a)(2)(A)(v). Lastly, no analysis exists herein of the failure to register or falsification of documents codified at 8 U.S.C. Section 1227(a)(3)(B).

[16] 8 U.S.C. § 1227(a)(2)(A)(iii).

[17] *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 7342, 102 Stat. 4181, 4469–70 (1988) (codified as amended at 8 U.S.C. § 1101(a)(43) (1988)) ("The term 'aggravated felony' means murder, any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, or any attempt or conspiracy to commit any such act, committed within the United States.").

[18] *Id.*

[19] UNDERSTANDING THE 1996 IMMIGRATION ACT: THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996 4–2 (Juan P. Osuna ed., 1st ed. 1997) [hereinafter Osuna].

[20] *See* 8 U.S.C. § 1101(a)(43)(A)–(U) (2006) (stating the aggravated felony definition that includes twenty-one subsections that potentially describe hundreds of offenses).

[21] *See* Syracuse Univ., *Aggravated Felonies and Deportation*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (June 9, 2006), http://trac.syr.edu/immigration/reports/155/ ("With the rapid expansion of crimes which can be considered 'aggravated felonies,' the list of applicable

Moreover, not only has the range of offenses increased, but the characteristic thresholds invoking some of the offenses listed in 8 U.S.C. Section 1101(a)(43) have also been significantly lowered in recent years.[22] These expansive amendments are in part what drove the Supreme Court to its holding in *Padilla*.[23]

B. A Brief Overview of Crimes Involving Moral Turpitude

A noncitizen convicted of a crime involving moral turpitude (CIMT) may be deportable after one such offense depending on the specific offense,[24] but a noncitizen twice convicted of CIMTs is definitely deportable.[25] The Immigration and Nationality Act (INA) never explicitly defines what constitutes moral turpitude.[26] Yet, CIMTs have influenced immigration status since at least 1891.[27] This DPIO was recently reviewed

crimes now includes both various criminal categories as well as specific crimes.").

[22] *Compare* 8 U.S.C. § 1101(a)(43)(M)(i) (providing that the financial minimum for invoking an offense that involves fraud or deceit is now $10,000), *with* Osuna, *supra* footnote 19, at 4-3 (stating that before 1996 the "provisions relating to fraud or deceit crimes and tax evasion crimes" required a loss to the victim or the government in excess of $200,000). Likewise, the crime of violence aggravated felony was first introduced with a five-year-imprisonment-term requirement. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 7345, 102 Stat. 4181, 4471 (1988) (codified as amended at 8 U.S.C. § 1101(a)(43)(F)). Now, the crime of violence-aggravated felony carries only a one-year imprisonment-term requirement. *See* 8 U.S.C. § 1101(a)(43)(F).

[23] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010) ("The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The 'drastic measure' of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes." (citations omitted)).

[24] 8 U.S.C. § 1227(a)(2)(A)(i) (2006) ("Any alien who—(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.").

[25] *Id.* § 1227(a)(2)(A)(ii) ("Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.").

[26] Silva-Trevino, 24 I. & N. Dec. 687, 689 n.1 (A.G. 2008) ("The absence of a statutory definition dates back to 1891, when the term first appeared in the immigration context, and courts and the Department have long agreed that this omission reflects Congress's decision to commit the definition of the term to 'administrative and judicial interpretation.'").

[27] *See* Pooja R. Dadhania, *The Categorical Approach for Crimes Involving Moral Turpitude*

by the Attorney General with the intent of "establish[ing] an administrative framework for determining whether an alien has been convicted of a [CIMT]."[28] The traditional definition of a CIMT includes:

> conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude. Among the tests to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind.[29]

Morality is a constantly evolving standard, and identifying offenses that involve moral turpitude is a nebulous undertaking.[30] More specifically, the manner by which an offense is determined to be a CIMT is a subject this Article considers in more detail in a separate part,[31] but it suffices for our current historical perspective to say that recent developments have changed the very fundamentals by which CIMTs are assessed.[32]

C. A Brief Overview of Crimes Involving Domestic Violence, Stalking, or Violation of Protection Order, and Crimes Against Children

Any noncitizen convicted of a crime involving domestic violence, stalking, crimes against children, or violating a protective order is deportable.[33] Congress introduced this DPIO section in 1996, so these DPIOs are considerably more recent than aggravated felonies and CIMTs.[34]

After Silva-Trevino, 111 Colum. L. Rev. 313, 313 (2011) (citing Jordan v. De George, 341 U.S. 233, 229 n.14 (1951)); *see also* Cabral v. INS, 15 F.3d 193, 194 (1st Cir. 1994).

[28] *Silva-Trevino*, 24 I. & N. Dec. at 689.

[29] *See* Orosco v. Holder, 396 F. App'x 50, 52 (5th Cir. 2010) (summarizing the BIA's administrative decisions in constructing the definition of the term moral turpitude).

[30] *See* Nunez v. Holder, 594 F.3d 1124, 1127 (9th Cir. 2010).

[31] *See* discussion *infra* Part III.c.1.B.

[32] *Silva-Trevino*, 24 I. & N. Dec. at 689 n.1.

[33] 8 U.S.C. § 1227(a)(2)(E)(i)–(ii) (2006).

[34] *See* Osuna, *supra* footnote 19, at 1–9.

1. Domestic Violence

A domestic violence DPIO in violation of 8 U.S.C. Section 1227(a)(2)(E)(i) must satisfy two prongs: (1) it has to be a crime of violence as defined in 18 U.S.C. Section 16;[35] and (2) it has to be against a victim with whom the actor possesses a familial relationship.[36] This specific DPIO assessment is the subject of recent judicial interpretation detailed in later parts of this Article.[37] Congress did not define the balance of the DPIOs in this subsection.[38]

2. Stalking

Fifth Circuit precedent arising from the stalking DPIO is relatively scarce because the Fifth Circuit has taken up this particular DPIO only once, in *Nysus v. Ashcroft*—an unpublished opinion.[39] The Fifth Circuit found New Mexico's generic stalking offense as fitting the stalking definition found in 8 U.S.C. Section 1227.[40] However, the Texas offense for stalking is not an exact replica of the New Mexico aggravated stalking offense, so the available guidance one can deduce from *Nysus* is not entirely clear.[41] *Nysus* is referenced here merely in the interest of thoroughness.

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[35] 8 U.S.C. § 1227(a)(2)(E)(i) ("For purposes of this clause, the term 'crime of domestic violence' means any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person . . . .").

[36] *Id.* (stating "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").

[37] *See* discussion *infra* Part III.c.1.B.

[38] *See* 8 U.S.C. § 1227(a)(2)(E)(i).

[39] 115 F. App'x 672 (5th Cir. 2004).

[40] *Id.* at 674 ("Nysus was ordered removed pursuant to 8 U.S.C. § 1227(a)(2)(E)(E)(i), which provides for deportation of an alien convicted of a stalking crime. Therefore, his assertion that he should not have been deported for having committed an aggravated felony is misplaced. Nysus's stalking conviction was final for immigration purposes at the time he was detained.").

[41] *Compare* N.M. STAT. ANN. § 30-3A-2 (West 2003) ("Harassment consists of knowingly pursuing a pattern of conduct that is intended to annoy, seriously alarm or terrorize another person and that serves no lawful purpose. The conduct must be such that it would cause a reasonable person to suffer substantial emotional distress."), *with* TEX. PENAL CODE ANN. § 42.072(a) (West Supp. 2011). The Texas statute provides, in relevant part:

> (a) A person commits an offense if the person, on more than one occasion and pursuant

3. Child Abuse

Sexual abuse of a minor is an enumerated aggravated felony that renders, independent of this DPIO, a noncitizen deportable.[42] A non-sexual crime of child abuse may still trigger this particular DPIO.[43] Courts have deferred to the Board of Immigration Appeals's (BIA's) definition of "a crime of child abuse" announced in *Velazquez-Herrera*.[44] Under that interpretation, "a 'crime of child abuse' is any offense that (1) involves an intentional, knowing, reckless, or criminally negligent act or omission that (2) constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation."[45]

> to the same scheme or course of conduct that is directed specifically at another person, knowingly engages in conduct that:
>
> > (1) the actor knows or reasonably believes the other person will regard as threatening:
> >
> > > (A) bodily injury or death for the other person;
> >
> > > (B) bodily injury or death for a member of the other person's family or household or for an individual with whom the other person has a dating relationship; or
> >
> > > (C) that an offense will be committed against the other person's property;
> >
> > (2) causes the other person, or a member of the other person's family or household, or an individual with whom the other person has a dating relationship to be placed in fear of bodily injury or death or fear that an offense will be committed against the other person's property; and
> >
> > (3) would cause a reasonable person to fear:
> >
> > > (A) bodily injury or death for himself or herself;
> >
> > > (B) bodily injury or death for a member of the person's family or household or for an individual with whom the person has a dating relationship; or
> >
> > > (C) that an offense will be committed against the person's property.

Id.

[42] *See* 8 U.S.C. § 1101(a)(43)(A) (2006) ("The term 'aggravated felony' means—murder, rape, or sexual abuse of a minor . . . ."); *see also id.* § 1227(a)(2)(E)(i) ("Any alien who . . . 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.").

[43] *See id.* § 1227(a)(2)(E)(i).

[44] *See* Jimenez-Juarez v. Holder, 635 F.3d 1169, 1171 (9th Cir. 2011) (citing Velazquez-Herrera, 24 I. & N. Dec. 503 (BIA 2008)).

[45] *Id.*

4. Violating a Protective Order

Finally, a noncitizen convicted of violating a protective order that involves a credible threat of violence, repeated harassment, or bodily injury to the person or persons for whom the protective order was issued, is also deportable.[46]

D. A Brief Overview of Crimes Involving Firearms and Destructive Devices

Any noncitizen convicted of conspiring or attempting to, or actually purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying any weapon, part, or accessory which is a firearm or destructive device in violation of any law is deportable.[47] Section 602 of the Immigration Act of 1990 added this DPIO.[48] This offense has seen only slight amendment.[49] The Texas firearm definition is analogous to its federal counterpart.[50] This DPIO affects every Texas criminal offense in which a firearm is an element of the offense.[51]

E. A Brief Overview of Crimes Involving Controlled Substances

A noncitizen that is convicted at any time after admission of attempting or conspiring to, or actually violating any law or regulation relating to a

[46] *See* 8 U.S.C. § 1227(a)(2)(E)(ii).

[47] *Id.* § 1227(a)(2)(C).

[48] *See* Pub. L. No. 101-649, § 602, 104 Stat. 4978, 5080 (1990).

[49] *Compare id.* ("Any alien who at any time after entry is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying in violation of any law, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) is deportable."), *with* 8 U.S.C. § 1227(a)(2)(C) ("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) in violation of any law is deportable.").

[50] *See* Castaneda v. Mukasey, 281 F. App'x 284, 289–90 n.20 (5th Cir. 2008) ("Texas Penal Code § 46.01(3) defines 'firearm' as 'any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.' 18 U.S.C. § 921(a)(3) defines a firearm, *inter alia*, as 'any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.'").

[51] *See id.*

controlled substance is deportable pursuant to 8 U.S.C. Section 1227(a)(2)(B)(i).[52] No grounds for exclusion or deportation based on drug offenses existed in the immigration code prior to 1952.[53] In addition, Congress in 1986 classified all controlled substances as "drugs" for purposes of establishing grounds of deportation under immigration law.[54] A full list of the controlled substances contained in 21 U.S.C. Section 802 is available for a Texas practitioner's review.[55] However, a noteworthy exception does exist for possession of a small quantity of marijuana.[56] Finally, although the controlled substance DPIO only specifically mentions the inchoate offenses of conspiracy and attempt, it does not necessarily follow that solicitation is outside the reach of this DPIO.[57]

F. A Brief Overview of the Effect of Pleading Guilty to Inchoate Offenses on Aggravated Felonies, Crimes Involving Moral Turpitude, and the Federal Sentencing Guidelines

Attempting[58] or conspiring[59] to commit an aggravated felony DPIO is itself an aggravated felony. Nevertheless, criminal solicitation is not that

[52] 8 U.S.C. § 1227(a)(2)(B)(i).

[53] Office of Immigration Litig., U.S. Dep't of Justice, *Immigration Consequences of Criminal Convictions:* Padilla v. Kentucky, JUSTICE.GOV, 49–50 http://www.justice.gov/civil/docs_forms/REVISED%20Padilla%20v.%20Kentucky%20Reference%20Guide_11-8-10.pdf (last revised Nov. 2010) [hereinafter "OIL Monograph"].

[54] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570 § 1751, 100 Stat. 3207, 3207–47 (1986).

[55] Office of Diversion Control, U.S. Dep't of Justice, *Controlled Substance Schedules*, DEA DIVERSION CONTROL http://www.deadiversion.usdoj.gov/schedules/index.html (last visited Oct. 8, 2011).

[56] *See* 8 U.S.C. § 1227(a)(B)(i) ("[An offense] other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

[57] *See* Peters v. Ashcroft, 383 F.3d 302, 309 (5th Cir. 2004) (holding that "Peters was convicted of an offense 'relating to controlled substances'; there was a sufficient nexus between his solicitation conviction and drug-related laws to satisfy the federal statute; and solicitation is not implicitly outside the reach of 8 U.S.C. § 1227(a)(2)(B)(i)").

[58] 8 U.S.C. § 1101(a)(43)(U) (2006) ("The term 'aggravated felony' means—an attempt or conspiracy to commit an offense described in this paragraph."); Clarke v. Holder, 386 F. App'x 501, 503 n.1 (5th Cir. 2010) (per curiam); Sladden v. Holder, 378 F. App'x 419, 420 (5th Cir. 2010) (per curiam) (citing Husband v. Mukasey, 286 F. App'x 130, 133 (5th Cir. 2008) ("An attempt is the equivalent of the underlying offense for purposes of the aggravated felony determination.")).

[59] Adenodi v. Gonzales, 255 F. App'x 766, 769 n.3 (5th Cir. 2007) ("Petitioner's argument that a 'conspiracy' conviction should be treated differently than the underlying substantive offence is inapposite.").

easy. Solicitation of a drug sale, that is, "a mere offer to sell, without evidence of possession or transfer," is not an aggravated felony.[60] Solicitation of other offenses remains too nebulous to opine about with any certainty.

Attempting to, conspiring to, or soliciting someone to commit a CIMT is tantamount to committing the subject CIMT because the BIA makes "no distinction, with respect to the morally turpitudinous nature of the crime, between an inchoate offense and the completed crime."[61] There is no advantage to pleading to an inchoate offense if the unconsummated offense is itself morally turpitudinous.[62]

Finally, the Sentencing Guidelines do not distinguish between inchoate offenses and successfully completed crimes for the purposes of determining whether an offense qualifies for a sentencing enhancement.[63] Fifth Circuit precedent "indicates that the definition of 'attempt' need not be separately analyzed because an analysis of the elements of the statute prohibiting the underlying crime is sufficient for classification purposes."[64] If completion of the underlying offense would subject the actor to an enhancement pursuant to Sentencing Guideline Section 2L1.2 (b)(1), so will any

[60] United States v. Ibarra–Luna, 628 F.3d 712, 716 (5th Cir. 2010) (noting that the government had conceded that solicitation of a drug sale was not an aggravated felony); *see also id.* at 716 n.19 (noting that U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.3(A) (2010) adopts the definition of "aggravated felony" from 8 U.S.C. § 1101(a)(43), which in turn incorporates 18 U.S.C. § 924(c)(1)(D)(2) (2006), which includes any felony punishable under the Controlled Substances Act, Pub. L. 91-513, 84 Stat. 1242 (1970)). Therefore, a solicitation of a drug offense must qualify under the Controlled Substances Act before it can be considered an aggravated felony. *But see Peters*, 383 F.3d at 309 ("Peters was convicted of an offense 'relating to controlled substances'; there was a sufficient nexus between his solicitation conviction and drug-related laws to satisfy the federal statute; and solicitation is not implicitly outside the reach of 8 U.S.C. § 1227(a)(2)(B)(i).").

[61] Feldman, A71 205 812- ELOY, 2007 WL 1794184, at *2 (BIA June 4, 2007); *see also* Khourn, 21 I. & N. Dec. 1041, 1044 (BIA 1978) ("If the statute defines a crime in which turpitude necessarily inheres, then for immigration purposes, the conviction is for a crime involving moral turpitude.").

[62] *Feldman*, 2007 WL 1794184, at *2.

[63] *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.5 (2010) (noting that prior convictions for crimes counted under Section 2L1.2(b)(1) for sentencing enhancement purposes "include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses").

[64] United States v. Esparza–Andrade, 418 Fed. App'x 356, 358 (5th Cir. 2011) (per curiam) (citing United States v. Cervantes–Blanco, 504 F.3d 576, 579–87 (5th Cir. 2007)).

preparatory offense pursuing completion of that enhancement-invoking offense.[65]

III. THE TERMS: SAME WORDS, DIFFERENT MEANINGS

After surveying the most common DPIOs, the discussion that follows explores the definitional nuance of typical criminal law terms within immigration statutes as well as within the federal sentencing guidelines. Definitions matter—do not take them for granted. The parts that follow provide particular attention to the definitions of: (a) convictions; (b) imprisonment terms and felonies; and (c) crimes of violence.

A. Defining Convictions

For the first time in history, Congress enacted a statutory definition for the term "conviction" in 1996.[66] Determining what constitutes a conviction for immigration purposes is a two-step process.[67] The first step seeks to establish whether: (1) a judge or jury found the alien guilty; or (2) the alien entered a guilty or *nolo contendere* plea; or (3) the alien admitted sufficient facts to warrant a finding of guilt.[68] The second step, conjunctive to the first, seeks to establish that the judge has: (1) ordered some form of punishment; or (2) a penalty; or (3) another restraint on the alien's liberty imposed.[69] Note that the definition of conviction does not contain any requirement that the conviction be final before it results in immigration

[65] *Id.*

[66] *See* OIL Monograph, *supra* footnote 53, at 55–56 ("For the first time, Congress enacted a statutory definition of 'conviction' for immigration purposes. The statutory definition had a stated purpose of deliberately broadening the scope of the Board's definition of 'conviction,' which, in Congress's view, did not go far enough to address situations where a judgment of guilt or imposition of sentence is suspended. Section 322 of [the Illegal Immigration Reform and Immigrant Responsibility Act] therefore clarifies Congressional intent that even in cases where adjudication is 'deferred,' the original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of the immigration laws." (citations omitted)).

[67] 8 U.S.C. § 1101(a)(48) (2006) ("The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.").

[68] *Id.*

[69] *Id.*

consequences.[70] In addition, "[b]oth the Board [of Immigration Appeals] and the federal courts have held that a deferred adjudication is a conviction for immigration purposes where it involves an admission of guilt and limitations on the defendant's liberty."[71] A general or special court martial judgment of guilt, probation before judgment, guilty plea held in abeyance, and court costs and surcharges could all constitute convictions for immigration purposes.[72]

B. Defining Imprisonment Terms

Several aggravated felonies require a term of imprisonment of at least one year.[73] In turn, the relevant immigration statute defines "term of imprisonment" to include "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or

[70] *See* OIL Monograph, *supra* footnote 53, app. at C-1 ("The statutory definition of 'conviction' does not contain any requirement that the conviction be final before it results in immigration consequences. Immigration consequences can therefore attach even if the alien has a pending challenge against the validity of his or her conviction.").

[71] *See* OIL Monograph, *supra* footnote 53, app. at C-2; H.R. REP. NO. 104-828, at 224 (1996) (Conf. Rep.) (explaining that the statute clarifies "Congressional intent that even in cases where adjudication is 'deferred,' the original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of the immigration laws").

[72] *See* OIL Monograph, *supra* footnote 53, app. at C-2 through C-3.

[73] *See, e.g.*, 8 U.S.C. § 1101(a)(43)(F) (2006) (defining aggravated felony as "a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at least one year"); *id.* § 1101(a)(43)(G) (defining aggravated felony as "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year"); *id.* § 1101(a)(43)(J) (defining aggravated felony as "an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed"); *id.* § 1101(a)(43)(Q) (defining aggravated felony as "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"); *id.* § 1101(a)(43)(R) (defining aggravated felony as "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"); *id.* § 1101(a)(43)(S) (defining aggravated felony as "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"); *id.* § 1101(a)(43)(T) (defining aggravated felony as "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").

execution of that imprisonment in whole or in part."[74] Criminal defense attorneys should note that the requirement here is at least one year, not more than a year like the felony definition found in Sentencing Guideline Section 2L1.2.[75] Situations commonly occur in which a defendant will plead guilty to a Texas Class A Misdemeanor, and because of the definition of an "imprisonment term" under immigration law,[76] that same misdemeanor conviction will actually trigger aggravated felony charges in immigration court.[77] Also noteworthy is that under Sentencing Guideline Section 2L1.2 the maximum punishable imprisonment term controls, whereas in the INA only the sentenced imposed—including suspension—counts in calculating the relevant term of imprisonment.[78]

C. Defining a Crime of Violence

1. Immigration Purposes

Several DPIOs contain an element that the defendant be convicted of a "crime of violence."[79] In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, which made significant changes to the definition of the crime-of-violence element of several DPIOs.[80] Those "changes greatly increase[d] the scope of crimes that are now

[74] *Id.* § 1101(a)(48)(B) ("Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.").

[75] *Compare id.* § 1101(a)(43) (requiring a term of imprisonment of at least one year for several aggravated felonies), *with* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.2 (2010) ("'[F]elony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.").

[76] *See id.* § 1101(a)(48)(B).

[77] This is a possibility in Texas for violations of Class A Misdemeanors which may equal a sentence of at least one year but may not "exceed one year." *See* TEX. PENAL CODE ANN. § 12.21 (West 2011).

[78] *Compare* 8 U.S.C. § 1101(a)(48)(B) ("[A] sentence with respect to an offense is deemed to include the period of incarceration or confinement . . . regardless of any suspension of the imposition or execution of that imprisonment or sentence . . . ."), *with* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(vii) ("'Sentence imposed' has the meaning given the term 'sentence of imprisonment' . . . without regard to the date of the conviction.").

[79] *See* 8 U.S.C. § 1101(a)(43).

[80] Osuna, *supra* footnote 19, at 4–2.

deemed to be aggravated felonies."[81] The statutory definition of an "aggravated felony" now consists of a patchwork of seemingly unrelated offenses that are linked together solely by congressional desire to label them as aggravated felonies.[82]

2. Federal Sentencing Purposes

Alternatively, for federal criminal purposes, one of the manners in which the 16-level enhancement under Sentencing Guideline Section 2L1.2 is employed is by reference to committing a crime of violence.[83] The Sentencing Guidelines have their own crime of violence definition, apart from that found in 18 U.S.C. Section 16, which governs the appropriateness of the 16-level and 4-level enhancements found in that Guideline.[84] These two definitions are not the same, and the reader should be mindful of which definition is appropriate in the specific context being examined. Moreover, adding confusion to the matter is that the 8-level enhancement in Sentencing Guideline Section 2L1.2 is controlled by the definition found in 8 U.S.C. Section 16.[85] Because of the similarities between the various definitions of "crime of violence" appearing within the Sentencing Guidelines and 18 U.S.C. Section 924(e), the Fifth Circuit treats cases dealing with those provisions interchangeably.[86]

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[81] *Id.*

[82] *See* Syracuse Univ., *supra* footnote 21 ("With the rapid expansion of crimes which can be considered 'aggravated felonies,' the list of applicable crimes now includes both various criminal categories as well as specific crimes.").

[83] *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2010) ("[A] conviction for a felony that is . . . (ii) a crime of violence . . . increase[s] by 16 levels.").

[84] *See id.* § 2L1.2 cmt. n.1 (B)(iii) ("'Crime of violence' means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.").

[85] *See id.* § 2L1.2 cmt. n.3(A) ("For purposes of subsection (b)(1)(C) [the 8-level enhancement], 'aggravated felony' has the meaning given that term in . . . [8 U.S.C. § 1101(a)(43) (2006)], without regard to the date of conviction for the aggravated felony.").

[86] *See* United States v. Moore, 635 F.3d 774, 776 (5th Cir. 2011) (per curiam) (citing United States v. Mohr, 554 F.3d 604, 609 n.4 (5th Cir. 2009)), *cert. denied*, (U.S. Oct. 11, 2011) (No. 10-11089).

IV. THE APPROACHES

Ideally, Congress could go state-by-state through each penal code and identify every state conviction that would trigger deportation proceedings. However, we do not live in an ideal world. Instead, Congress created a generalized laundry list of offenses—DPIOs—that in turn list generalized predicate offenses or conduct that triggers deportation proceedings.[87] For example, certain types of fraud, theft, and burglary can all trigger DPIOs.[88] Ideally again, Congress could define burglary, an example from the list just provided, in a manner that made the elemental character of a predicate offense clear, but Congress did not clearly define many of the predicate offenses that trigger DPIOs.[89]

To be fair, immigration statutes are not the only place, nor the oldest, in the United States Code where predicate offenses trigger certain consequences.[90] In fact, the Armed Career Criminal Act of 1984 (ACCA), codified at 18 U.S.C. Section 924,[91] where Congress conditioned sentencing enhancements on imprecisely defined predicate offenses, predates all but a small minority of DPIOs. DPIOs and ACCA sentencing enhancements both create an undesirable consequence—deportation proceedings and stiffer sentences, respectively—and under both paradigms, an imprecisely defined predicate offense triggers the undesirable consequence. As a result, much rides on what constitutes a predicate offense under either statutory framework.[92] And for that reason, the history of how courts have wrestled with DPIO predicate offense definitions has its genesis in how the courts have wrestled with defining predicate offenses for the purposes of the ACCA. The story of one is the story of the other.

A. Beginning Approaches

One option is to let the criminal statute's title be the determinative factor. For example, if the State of Texas labels a defendant's conviction as a "burglary," then it is a "burglary" as far as federal law is concerned.[93]

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[87] *See* 8 U.S.C. § 1101(a)(43) (2006).

[88] *See id.*

[89] *See id.* This section does not define predicate offenses such as a theft offense, a burglary offense, or fraud in the context of triggering deportation proceedings. *See generally id.*

[90] *See, e.g.*, 18 U.S.C. § 924 (2006).

[91] *Id.*

[92] *Id.*

[93] *See* United States v. Leonard, 868 F.2d 1393, 1399 (5th Cir. 1989), *overruled by* Taylor v.

The Fifth Circuit Court of Appeals originally adopted this method in *United States v. Leonard*.[94]

The defendant in *Leonard* was indicted for being a three-time convicted felon in possession of a firearm in violation of 18 U.S.C. Section 922(g)(1).[95] Leonard pleaded guilty to violating the ACCA but challenged the proposed enhancements because his Texas burglary convictions were not violent felonies as defined by the ACCA.[96] More specifically, Leonard argued that the ACCA defined violent felonies as offenses that involved actual or potential physical injury to others.[97] Leonard also argued that because the Texas burglary statute included a variety of non-violent crimes, not all Texas burglary convictions came within the purview of Section 924(e)(2)(B)(ii).[98] Leonard wanted the district court to examine the factual circumstances of his crimes to prove that they had not been violent felonies.[99] The Fifth Circuit refused.[100]

Instead, the Fifth Circuit ruled that if the State of Texas called it a "burglary," it was a burglary for the purposes of the ACCA enhancement.[101] The Fifth Circuit also justified its ruling by stating that "[e]very circuit squarely confronting the issue ha[d] so held."[102] Despite the certainty in the Fifth Circuit's *Leonard* pronouncement, soon several methods for defining these congressionally undefined offenses began to spring up throughout the United States thereby creating inconsistent results.[103]

United States, 495 U.S. 575 (1990).

[94] *See id.*

[95] *Id.* at 1394.

[96] *Id.*

[97] *See id.* at 1395.

[98] *Id.*

[99] *See id.*

[100] *See id.* at 1397.

[101] *See id.* at 1399.

[102] *See id.*

[103] *See, e.g.*, Taylor v. United States, 495 U.S. 575, 580–81 n.2 (1990) (citing the following cases to point out the conflict among the courts of appeals concerning the definition of burglary: United States v. Leonard, 868 F.2d 1393 (5th Cir. 1989); United States v. Taylor, 864 F.2d 625 (8th Cir. 1989); United States v. Chatman, 869 F.2d 525 (9th Cir. 1989); United States v. Headspeth, 852 F.2d 753 (5th Cir 1988); United States v. Palmer, 871 F.2d 1202 (3d Cir. 1989); United States v. Taylor, 882 F.2d 1018 (6th Cir. 1989); United States v. Dombrowski, 877 F.2d 520 (7th Cir. 1989); United States v. Hill, 863 F.2d 1575 (11th Cir. 1989); United States v. Patterson, 882 F.2d 595 (1st Cir. 1989) (each case overruled or reversed by Taylor v. United States, 495 U.S. 575 (1990)).

B. The Traditional-Categorical Approach and the Modified-Categorical Approach

A year after *Leonard*, the patchwork of approaches that developed came squarely before the Supreme Court in *Taylor v. United States*.[104] The Court admitted that from the face of the ACCA, "it [was] not readily apparent whether Congress intended 'burglary' to mean whatever the State of the defendant's prior conviction defines as burglary, or whether it intended that some uniform definition of burglary be applied to all cases in which the Government seeks a [Section] 924(e) enhancement."[105] Nevertheless, the Court turned to the legislative history.[106]

First, the Court deduced that congressional intent was to punish a criminal lifestyle that encouraged the use of weapons, not necessarily a specific violent criminal act targeting individuals.[107] Second, the Court deduced that Congress had an idea of the elements required to commit a burglary and by originally placing a burglary definition in the statute itself, Congress had no desire to leave definition of that term "to the vagaries of state law."[108] Third, the 1984 definition of burglary demonstrated to the Court that Congress, "at least at that time, had in mind a modern 'generic' view of burglary, roughly corresponding to the definitions of burglary in a majority of the States' criminal codes."[109]

Because of those findings, the Court adopted a general approach that employs generic, court-created definitions aimed at capturing all state and federal criminal offenses that share a level of seriousness and character.[110] The Court admitted that exact formulations may vary, but the generic, contemporary meaning of an offense is attainable by surveying modern codes and statutes.[111] The generic offense is the product of this survey.

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[104] *Id.*

[105] *Id.* at 580.

[106] *Id.* at 588.

[107] *Id.* at 587–88 ("Congress focused its efforts on career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons.").

[108] *Id.* at 588.

[109] *Id.* at 589 ("In adopting this definition, Congress both prevented offenders from invoking the arcane technicalities of the common-law definition of burglary to evade the sentence-enhancement provision, and protected offenders from the unfairness of having enhancement depend upon the label employed by the State of conviction.").

[110] *See id.* at 591–92.

[111] *See id.* at 598.

Elemental parallelism between the generic offense and the state offense controls, not the label a state legislature chooses to affix to a particular criminal offense.[112]

Equipped with the generic offense and the particular criminal statute, a court is then able to compare the state offense and the generic offense for a possible match.[113] If the subject criminal statute and the generic offense parallel each other, perhaps with some minor variations in terminology, the inquiry ends and the criminal statute triggers the federal enhancement.[114] This process became the categorical approach, named so because approaching the state offense with the generic offense categorically yields a match between both offenses or it does not. A variety of settings has seen the application of the categorical approach.[115] Yet, the *Taylor* Court quickly identified a problem that the categorical approach was not designed to address: divisible statutes.[116]

Divisible statutes are those criminal statutes that contain elements that parallel the federal offense but also have elements that do not parallel the federal offense.[117] A conviction stemming from a divisible statute thus does not necessarily help the court decide whether the conviction triggers the federal offense. The Court solved this dilemma by instructing lower courts to perform an extra-statutory inquiry to determine the specific elements the defendant was convicted of violating.[118] The modified-categorical approach was born of this necessity.[119]

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[112] *See id.* at 592. The Court expressly rejected the Fifth Circuit's reliance on the State of Texas's "burglary" label. *Id.* ("We think that 'burglary' in § 924(e) must have some uniform definition independent of the labels employed by the various States' criminal codes."). The Court also rejected other circuits' reliance on common law definitions. *See also id.* at 594 ("Moreover, construing 'burglary' to mean common-law burglary would come close to nullifying that term's effect in the statute, because few of the crimes now generally recognized as burglaries would fall within the common law-definition.").

[113] *See id.* at 599–600 (demonstrating how to compare the generic offense of burglary with the state offense).

[114] *See id.* at 599.

[115] *See, e.g.*, *id.* at 601.

[116] *See id.*

[117] *See* United States v. Dismuke, 593 F.3d 582, 589 (7th Cir. 2010) (stating that a statute is divisible "when it describes multiple offense categories, some of which would be crimes of violence and some of which would not") *cert denied,* 131 S. Ct. 3018 (2011).

[118] *See Taylor*, 495 U.S. at 602.

[119] *See id.* at 601–02.

The modified-categorical approach announced in *Taylor* allowed a federal trial court to consider a limited record of conviction to determine which elements of a particular divisible statute resulted in the subject conviction.[120] Defining what constituted the "record of conviction" spawned a fifteen-year litigation period in lower courts.[121]

The Supreme Court granted certiorari in *Shepard v. United States* to "address divergent decisions in the Courts of Appeals applying *Taylor* when prior convictions stem from guilty pleas, not jury verdicts."[122] In *Shepard*, the defendant faced an ACCA enhancement,[123] but unlike the defendant in *Taylor*, the *Shepard* defendant elected to plead guilty to a divisible statute rather than face a jury.[124] By pleading guilty, the *Shepard* defendant deprived subsequent courts of a charging document and jury instructions to elicit the true nature of his conviction.

In *Shepard*, the Court made it clear that *Taylor* had listed jury charges and instructions solely as examples of what trial courts could look to, and not, as several lower courts had ruled, an exhaustive list incapable of expansion.[125] The Court, however, was not willing to expand that list as broadly as the government advocated.[126] Despite the government's efforts, the Court ultimately found the government's position "uncomfortable" and rejected the government's arguments.[127] Instead, the Court limited extra-statutory inquiry to the "charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information."[128] The "record of conviction" definition announced in *Shepard* remains controlling precedent.

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[120] *See Dismuke*, 593 F.3d at 589 ("Under the modified categorical approach, [the court] may expand [its] inquiry into a *limited* range of additional material in order to determine whether the jury actually *convicted* the defendant of violating a portion of the statute that constitutes a violent felony." (citation omitted)).

[121] *See* Shepard v. United States, 544 U.S. 13, 19 (2005).

[122] *Id.*

[123] *Id.* at 15–16. A conviction under Section 922(g) coupled with three prior convictions for "violent felonies" or "serious drug offenses" committed on different occasions will trigger a minimum of fifteen years to a maximum of life. *See* 18 U.S.C. § 924(e) (2006).

[124] *See Shepard*, 544 U.S. at 17–18.

[125] *Id.* at 20.

[126] *Id.* at 21–22.

[127] *See id.* at 22.

[128] *Id.* at 26.

C. The Traditional-Categorical Approach and the Modified-Categorical Approach Come to Immigration Law

The approaches announced in *Taylor* and *Shepard* have been extended to DPIOs. The rationale of this extension is that, like the sentence enhancement provisions at issue in *Taylor*, immigration consequences are "triggered by prior *convictions*, and not by the fact that defendant has previously committed an offense."[129] But even more specifically, the categorical approach developed by *Taylor* and *Shepard* has been specifically extended by the Fifth Circuit to apply to the firearm and explosives DPIO codified at 8 U.S.C. Section 1227(a)(2)(C),[130] as well as the aggravated felony DPIO codified at 8 U.S.C. Section 1227(a)(2)(A)(iii).[131] The BIA has also extended *Taylor* and *Shepard* to cover other DPIOs codified at 8 U.S.C. Section 1227(a)(2) including: controlled substances convictions,[132] crimes of domestic violence, stalking, or violation of protection order and crimes against children.[133]

Nevertheless, the *Taylor* and *Shepard* transplant has not gone without some modification.[134] Deportation proceedings are administrative civil proceedings that stand in stark contrast to a federal or state criminal trial. When a noncitizen undergoes deportation proceedings, the immigration judge and the BIA look to the federal jurisdiction where the case is properly heard for controlling precedent.[135] Only precedent from the Fifth Circuit and the Supreme Court bind the BIA when the same is considering an appeal from an immigration judge within the Fifth Circuit.[136] After the BIA

[129] *See* Larin–Ulloa v. Gonzales, 462 F.3d 456, 463 n.8 (5th Cir. 2006) ("The *Taylor* court also emphasized that the language of 18 U.S.C. § 924(e) supported a categorical approach because its sentence enhancement provisions are triggered by prior *convictions*, and not by the fact that the person has previously committed an offense." (citing Taylor v. United States, 495 U.S. 575, 601 (1990))). This rationale applies equally to the INA's provision concerning aggravated felonies. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

[130] *See* Castaneda v. Mukasey, 281 F. App'x 284, 289 (5th Cir. 2008) (per curiam).

[131] *See* Nolos v. Holder, 611 F.3d 279, 285 (5th Cir. 2010) (per curiam).

[132] *See* Zapata-Perez, A092 829 857, 2010 WL 4035422, at *1 (BIA Sept. 20, 2010).

[133] *See* Velasquez, 25 I. & N. Dec. 278, 278–79 (BIA 2010) (citing 8 U.S.C. § 1227(a)(2)(E) (2006)).

[134] *See* Silva-Trevino, 24 I. & N. Dec. 687, 701 (A.G. 2008).

[135] *See* Peters v. Ashcroft, 383 F.3d 302, 305 n.2 (5th Cir. 2004) ("Because Peters's immigration case was properly heard in Oakdale, Louisiana, where he was detained, the BIA is bound only by this circuit's decisions.").

[136] *See id.*

issues its ruling, the only available means of appeal is the judicial circuit in which the immigration judge completed the proceedings.[137]

Nevertheless, even when a case does make its way to the Fifth Circuit Court of Appeals, the Fifth Circuit's jurisdiction is limited to reviewing pure constitutional claims and questions of law.[138] The *entire* genesis of *Taylor* and *Shepard* was the ambiguity and silent nature of the federal statutes triggering subsequent enhancements and action.[139] That ambiguity coupled with *Chevron* deference results in an almost complete lack of judicial review of BIA opinions.[140]

At any rate, like in the ACCA cases, the first inquiry in immigration law begins with determining whether the criminal statute is divisible.[141] If it is not divisible, the categorical approach applies.[142] If it is divisible, the modified categorical approach applies.[143] The immigration process up to this point is identical to its federal criminal sentencing antecedents, but two recent developments have begun to differentiate the immigration process.[144]

1. The Circumstance-Specific Approach

The Fifth Circuit recently wrote that the Supreme Court has arguably opened the door to a new approach: the circumstance-specific approach.[145]

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[137] 8 U.S.C. § 1252(b)(2) (2006).

[138] *See* Enriquez-Gutierrez v. Holder, 612 F.3d 400, 411 (5th Cir. 2010) ("We have already explained that the REAL ID Act limits our jurisdiction in cases such as this to 'constitutional claims or questions of law.'" (quoting 8 U.S.C. § 1252(a)(2)(D)).

[139] *See* Shepard v. United States, 544 U.S. 13, 19 (2005); *see also* Taylor v. United States, 495 U.S. 575, 580 (1990).

[140] *See Peters*, 383 F.3d at 305–06 (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984); INS v. Aguirre-Aguirre, 526 U.S. 415, 424-26 (1999)) (applying *Chevron* deference to BIA interpretation of immigration laws)).

[141] William R. Maynard, *Deportation: An Immigration Law Primer for the Criminal Defense Lawyer*, THE CHAMPION, June 1999, at 12.

[142] *See id.*

[143] *See* Norton Tooby & Dan Kesselbrenner, *Living with* Silva-Trevino, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD (April 27, 2009), http://www.nilc.org/dc_conf/flashdrive09/Immigration-Law-and-Enforcement/imm-201_Living-With-Silva-Trevino-rev.pdf.

[144] *See* Nijhawan v. Holder, 129 S. Ct. 2294, 2302 (2009); *see also* Bianco v. Holder, 624 F.3d 265, 270 (5th Cir. 2010).

[145] See *Bianco*, 624 F.3d at 270 ("We must, though, view that court's analysis in light of two subsequent Supreme Court decisions that arguably opened the door to a new 'circumstance-specific' approach." (citing United States v. Hayes, 129 S. Ct. 1079 (2009); *Nijhawan*, 129 S. Ct.

The Supreme Court and the Fifth Circuit Court of Appeals have respectively extended the circumstance-specific approach to at least two DPIOs: offenses with a monetary-loss threshold and domestic violence offenses.[146] Several aggravated felony DPIOs contain a monetary loss threshold.[147] The exact aggravated felony discussed by both the Supreme Court[148] and the Fifth Circuit Court of Appeals[149] is codified at 8 U.S.C. Section 1101(a)(43)(M)(ii) which makes it an aggravated felony to commit an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000."[150]

a. Applied to Monetary Loss Thresholds

In *Nijhawan v. Holder*, the defendant stipulated that the loss he caused to the victim exceeded $100 million but argued that he had not pleaded guilty to an offense that had as an element a monetary loss threshold.[151] Nijhawan argued that because he had not pleaded guilty to an offense with a monetary loss threshold, any DPIO that required such a threshold could not be triggered by his conviction.[152] The issue in *Nijhawan* was whether an immigration judge could go beyond the record of conviction in assessing the actual loss to the victim.[153]

The Supreme Court found Nijhawan's interpretation troubling: "To apply a categorical approach here would leave subparagraph (M)(i) with little, if any, meaningful application. We have found no widely applicable federal fraud statute that contains a relevant monetary loss threshold."[154]

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at 2294).

[146] *See Nijhawan*, 129 S. Ct. at 2302; *see also Bianco*, 624 F.3d at 272.

[147] *See* 8 U.S.C. § 1101(a)(43)(D) (2006) ("The term 'aggravated felony' means—an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000 . . . ."); *id.* § 1101(a)(43)(M) ("The term 'aggravated felony' means—an offense that—(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.").

[148] *See Nijhawan*, 129 S. Ct. at 2297.

[149] *See Bianco*, 624 F.3d at 272.

[150] *Id.* at 270.

[151] *See Nijahwan*, 129 S. Ct. at 2298, 2299–2300.

[152] *See id.* at 2300.

[153] *See id.* at 2302.

[154] *Id.* at 2301.

The Court held that said section calls for a "circumstance-specific" not a "categorical" interpretation[155] because the monetary threshold is not elemental in nature but instead couples a circumstance, $10,000 in this case, with a generic offense.[156] The generic offense remains entitled to the *Taylor* and *Shepard* approaches, but the monetary loss threshold is a circumstance that must be sought out by the immigration judge.[157] In addition, the Supreme Court found that the immigration judge's reliance "upon earlier sentencing-related material" was fair.[158] Specifically, "the defendant's own stipulation, produced for sentencing purposes, shows that the conviction involved losses considerably greater than $10,000."[159]

Because a monetary loss threshold is a DPIO circumstance, as opposed to an element, pleading guilty to an offense that does not contain a monetary loss threshold while admitting to creating a DPIO-triggering loss will nonetheless trigger the DPIO even if the loss is not an element of the criminal offense.[160]

b. Applied to the Domestic Violence DPIO

In *Bianco*, the Fifth Circuit's first opinion addressing *Nijhawan*, the Fifth Circuit applied the *Nijhawan* standard to the domestic violence DPIO codified at 8 U.S.C. Section 1227(a)(2)(E)(i).[161] Recall that the domestic violence DPIO has two components: a crime of violence element and a familial relationship circumstance between the actor and the victim.[162]

The Fifth Circuit in *Bianco* found that the "crime of violence" component was an element demanding traditional analysis, but that that the familial relationship was a circumstance similar to the $10,000 monetary loss threshold found to demand a circumstance-specific inquiry in *Nijhawan*.[163] The Fifth Circuit justified this holding by following through

[155] *Id.* at 2300.

[156] *See id.* at 2302.

[157] *See id.* at 2303.

[158] *See id.*

[159] *Id.*

[160] *See id.* at 2298, 2302 (holding that a petitioner who stipulated to causing a loss that exceeded $100 million for a crime without a monetary loss element threshold triggered a DPIO circumstance).

[161] *See* Bianco v. Holder, 624 F.3d 265, 272–73 (5th Cir. 2010).

[162] *See id.* at 269.

[163] *See id.* at 272–73.

the "door opened by" the Supreme Court, by opining that applying the categorical approach to Section 1227(a)(2)(E)(i) would render that provision, like 8 U.S.C. Section 1101(a)(43)(M)(i) in *Nijhawan*, an empty vessel.[164] More specifically, the Fifth Circuit held that:

> Based on these precedents, we conclude that under Section 1227(a), a crime of domestic violence need not have as an element the domestic relation of the victim to the defendant. We also conclude that the government has the burden to prove the domestic relationship by clear and convincing evidence, using the kind of evidence generally admissible before an immigration judge. The alien may present contrary evidence.[165]

The criminal statute subject to review in *Bianco* was not a Texas statute, but instead from Pennsylvania.[166] Pennsylvania does not have a domestic violence statute and instead prosecutes domestic offenders pursuant to a general assault statute.[167] The Pennsylvania law is exactly the kind of criminal statute that the *Nijhawan* Court believed needed to be given real effect by applying the circumstance-specific approach to give real meaning to the domestic violence DPIO.[168] The Fifth Circuit Court of Appeals recently ruled that the familial relationship required by the domestic violence DPIO is not an element of that offense but instead is a circumstance-specific component that can be analyzed only after a factual inquiry.[169] The Fifth Circuit's rationale was that very few states have

[164] *See id.* at 271 ("[T]he Court observed that '[a]s of 1996, only about one-third of the States had criminal statutes that specifically proscribed *domestic* violence.' Domestic abusers were 'routinely prosecuted under generally applicable assault or battery laws.' Given the relative dearth of state and federal statutes specifically targeting domestic violence, the Court found it highly unlikely that Congress intended to limit its gun prohibition only to persons convicted under laws making the domestic relationship an element of the predicate offense." (citations omitted) (quoting and citing United States v. Hayes, 129 S. Ct. 1079, 1087–88 (2009)).

[165] *Id.* at 272–73.

[166] *See id.* at 267; *see also* 18 PA. CONS. STAT. ANN. § 2702(a)(4) (West 2000 & Supp. 2011).

[167] D'Alessandro v. Pa. State Police, 878 A.2d 133, 139 (Pa. Commw. Ct. 2005), *rev'd on other grounds*, 937 A.2d 404 (Pa. 2007).

[168] *See* Nijhawan v. Holder, 129 S. Ct. 2294, 2302 (2009).

[169] *See Bianco*, 624 F.3d at 272–73 ("Based on these precedents, we conclude that under Section 1227(a), a crime of domestic violence need not have as an element the domestic relation of the victim to the defendant. We also conclude that the government has the burden to prove the

domestic violence statutes in place, and further, that typically domestic violence cases are prosecuted under a generic assault statute.[170] But the Fifth Circuit left open the possibility that if a state had a specific domestic violence statute and the noncitizen was convicted of an assault prosecuted outside that domestic violence statute, it would at the very least cast doubt on effectuating the domestic violence DPIO via a circumstance-specific approach.[171] The Fifth Circuit stated:

> Admittedly, there are variables that can make the considerations identified in *Hayes* and *Nijhawan* not always a clean fit to the facts of a particular removal. For example, a state may adopt statutes that have explicit elements of domestic violence. If the alien could have been convicted under a specific domestic violence crime but was instead convicted under a general one, perhaps due to a plea bargain, would that affect the result?[172]

The Fifth Circuit's decision in *Bianco* does not seem to produce much of an impact on misdemeanor assault pleas.[173] Domestic violence in Texas is prosecuted pursuant to the general Texas assault statute much like in Pennsylvania.[174] But, the Texas statute does have disjunctive elements that a defendant can be prosecuted under for committing a battery against someone with a familial relationship to the actor.[175] Recall that the crime of violence definition for the purposes of this DPIO is codified at 18 U.S.C.

domestic relationship by clear and convincing evidence, using the kind of evidence generally admissible before an immigration judge. The alien may present contrary evidence." (citation omitted)).

[170] *See id.* at 271 ("[T]he Court observed that '[a]s of 1996, only about one-third of the States had criminal statutes that specifically proscribed domestic violence.' Domestic abusers were 'routinely prosecuted under generally applicable assault or battery laws.' Given the relative dearth of state and federal statutes specifically targeting domestic violence, the Court found it highly unlikely that Congress intended to limit its gun prohibition only to persons convicted under laws making the domestic relationship an element of the predicate offense." (citations omitted) (quoting and citing United State v. Hayes, 129 S. Ct. 1079, 1087–88 (2009)).

[171] *See id.* at 273.

[172] *Id.*

[173] *See* Reyes-Olvera, A39 293 808, 2008 WL 1924639, at *2 (BIA Apr. 15, 2008).

[174] *Compare* 18 PA. CONS. STAT. § 2702(a)(4) (West 2000 & Supp. 2011), *with* TEX. PENAL CODE § 22.01(a)(1)–(3) (West 2011).

[175] *See* TEX. PENAL CODE § 22.01(a)(1), (b)(2).

Section 16 and is itself further subdivided into two subparts: 16(a) and 16(b).[176]

In turn, the Texas assault statute is divisible into three easily recognizable subdivisions ranging from (a)(1) through (a)(3).[177] The generic battery definition is found in (a)(1);[178] the generic assault definition is found in (a)(2);[179] and the generic nonconsensual offensive touching in (a)(3).[180]

The Fifth Circuit Court of Appeals has ruled that a misdemeanor Texas Penal Code Section 22.01(a)(1) charge is not a crime of violence as the term is defined in 18 U.S.C. Section 16(a).[181] Therefore, the only manner in which Texas Penal Code Section 22.01(a)(1) can be declared a crime of violence in the Fifth Circuit is to be so declared pursuant to 18 U.S.C. Section 16(b).[182] Nevertheless, 18 U.S.C. Section 16(b) requires the criminal statute to have been prosecuted as a felony, not a misdemeanor to qualify as a crime of violence.[183] So in short, so long as a Texas Penal Code Section 22.01(a)(1) assault remains a misdemeanor, it will not include the use of force as an element of the crime nor will it be a felony under Texas or federal law.[184] Therefore, the *Bianco* and *Nijhawan* opinions,

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[176] *See* 18 U.S.C. § 16 (2006).

[177] *See* TEX. PENAL CODE § 22.01(a)(1)–(3).

[178] *See id.* § 22.01(a)(1).

[179] *See id.* § 22.01(a)(2).

[180] *See id.* § 22.01(a)(3).

[181] *See* Reyes-Olvera, A39 293 808, 2008 WL 1924639, at *2 (BIA Apr. 15, 2008) ("The United States Court of Appeals for the Fifth Circuit, the jurisdiction wherein this case arises, has held that the misdemeanor offense defined by TEX. PENAL CODE § 22.01(a) does not qualify as a crime of violence under 18 U.S.C. § 16(a), and that conclusion is determinative in this case.") (citing United States v. Villegas-Hernandez, 468 F.3d 874, 878–83 (5th Cir. 2006)).

[182] *See id.*

[183] *See* 18 U.S.C. § 16(b) (2006) ("The term 'crime of violence' means—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." (emphasis added)).

[184] *See* Gonzalez-Lopez, A35 048 090, 2007 WL 1194710, at *1 (BIA Mar. 30, 2007) (remanding a case to the immigration judge because a Section 22.01 misdemeanor is not a crime of violence under 18 U.S.C. Section 16(a), and because it is not a felony under state or federal law it is not a crime of violence under 18 U.S.C Section 16(b) either); *see also* Small, 23 I. & N. Dec. 448, 452 (BIA 2002) (Rosenberg, Bd. Member, dissenting) ("A conviction must be for a *felony* offense under the law of the jurisdiction in which the conviction occurs in order to constitute a crime of violence under § 16(b)"). It is important to note at this juncture that the impact of a sentence of 365 days for a class A misdemeanor will not affect the domestic violence label in light

while relevant, are not consequential in Texas misdemeanor assault cases because *Bianco* and *Nijhawan* fill but half the recipe.

Section 22.01(a)(1) felonies are a different matter.[185] The BIA has ruled that a felony prosecution under Section 22.01(a)(1) is a crime of violence for the purposes of Section 16(b).[186] There exists no "wiggle" room because a Section 22.01(a)(1) charge, enhanced by any of the enhancements found in other subsections, will always be a felony.[187] It is in this regard that the *Bianco* and *Nijhawan* decisions become paramount concerns in advising a client to plead guilty to any particular Texas assault offense.

The Fifth Circuit seems to have implied that if a noncitizen pleads guilty to a non-domestic violence assault when that noncitizen could have been prosecuted under a domestic violence statute, then the courts will examine the conviction differently than they would if a separate domestic violence statute exists.[188] I respectfully disagree because I fail to see how that distinction would be one with any significance in light of *Bianco* and *Nijhawan*.

The relationship between the actor and the victim is a "circumstance"—not an element of the offense.[189] That conclusion is the entire basis of the Fifth Circuit's opinion in *Bianco*, and because it is not an element, *Taylor* and *Shepard* do not apply.[190] The Fifth Circuit Court of Appeals has clearly ruled that the familial relationship is a "circumstance."[191] If that familial relationship is a circumstance, then it is a circumstance in all settings whether a domestic violence element exists as part of some uncharged criminal statute.

of the matters discussed directly above, but a sentence of 365 days will invoke the removal procedures triggered by the aggravated felony for a crime of violence where the sentence imposed is at least one year. *See* 18 U.S.C. § 16; *see also* 8 U.S.C. § 1227(a)(1)(H)(i)(II). The crime of violence definition used by domestic violence deportation-invoking offenses depends on the law of the jurisdiction where the conviction occurs, so a sentence of 365 days does not matter so long as the offense charged is a misdemeanor. *See Reyes-Olvera*, 2008 WL 1924639, at *3.

[185] *See Reyes-Olvera*, 2008 WL 1924639, at *3.

[186] *See id.*

[187] *See* TEX. PENAL CODE § 22.001(a)(1)–(b-1)(B) (West 2011).

[188] *See* Bianco v. Holder, 624 F.3d 265, 273 (5th. Cir. 2010).

[189] *See id.* at 272–73.

[190] *See id.* at 273.

[191] *See id.* at 272–73.

A circumstance demands a factual inquiry to establish its presence.[192] That, at least, is the import of *Bianco* and *Nijhiwan*, so it is difficult to imagine suspension of that otherwise applicable inquiry if the state penal code has a domestic violence statute on the books.[193] Such a holding would allow state law to control the appropriate interpretive approach that federal courts should take when faced with this DPIO.[194] The Fifth Circuit has unsuccessfully gone down that path before.[195]

Criminal defense attorneys should assume that the Fifth Circuit *would* utilize the circumstance-specific approach when constructing a plea bargain.[196] Because if anything, a defendant that pleads guilty to a domestic violence element-based offense will save the immigration judge the trouble of reviewing the documents that are "necessary and appropriate."[197] Likewise, a defendant that pleads guilty to an assault that does not contain a domestic-violence element will find himself in the exact situation as the defendant in *Bianco*: facing a factual inquiry because the relationship between the actor and the victim is a circumstance.[198] A circumstance demands an inquiry regardless of whether that circumstance is codified somewhere in the state penal code as an element of some uncharged offense.[199]

In closing, when trying to avoid triggering the domestic violence DPIO, the defendant should plead guilty to a misdemeanor. If that is not an option, the next choice is to plead guilty to a felony that does not have as an element a domestic relationship between the actor and the victim. Finally, the worst situation for such a defendant is to plead guilty to violating Texas

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[192] *See id.*

[193] *See id.*; *see also* Nijhawan v. Holder, 129 S. Ct. 2294, 2302 (2009).

[194] *See* U.S. v. Leonard¸ 868 F.2d 1393, 1397 (5th Cir. 1989), *overruled by* Taylor v. U.S., 495 U.S. 575, 580 (1990) (explaining how varying state statutes on burglary require a different interpretive approach for the federal court).

[195] *See id.*

[196] *See Bianco*, 624 F.3d at 269–70 (explaining and giving "respectful consideration" to the Ninth Circuit's decision to use a categorical approach, but examining that decision in light of Supreme Court decisions "that arguably opened the door to a new 'circumstance-specific' approach").

[197] *See id.* at 273 (explaining how petitioner's concession that the victim of the assault was the petitioner's husband, along with restitution for the husband and participation in a domestic violence program were sufficient to amount to admissible proof of a crime of domestic violence).

[198] *See id.* at 272–73.

[199] *See id.*

Penal Code Section 22.01(b)(2), (b-1)(1), or (b-1)(2)[200] because under either the modified categorical approach or the circumstance-specific approach, the defendant will undoubtedly be found deportable pursuant to the domestic violence DPIO.[201]

2. The Traditional and Modified Categorical Approaches After *Silva-Trevino*

The other major change to *Taylor* and *Shepard* in immigration proceedings relates to the method by which immigration officials have decided to adjudicate allegations involving CIMTs.[202] CIMTs have been steadily increasing over the last decade.[203] The INA does not define CIMTs,[204] presumably because moral turpitude is a definition that "necessarily changes over time and from place to place."[205] However, collecting the case law tends to yield the following definition: a CIMT is a crime that society finds particularly morally objectionable and that is inherently wrong because it is committed with a specific intent, or with deliberateness, willfulness, or recklessness.[206] Of all the grounds for

[200] *See* TEX. PENAL CODE ANN. § 22.01(b)(2), (b-1)(1)–(2) (West 2011).

[201] *See Bianco*, 624 F.3d at 273.

[202] *See* Louissaint, 24 I. & N. 754, 757 (BIA 2009).

[203] *See* Syracuse Univ., *Individuals Charged with Moral Turpitude in Immigration Court*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (2008), http://trac.syr.edu/immigration/reports/moral_turp.html.

[204] Silva-Trevino, 24 I. & N. Dec. 687, 693 (A.G. 2008) ("[The INA] is also silent on the precise method that immigration judges and courts should use to determine if a prior conviction is for a crime involving moral turpitude").

[205] *See* Dadhania, *supra* footnote 27, at 319 n.33 ("Since 'moral turpitude' refers to moral standards, rather than legal standards, its definition necessarily changes over time and from place to place." (quoting Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 265 (2000)) (citing United States *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534, 537 (E.D. Pa. 1947) (stating moral turpitude reflects changing moral standards); Skrmetta v. Coykendall, 16 F.2d 783, 784 (N.D. Ga. 1926) (stating moral turpitude is "measured by the general moral standards of the time and country")).

[206] *See* Orosco v. Holder, 396 Fed. App'x 50, 52 (5th Cir. 2010) ("The BIA, through its administrative decisions, has crafted the following definition of the term 'moral turpitude': 'Moral turpitude refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude. Among the tests to determine if a crime involves moral turpitude is whether the act is accompanied by a

deportation, this is by far the oldest.[207]

As early as 1954, the BIA was using a test turned toward the elements of the offense—not the specific acts committed by the defendant—to determine if a criminal statute inherently involved moral turpitude.[208] And yet, it would be forty years before the BIA would use the term "categorical approach" in one of its opinions.[209] The categorical approach, discussed at length earlier in this Article, again considers whether the offenses defined under the state or federal criminal statute in question by definition necessarily involve moral turpitude by looking only to the elements of the conviction.[210]

Some courts look at whether moral turpitude inheres in those acts that would be realistically prosecuted under the statute;[211] and others look to whether moral turpitude would inhere in the minimum conduct required to satisfy the elements of the offense being reviewed.[212] The Fifth Circuit Court of Appeals follows the latter method of determining whether a particular law meets the BIA's definition of a CIMT.[213] In the Fifth Circuit, "if the orbit of the statute may include offenses not inherently entailing moral turpitude, then the crime is not a crime involving moral turpitude."[214]

A major exception to this general rule exists "if the statute is divisible into discrete subsections of acts that are and those that are not CIMTs."[215]

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vicious motive or a corrupt mind.'" (quoting Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir. 2006))).

[207] *See* Cabral v. INS 15 F.3d 193, 194 (1st Cir. 1994) (citing S. REP. NO. 81-1515, at 350 (1950)) ("The available legislative history reveals that the term 'moral turpitude' first appeared in the federal immigration laws in 1891.").

[208] *See* R—, 6 I. & N. Dec. 444, 447–48 (BIA 1954).

[209] *See* Alcantar, 20 I. & N. Dec. 801, 809 (BIA 1994).

[210] *See supra* Part IV.B.

[211] *See* Nicanor-Romero v. Mukasey, 523 F.3d 992, 1004–05 (9th Cir. 2008) (discussing the realistic probability test), *overruled on other grounds by* Marmolejo-Campos v. Holder, 558 F.3d 903, 911 (9th Cir. 2009).

[212] *See* Smalley v. Ashcroft, 354 F.3d 332, 336 (5th Cir. 2003) (citing Omagah v. Ashcroft, 288 F.3d 254, 258 (5th Cir. 2002)); Okoro v. INS, 125 F.3d 920, 925 n.10 (5th Cir. 1997)).

[213] *See* Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir. 2006).

[214] *Id.* (internal quotations omitted); *see also* Orosco v. Holder, 396 Fed. App'x 50, 54 (5th Cir. 2010) ("The failure to report an accident involving a parked car to the local police department after leaving the name and address to notify the driver of the parked car of the incident is not conduct that rises to the level of moral turpitude . . . .").

[215] Garcia-Maldonado v. Gonzales, 491 F.3d 284, 288 (5th Cir. 2007) (quoting *Smalley*, 354 F.3d at 336).

If the statute is divisible, the Fifth Circuit Court of Appeals will look, just like in the federal criminal enhancement setting, to the record of conviction to "determine whether [the defendant] has been convicted of a subsection that qualifies as a CIMT."[216] Historically, if the record of conviction did not make clear which subsection of the otherwise divisible statute the noncitizen was convicted of, the inquiry ended, and the Fifth Circuit did not consider the conviction as one arising from moral turpitude.[217]

This all changed on November 7, 2008.[218] On that date, Attorney General Mukasey issued *Silva-Trevino* and set the test that now controls all immigration officials adjudicating deportation proceedings:[219]

> [In order] to determine whether an alien's prior conviction triggers application of the Act's moral turpitude provisions, adjudicators should: (1) look first to the statute of conviction under the categorical inquiry set forth in this opinion and recently applied by the Supreme Court in *Duenas-Alvarez*; (2) if the categorical inquiry does not resolve the question, look to the alien's record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript; and (3) if the record of conviction does not resolve the inquiry, consider any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question.[220]

The Attorney General's decision in *Silva-Trevino* caused a motion for reconsideration almost immediately that was ultimately denied.[221] Various amici curiae also filed briefs protesting *Silva-Trevino*.[222] The American Bar

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[216] *Id.*

[217] *See* Hamdan v. INS, 98 F.3d 183, 189 (5th Cir. 1996).

[218] *See* Silva-Trevino, 24 I. & N. Dec. 687 (A.G. 2008).

[219] *See id.* at 696 (citing 8 C.F.R. § 1003.1(d)(1) (2008)).

[220] *Id.* at 704.

[221] *See* Letter from the Am. Immigration Law Found. et al., to Eric H. Holder, Attorney Gen. of the U.S. (Mar. 3, 2009), http://www.aila.org/content/default.aspx?docid=28187.

[222] *See id.*; *see also* Brief for Am. Immigration Lawyers Ass'n et al. as Amici Curiae Supporting Reconsideration, Silva-Trevino, 24 I. & N. Dec. 687 (A.G. 2008) (A013 014 303), http://www.immigrantdefenseproject.org/docs/08_SilvaTrevinoAmicusBrief.pdf.

Association has also challenged the *Silva-Trevino* opinion.[223] At least two circuit courts of appeals have expressly rejected *Silva-Trevino*.[224] And, a third has recognized some disagreement.[225] However, the Fifth Circuit Court of Appeals has yet to cite *Silva-Trevino*.[226] In addition, although *Silva-Trevino* faces strong opposition,[227] the purpose of this Article is to apprise Texas practitioners of immigration consequences arising from a guilty plea in state court, not to evaluate the correctness of *Silva-Trevino*. For the time being, Texas criminal defense attorneys have to learn to live under *Silva-Trevino*'s new structure.[228]

Nevertheless, extrapolating some guidance from the above is possible. First, the Attorney General's "realistic probability" test for determining the first step is currently at odds with the Fifth Circuit's "minimum conduct" approach for determining the first step.[229] Second, now more than ever, any admission of any fact could conceivably be reviewed by an immigration official adjudicating a deportation proceeding.[230] Third, this new method applies to CIMT DPIOs.[231] Fourth, and most importantly, because of the disrepair in which this area of the law currently sits, criminal defense attorneys should avoid pleading their clients to offenses where it could be argued that the crime is one that involves moral turpitude.[232]

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[223] *See* Letter from Mark D. Agrast & Anthony Joseph, ABA, to Eric H. Holder, Attorney Gen. of the U.S. (Jan. 22, 2010), http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/immigration/2010jan26_silvatrevino_l.authcheckdam.pdf.

[224] *See* Jean-Louis v. Attorney Gen., 582 F.3d 462, 470 (3rd Cir. 2009); *see also* Guardado-Garcia v. Holder, 615 F.3d 900, 902 (8th Cir. 2010) (explaining the court's duty to adhere to Eighth Circuit law to the extent *Silva-Trevino* is inconsistent).

[225] *See* Castillo-Torres v. Holder, 394 Fed. App'x 517, 520–21 (10th Cir. 2010).

[226] *See* Dadhania, *supra* footnote 27, at 340.

[227] *See id.* at 346.

[228] *See* Tooby & Kesselbrenner, *supra* footnote 143.

[229] *Compare* Silva-Trevino, 24 I. & N. Dec. 687, 699 n.2 (A.G. 2008) ("If an immigration judge determines, based on application of the realistic probability approach, that a prior conviction is categorically a crime involving moral turpitude, there is no reason to proceed to a second stage."), *with* Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir. 2006) ("Under the categorical approach, we read the statute at its minimum, taking into account the minimum criminal conduct necessary to sustain a conviction under the statute." (internal quotations omitted)).

[230] *See Silva-Trevino*, 24 I. & N. Dec. at 704.

[231] *See id.* at 688.

[232] In the appended chart, only offenses that are categorically not CIMTs were given the "N" symbol, and if I believed any ambiguity exists, I elected to use the "?" symbol to denote any reasonable probability of that type of offense going either way. *See infra* app.

V. THE FEDERAL SENTENCING ENHANCEMENTS FOR 8 U.S.C. SECTION 1326

Federal criminal immigration felony prosecutions rose seventy-seven percent between 2007 and 2010.[233] Some experts suggest that this increase is because, from a prosecution standpoint, Section 1326 cases are "relatively simple cases [that] have become the low-hanging fruit of the federal legal system."[234] Other experts posit that we are seeing the product of a failed immigration reform bid in 2007.[235] The data also suggest that the leading charged felony in this increased number of prosecutions is 8 U.S.C. Section 1326, which punishes noncitizens that are formally deported from the United States and are later found again in the United States.[236] Section 1326(b) carries harsh consequences (up to a twenty-year term of imprisonment) if the noncitizen has been deported or removed after conviction of a crime and later is found anew in the United States.[237]

These enhancements are especially relevant to Texas criminal defense attorneys for several reasons. First, a strong probability exists that a noncitizen with established ties to the nation will attempt to re-enter after being deported.[238] Second, the scope of *Padilla* warnings is not entirely clear.[239] Third, antecedent criminal convictions are double-counted for 8

[233] *See* Syracuse Univ., *Federal Criminal Enforcement and Staffing: How Do the Obama and Bush Administrations Compare?*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Feb. 2, 2011), http://trac.syr.edu/tracreports/crim/245/.

[234] *See* John Schwartz, *Immigration Enforcement Fuels Rise in U.S. Cases*, N.Y. TIMES, Dec. 22, 2009, at A16 *available at* http://www.nytimes.com/2009/12/22/us/22crime.html.

[235] *See* Syracuse Univ., *supra* footnote 233.

[236] *See* Syracuse Univ., *Criminal Immigration Prosecutions Are Down, but Trends Differ by Offense*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (March 17, 2010), http://trac.syr.edu/immigration/reports/227/.

[237] *See* 8 U.S.C. § 1326(b)(2) (2008); *see also* Syracuse Univ., *supra* footnote 236.

[238] *See, e.g.*, United States v. Gomez-Herrera, 523 F.3d 554, 557 (5th Cir. 2008) (stating that the defendant's "ties to the United States and lack of ties to Mexico made him more likely to return illegally").

[239] *See, e.g.*, United States v. Bakilana, No. 1:10-cr-00093, 2010 WL 4007608, at *3 n.2 (E.D. Va. Oct. 12, 2010) ("Potential damages liability in a suit by a victim simply does not rise to the same level as deportation in terms of its pervasive effects on a defendant's life."); Maxwell v. Larkins, No. 4:08 CV 1896, 2010 WL 2680333, at *10 (E.D. Mo. July 1, 2010); Brown v. Goodwin, Civil No. 09-211, 2010 WL 1930574, at *13 (D.N.J. May 11, 2010); United States v. Rose, ACM 36508, 2010 WL 4068976, at *2 (A.F. Ct. Crim. App. June 11, 2010); People v. Gravino, 928 N.E.2d 1048, 1052–53 n.4 (N.Y. 2010).

U.S.C. Section 1326 purposes.[240] In light of all of these considerations, the following part is provided to Texas criminal defense attorneys that may wish to incorporate federal criminal sentencing consequences into their calculus on a specific case before suggesting a guilty plea.

This Article is intended primarily for Texas criminal defense attorneys prospectively planning the consequences of entering a Texas guilty plea. Nevertheless, what follows could be useful to a federal criminal defense attorney reviewing a Pre-Sentence Investigation Report prepared by the United States Probation Office or advising a client about the federal sentencing consequences of previous offenses in an 8 U.S.C. Section 1326 prosecution.

A. The 16-Level Enhancement

Again, a noncitizen that is formally deported from the United States after conviction of a crime faces harsh consequences upon return to, and discovery in, the United States.[241] The harshest of those consequences are found in Sentencing Guideline Section 2L1.2(b)(1)(A), which increases the base offense level by sixteen levels if the alien has previously been convicted of one of the seven types of serious offenses listed in this enhancement.[242] Six of those offenses are defined relatively clearly in the comments to Section 2L1.2.[243] Arguably the most complex and difficult-to-discern definition is that of what constitutes a crime of violence for the purposes of Sentencing Guideline Section 2L1.2(b)(1)(A)(ii).[244]

The application note to Section 2L1.2 defines the term "crime of violence" as being either (a) any of a list of specified enumerated

[240] *See* United States v. Duarte, 569 F.3d 528, 529 (5th Cir. 2009) (showing that "double-counting" occurs because previous crimes are factored into the calculation of both the criminal history category and the offense level). This "double-counting" has been repeatedly challenged unsuccessfully. *See id.* at 529 n.5.

[241] *See* 8 U.S.C. § 1326(b)(1)–(b)(2) (instituting penalty of fines, imprisonment, or both).

[242] U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2010) (stating "a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels").

[243] *See id.* § 2L1.2 cmt. n.1(B)(i)–(vi) (defining drug trafficking, firearms, child pornography, terrorism, human trafficking, and alien smuggling offenses).

[244] *See id.* § 2L1.2(b)(1)(A)(ii).

offenses,[245] or (b) "any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another."[246] The approach employed depends on whether the proposed enhancement is sought by application of a specified "crime of violence" enumerated offense or the application of the later residual clause.[247]

In deciding whether a prior statute of conviction qualifies as a crime of violence, the Fifth Circuit Court of Appeals has alternatively employed (1) a common sense approach, defining the offense according to its ordinary, contemporary, and common meaning, or (2) a categorical approach defining the offense according to a generic, contemporary definition.[248] The categorical approach is discussed in detail in earlier parts of this Article.[249] The Fifth Circuit Court of Appeals looks to sources such as the Model Penal Code, Professor LaFave's treatise, and legal dictionaries when seeking to distill the plain and ordinary meaning of an offense.[250]

It is not entirely clear what the difference is between the "common sense approach" and "the categorical approach"—if one exists at all—because both approaches look to create a "generic" definition and compare it to the criminal offense.[251] For example, both the Ninth Circuit and the Fifth Circuit rely on the Model Penal Code in defining generic offenses but appear to call the conclusions they arrive at by two different, albeit similar,

[245] *See id.* § 2L1.2 cmt. n.1(B)(iii) (stating "murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling").

[246] *Id.*

[247] *See* United States v. Olalde-Hernandez, 630 F.3d 372, 374 (5th Cir. 2011).

[248] *See id.*

[249] *See supra* Part IV.B.

[250] United States v. Mungia-Portillo, 484 F.3d 813, 816 (5th Cir. 2007).

[251] *See* United States v. Esparza-Herrera, 557 F.3d 1019, 1023 (9th Cir. 2009) ("We do not use the common sense approach. Instead, we must apply the categorical approach even when the object offense is enumerated as a per se crime of violence under the [Sentencing] Guidelines. In applying the categorical approach to a traditional crime such as aggravated assault, we derive the crime's uniform meaning from the generic, contemporary meaning employed by most states, guided by scholarly commentary. The Model Penal Code serves as an aid in determining an offense's generic meaning. We derive the meaning of an enumerated Guidelines crime not from the offense's ordinary meaning but rather by surveying the Model Penal Code and state statutes to determine how they define the offense." (internal quotations and citations omitted)).

names.[252] Nevertheless, I could deduce only a small difference between the two: the respective court's willingness to survey state statutes.[253] The Fifth Circuit's use of terms from each test interchangeably has furthered this lack of clarity.[254]

B. The 12-Level Enhancement

The 12-level enhancement is a great deal more straightforward because a drug trafficking offense is defined in the Application Notes to Sentencing Guideline Section 2L1.2.[255] The major source of litigation concerning this particular enhancement was its applicability to a state offense that criminalized a mere offer to sell.[256] Nevertheless, that litigation was settled via a 2008 amendment to the Guidelines, which expanded the definition of a drug trafficking offense to include an "offer to sell a controlled

[252] *Compare id.* ("We derive the meaning of an enumerated [Sentencing] Guidelines crime not from the offense's ordinary meaning but rather by surveying the Model Penal Code and state statutes to determine how they define the offense."), *with Mungia-Portillo*, 484 F.3d at 816 ("To distill the plain, ordinary meaning, this court looks to sources such as the Model Penal Code, Professor LaFave's treatise, and legal dictionaries.").

[253] *Compare Esparza-Herrera*, 557 F.3d at 1024 (describing survey of state statutes as tool for determining *mens rea* element of aggravated assault), *with Mungia-Portillo*, 484 F.3d at 817 (reflecting the court's choice to not look beyond the specific state's statute and its correlation with the Model Penal Code in determining *mens rea* element of aggravated assault).

[254] *See* United States v. Gore, 636 F.3d 728, 745 (5th Cir. 2011) ("[W]e employ a common sense approach based on the term's generic, contemporary meaning to determine whether it encompasses a particular state's version of that offense." (internal quotations omitted)), *petition for cert. filed*, (U.S. Sept. 28, 2011) (No. 11-6606); United States v. Martinez Valdez, No. 10 50154, 2011 WL 1057578, at *524 (5th Cir. Mar. 23, 2011) ("Because the Guidelines do not further define 'forgery,' the court applies a 'common sense approach' and defines the enumerated crime by its 'generic, contemporary meaning."); United States v. Esparza Andrade, No. 10 40586, 2011 WL 924262, at *357 (5th Cir. Mar. 17, 2011) ("[T]his court uses a 'common sense approach.' This court gives the enumerated offense its ordinary, contemporary, and common meaning." (citations omitted)).

[255] U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(iv) (2010) ("'Drug trafficking offense' means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.").

[256] *See* United States v. Marban-Calderon, 631 F.3d 210, 212 (5th Cir. 2011) (surveying Fifth Circuit precedent establishing that a mere offer to sell was not a drug trafficking offense under this guideline), *cert. denied*, 132 S. Ct. 129 (2011).

substance."[257] In deciding whether a Texas conviction qualifies as a drug trafficking offense, the Fifth Circuit applies the categorical approach announced in *Taylor* and *Shepard*, considering only the elements of the offense and those facts essential to the conviction.[258]

C. The 8-Level Enhancement

The 8-level enhancement is found in Sentencing Guideline Section 2L1.2(b)(1)(C) and provides for the enhancement in prosecutions where the defendant has been convicted of an aggravated felony.[259] The aggravated felony, which triggers the 8-level enhancement, relies on the same definition of aggravated felony that makes many aliens deportable in the first place.[260] Recent developments in the determination of what constitutes an aggravated felony and the manner by which courts interpret state offenses warranted the discussion earlier in this Article.[261]

D. The 4-Level Enhancements

There are two 4-level enhancements which can be found at Sentencing Guideline Section 2L1.2(b)(1)(D) and (E).[262] Section 2L1.2(b)(1)(D) enhances the base offense level by four levels if the defendant has been convicted for any other felony while Section 2L1.2(b)(1)(E) enhances the base offense level by four levels if the defendant has been convicted of three or more misdemeanors that are crimes of violence[263] or drug trafficking offenses.[264] Practitioners should look to state-court documents to determine the exact offense that the defendant pled guilty to and determine the offense level under state law. If the offense is at least a state

[257] *See* United States v. Castillo-Estevez, 597 F.3d 238, 240 (5th Cir. 2010) (discussing the amendment to the Sentencing Guidelines), *cert. denied*, 131 S. Ct. 457 (2010).

[258] *See Marban-Calderon*, 631 F.3d at 212 (citing Shepard v. United States, 544 U.S. 13, 16 (2005); Taylor v. United States, 495 U.S. 575, 602 (1990)).

[259] U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C).

[260] U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.3(A) ("For purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.").

[261] *See supra*, part II.a.

[262] U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D)–(E).

[263] *See id.*; *see also id.* § 2L1.2 cmt. n.1(B)(iii).

[264] *See id.* § 2L1.2(b)(1)(D)–(E); *see also id.* § 2L1.2 cmt. n.1(B)(iv).

jail felony it will qualify as a felony for the purposes of this enhancement.[265]

Additionally, this is the only enhancement in Section 2L1.2 that accounts for certain misdemeanors if those misdemeanors are crimes of violence or involve drug trafficking.[266] Fifth Circuit precedent as to this enhancement is scarce.[267] However, this scarcity is probably a result of the state usually prosecuting crimes of violence (which would trigger the 16-level enhancement) and drug trafficking (which would trigger the 16-level, or 12-level enhancement) as felonies, especially given the relatively recent expansion of what constitutes a drug-trafficking offense.

VI. CONCLUSION

The negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.[268] In turn, immigration consequences are a critically important component of a noncitizen's decision to plead guilty.[269] Criminal defense attorneys must inform their clients whether a plea bargain carries a risk of deportation because of: (1) longstanding Sixth Amendment precedents, (2) the seriousness of deportation, and (3) the "concomitant impact of deportation on families living lawfully in this country demand no less."[270]

That said, immigration law is often complex and usually requires its own legal specialty. In addition, some attorneys who represent clients facing criminal charges in either state or federal court may not be as familiar with it as the Supreme Court expects them to be.[271] Despite that

[265] *See* United States v. Martinez-Padron, 401 Fed. App'x 934, 935 (5th Cir. 2010) (citing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.2; United States v. Rivera-Perez, 322 F.3d 350, 352 (5th Cir. 2003)).

[266] *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (b)(1)(E).

[267] *See* United States v. Hernandez-Castillo, 381 Fed. App'x 397, 399 (5th.Cir. 2010); United States v. Cardenas-Landin, 266 Fed. App'x 368, 369 (5th Cir. 2008); United States v. Landeros-Reyes, 229 Fed. App'x 302, 303 (5th Cir. 2007); United States v. Magdaleno-Sanchez, 169 Fed. App'x 830, 830–31 (5th Cir. 2006); United States v. Sanchez-Torres, 136 Fed. App'x 644, 646 (5th Cir. 2005); United States v. Ayala-Bermudes, 61 Fed. App'x 917, 917 (5th Cir. 2003) (per curiam).

[268] Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (citing Hill v. Lockhart, 474 U.S. 52, 57 (1985)).

[269] *See id.*

[270] *Id.*

[271] *See id.* at 1483.

complexity, it is no longer an option to continue to represent noncitizens in criminal proceedings without obtaining some basic knowledge of the immigration consequences of a guilty plea.

This Article's aim was to provide that basic knowledge. Nevertheless, any Article that purports to map precisely the interaction between immigration deportation proceedings, state criminal offenses, and the federal sentencing guidelines will undoubtedly leave important points left unsaid. This is a starting point, not an exhaustive resource and under no circumstances an omniscient guide.

APPENDIX

I. CHART LAYOUT

A. Using the Guide

The Guide tracks adverse immigration consequences as well as the typical United States Sentencing Guideline enhancements found in Sentencing Guideline Section 2L1.2.[1] The Chart is numerically organized in ascending order by the relevant Texas Penal Code sections followed with the Texas Health and Safety Code sections outlawing drug related offenses.

1. The Guide Is Actually Two Volumes

The Guide has two volumes: (1) the Chart itself and (2) the endnotes that justify the consequence noted in the Chart. From the inception of this project, my goal has been to provide practitioners with an accessible chart that can be easily carried in a briefcase to court for use as a quick reference. At the same time, the Chart needed to balance easy access with providing relevant authorities for further research. In that spirit, the Chart breaks into simple, discrete components with each component representing consequences for a particular offense, and practitioners can find authority for the consequences in the endnotes.

2. All Information Provided on the Chart Listing Is Relevant to the Analysis

If a particular offense is listed more than once, readers should pay considerable attention to the distinct variables that warrant the separate listing—i.e., burglary of a habitation with an intent to commit theft versus burglary of a habitation with an intent to commit another felony—and the distinction in consequences that the circumstantial variable in the charge

[1] Sentencing Guideline Section 2L1.2 is the sentencing guideline suggesting the advisory sentence for a violation of 8 U.S.C. Section 1326. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2011).

produces. The Chart lists separate entries to account for variables that affect the analysis, including imprisonment-term length, weapon or vehicle use, loss to the victim, and etcetera. This keeps the Chart more organized and makes explicit what the consequences of one type of plea, even from within the same statute, can produce as opposed to another type of plea.

B. Consideration of United States Sentencing Guideline Section 2L1.2 Enhancements

In addition to the likely immigration consequences of a guilty plea, the Chart provides the likely sentencing enhancements routinely applied to base offense levels when the United States Probation Office is constructing a Pre-Sentencing Investigation Report for the sentencing court's benefit in an action where the defendant is charged with violating 8 U.S.C. Section 1326. Further reasons for including these consequences appear earlier in the Article.[2]

Additionally, the Chart provides analysis of every enhancement, for every offense. There are times when multiple enhancements apply for a given offense, e.g., murder. Nevertheless, the Fifth Circuit has made it clear that "the Sentencing Commission is aware of the redundancies contained in the guidelines, and has instructed courts to '[a]pply the [g]reatest' enhancement applicable."[3] Cautionary practitioners should assume that the highest available enhancement will be applied.

[2] See *supra* Part IV.

[3] United States v. Gomez-Gomez, 547 F.3d 242, 248 (5th Cir. 2008) (en banc) (citing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)), *superseded by regulation*, U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(iii) (2010), *as recognized in* U.S. v. Diaz-Corado, 648 F.3d 290, 294 (5th Cir. 2011).

II. KEY

FOR DETERMINING SELECTED IMMIGRATION AND SELECTED FEDERAL SENTENCING CONSEQUENCES OF SELECTED TEXAS OFFENSES[4]

Enhancement/Label Applies	Y
Enhancement/Label Does Not Apply	N
Enhancement/Label Not Clear	?
Aggravated Felony Concern	Agg. Fel.
Crime Involving Moral Turpitude Concern	C.I.M.T.
Immigration Domestic Violence Violation Removal Concern	D.V.
Immigration Protective Order Violation Removal Concern	P.O.
Immigration Firearms and Explosives Violation Removal Concern	F.A.
Immigration Stalking Violation Removal Concern	Stalk
Immigration Controlled Substance Violation Removal Concern	C.S.
Immigration Child Abuse Violation Removal Concern	C.A.

[4] Many thanks to Jodilyn M. Goodwin and Jaime Diez for lending their almost combined forty-year immigration law experiences to this project. Both graciously met with me—on more than one occasion—to provide extremely valuable feedback that I have tried my best to incorporate herein. Whatever error or omission follows herein is the sole responsibility of the author.

III. THE CHART

1. Tex. Penal Code Ann. § 19.02 (Felony) – Murder

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[1]	Y[2]	Y[3]	N	Y[4]	Y[5]

2. Tex. Penal Code Ann. § 19.02 (Felony) – Manslaughter

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[6]	Y[7]	Y[8]	N	Y[9]	Y[10]

3. Tex. Penal Code Ann. § 19.04 (Felony) – Involuntary Manslaughter

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N[11]	?[12]	Y[13]	N	N	Y[14]

4. Tex. Penal Code Ann. § 19.05 (Felony) – Criminally Negligent Homicide

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	?[15]	N	N	N	Y[16]

5. Tex. Penal Code Ann. § 20.02(c)(1), (2) (Felony) – Unlawful Restraint with a Sentence of at Least One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[17]	Y[18]	N[19]	N	Y[20]	Y[21]

6. Tex. Penal Code Ann. § 20.02 (Misdemeanor) – Unlawful Restraint with a Sentence of Less than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N[22]	N	N[23]	N	N	N

7. Tex. Penal Code Ann. § 20.03 (Felony) – Kidnapping

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[24]	?[25]	Y[26]	N	Y[27]	Y[28]

8. Tex. Penal Code Ann. § 21.11(a)(1) (Felony) – Indecency with a Child via Contact

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[29]	Y[30]	Y[31]	N	Y[32]	Y[33]

9. Tex. Penal Code Ann. § 21.11(a)(2) (Felony) – Indecency with a Child via Exposure

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[34]	Y[35]	Y[36]	N	Y[37]	Y[38]

10. Tex. Penal Code Ann. § 22.01(a)(1) (Misdemeanor) – Assault with a Sentence of Exactly One Year

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	D.V.	+16	+12	+8	+4
N[39]	?[40]	N[41]	N[42]	N	N[43]	N[44]

11. Tex. Penal Code Ann. § 22.01(a)(1) (Misdemeanor) – Assault with a Sentence of Less than One Year

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	D.V.	+16	+12	+8	+4
N[45]	?[46]	N[47]	N[48]	N	N[49]	N[50]

12. Tex. Penal Code Ann. § 22.01(b), (b-1) (Felony) – Assault with a Sentence of Less than One Year

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	D.V.	+16	+12	+8	+4
N	?[51]	?[52]	N[53]	N	N	Y[54]

13. Tex. Penal Code Ann. § 22.01(b), (b-1) (Felony) – Assault with a Sentence of Exactly One Year

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	D.V.	+16	+12	+8	+4
Y[55]	?[56]	?[57]	N[58]	N	Y[59]	Y[60]

14. Tex. Penal Code Ann. § 22.01(b), (b-1) (Felony) – Assault with a Sentence Greater than One Year

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	D.V.	+16	+12	+8	+4
Y[61]	?[62]	?[63]	N[64]	N	Y[65]	Y[66]

15. Tex. Penal Code Ann. § 22.01(a)(2) (Misdemeanor) – Assault with a Sentence of Exactly One Year

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	D.V.	+16	+12	+8	+4
Y[67]	N[68]	?[69]	N[70]	N	Y[71]	N[72]

16. Tex. Penal Code Ann. § 22.01(a)(2) (Misdemeanor) – Assault with a Sentence of Less than One Year

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	D.V.	+16	+12	+8	+4
N[73]	N[74]	?[75]	N[76]	N	N[77]	N[78]

17. Tex. Penal Code Ann. § 22.01(a)(3) (Misdemeanor) – Assault with a Sentence of Exactly One Year

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	D.V.	+16	+12	+8	+4
N[79]	N[80]	N[81]	N[82]	N	N[83]	N[84]

18. Tex. Penal Code Ann. § 22.01(a)(3) (Misdemeanor) – Assault with a Sentence of Less than One Year

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	D.V.	+16	+12	+8	+4
N[85]	N[86]	N[87]	N[88]	N	N[89]	N[90]

19. Tex. Penal Code Ann. § 22.02(a)(1) (Felony) – Aggravated Assault with Bodily Injury and a Sentence Greater than One Year

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	D.V.	+16	+12	+8	+4
Y[91]	Y[92]	?[93]	Y[94]	N	Y[95]	Y[96]

20. Tex. Penal Code Ann. § 22.02(a)(1) (Felony) – Aggravated Assault with Bodily Injury and a Sentence of Less than One Year

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	D.V.	+16	+12	+8	+4
N	Y[97]	?[98]	Y[99]	N	N	Y[100]

21. Tex. Penal Code Ann. § 22.02(a)(2) (Felony) – Aggravated Assault with a Deadly Weapon and a Sentence Greater than One Year

Immigration Status				U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	F. A.	D.V.	+16	+12	+8	+4
Y[101]	Y[102]	?[103]	?[104]	Y[105]	N	Y[106]	Y[107]

22. Tex. Penal Code Ann. § 22.02(a)(2) (Felony) – Aggravated Assault with a Deadly Weapon and a Sentence of Less than One Year

Immigration Status				U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	F. A.	D.V.	+16	+12	+8	+4
N	Y[108]	?[109]	?[110]	Y[111]	N	N	Y[112]

23. Tex. Penal Code Ann. § 22.011 (Felony) – Sexual Assault with an Adult Victim

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[113]	Y[114]	Y[115]	N	Y[116]	Y[117]

24. Tex. Penal Code Ann. § 22.011 (Felony) – Sexual Assault with a Minor Victim

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[118]	Y[119]	Y[120]	N	Y[121]	Y[122]

25. Tex. Penal Code Ann. § 22.021 (Felony) – Aggravated Sexual Assault

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[123]	Y[124]	Y[125]	N	Y[126]	Y[127]

26. Tex. Penal Code Ann. § 22.04 (Felony) – Injury to a Child, Elderly Individual, or Disabled Individual with a Sentence Greater than One Year

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	C.A.	+16	+12	+8	+4
?[128]	?[129]	?[130]	N[131]	N	?[132]	Y[133]

27. Tex. Penal Code Ann. § 22.04 (Misdemeanor) – Injury to a Child, Elderly Individual, or Disabled Individual with a Sentence of Less than One Year

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	C.A.	+16	+12	+8	+4
N[134]	?[135]	?[136]	N[137]	N	N[138]	N[139]

28. Tex. Penal Code Ann. § 22.041(c) (Felony) – Abandoning or Endangering a Child

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	C.A.	+16	+12	+8	+4
N[140]	?[141]	?[142]	N[143]	N	N	N[144]

29. Tex. Penal Code Ann. § 22.07(a)(1), (2) (Misdemeanor) – Terroristic Threat

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N[145]	Y[146]	N	N	N	N

30. Tex. Penal Code Ann. § 22.07(a)(3) (Misdemeanor) – Terroristic Threat with a Sentence of Exactly One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[147]	Y[148]	N	N	Y[149]	?[150]

31. Tex. Penal Code Ann. § 22.07(a)(3) (Misdemeanor) – Terroristic Threat with a Sentence of Less than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N[151]	Y[152]	N	N	N	?[153]

32. Tex. Penal Code Ann. § 22.07(a)(4) (Felony) – Terroristic Threat with a Sentence of at Least One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[154]	Y[155]	N	N	Y[156]	Y[157]

33. Tex. Penal Code Ann. § 22.07(a)(4) (Felony) – Terroristic Threat with a Sentence of Less than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	Y[158]	N	N	N	Y[159]

34. Tex. Penal Code Ann. § 25.05 (Felony) – Criminal Non-Support

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	?[160]	N	N	N	Y[161]

35. Tex. Penal Code Ann. § 25.07 (Misdemeanor) – Violating Protective Order

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	P.O.	+16	+12	+8	+4
N	?[162]	?[163]	N	N	N	N

36. Tex. Penal Code Ann. § 25.07 (Felony) – Violating Protective Order

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	P.O.	+16	+12	+8	+4
N	?[164]	?[165]	N	N	N	Y[166]

37. Tex. Penal Code Ann. § 28.02 (Felony) – Arson

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[167]	Y[168]	Y[169]	N	Y[170]	Y[171]

38. Tex. Penal Code Ann. § 28.03 (Felony) – Criminal Mischief

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
?[172]	N[173]	N	N	?[174]	Y[175]

39. Tex. Penal Code Ann. § 28.03 (Misdemeanor) – Criminal Mischief

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
?[176]	N[177]	N	N	?[178]	N

40. Tex. Penal Code Ann. § 28.04 (Misdemeanor) – Reckless Damage

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	N	N	N	N	N

41. Tex. Penal Code Ann. § 28.08 (Felony) – Graffiti

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	N	N	N	N	Y[179]

42. Tex. Penal Code Ann. § 28.08 (Misdemeanor) – Graffiti

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	N	N	N	N	N

43. Tex. Penal Code Ann. § 29.02 (Felony) – Robbery with a Sentence of at Least One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[180]	Y[181]	Y[182]	N	Y[183]	Y[184]

44. Tex. Penal Code Ann. § 29.02 (Felony) – Robbery with a Sentence of Less than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	Y[185]	Y[186]	N	N	Y[187]

45. Tex. Penal Code Ann. § 29.03 (Felony) – Aggravated Robbery with a Sentence of at Least One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[188]	Y[189]	Y[190]	N	Y[191]	Y[192]

46. Tex. Penal Code Ann. § 29.03 (Felony) – Aggravated Robbery with a Sentence of Less than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	Y[193]	Y[194]	N	N	Y[195]

47. Tex. Penal Code Ann. § 30.02 (Felony) – Burglary of a Habitation with Felony Non-Theft Intent and a Sentence of at Least One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[196]	Y[197]	Y[198]	N	Y[199]	Y[200]

48. Tex. Penal Code Ann. § 30.02 (Felony) – Burglary of a Habitation with Theft Intent and a Sentence of at Least One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[201]	Y[202]	Y[203]	N	Y[204]	Y[205]

49. Tex. Penal Code Ann. § 30.02 (Felony) – Burglary of a Habitation with Theft Intent and a Sentence of Less than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	Y[206]	Y[207]	N	N	Y[208]

50. Tex. Penal Code Ann. § 30.02 (Felony) – Burglary of a Building with Theft Intent and a Sentence of at Least One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[209]	Y[210]	N	N	Y[211]	Y[212]

51. Tex. Penal Code Ann. § 30.02 (Felony) – Burglary of Building with Theft or Assault Intent and a Sentence of Less than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	Y[213]	N	N	N	Y[214]

52. Tex. Penal Code Ann. § 30.04 (Felony) – Burglary of a Vehicle with a Sentence Greater than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[215]	Y[216]	N	N	Y[217]	Y[218]

53. Tex. Penal Code Ann. § 30.04 (Felony) – Burglary of a Vehicle with a Sentence of Less than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	Y[219]	N	N	N	Y[220]

54. Tex. Penal Code Ann. § 30.04 (Misdemeanor) – Burglary of a Vehicle with a Sentence Greater than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[221]	Y[222]	N	N	Y[223]	Y[224]

55. Tex. Penal Code Ann. § 30.04 (Misdemeanor) – Burglary of Vehicle with a Sentence of Less than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	Y[225]	N	N	N	N[226]

56. Tex. Penal Code Ann. § 30.05 (Misdemeanor) – Criminal Trespass

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	N	N	N	N	N

57. Tex. Penal Code Ann. § 31.03 (Felony) – Theft with a Sentence of at Least One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[227]	Y[228]	N	N	Y[229]	Y[230]

58. Tex. Penal Code Ann. § 31.03 (Felony) – Theft with a Sentence of Less than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	Y[231]	N	N	N	Y[232]

59. Tex. Penal Code Ann. § 31.03 (Misdemeanor) – Theft with a Sentence of Exactly One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[233]	Y[234]	N	N	Y[235]	N

60. Tex. Penal Code Ann. § 31.07 (Felony) – Unauthorized Use of a Vehicle

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N[236]	N[237]	N[238]	N	Y[239]	Y[240]

61. Tex. Penal Code Ann. § 31.11 (Misdemeanor) – Tampering with Identification Numbers with a Sentence of Exactly One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[241]	?[242]	N	N	Y[243]	N

62. Tex. Penal Code Ann. § 31.11 (Misdemeanor) – Tampering with Identification Numbers with a Sentence of Less than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	?[244]	N	N	N	N

63. Tex. Penal Code Ann. § 32.21 (Felony) – Forgery with a Sentence of at Least One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[245]	Y[246]	N	N	Y[247]	Y[248]

64. Tex. Penal Code Ann. § 32.21 (Felony) – Forgery with a Sentence of Less than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	Y[249]	N	N	N	Y[250]

65. Tex. Penal Code Ann. § 32.21 (Misdemeanor) – Forgery with a Sentence of Exactly One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[251]	Y[252]	N	N	Y[253]	N

66. Tex. Penal Code Ann. § 32.21 (Misdemeanor) – Forgery with a Sentence of Less than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	Y[254]	N	N	N	N

67. Tex. Penal Code Ann. § 32.31 (Felony) – Credit Card Abuse with a Loss Greater than $10,000

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[255]	Y[256]	N	N	Y[257]	Y[258]

68. Tex. Penal Code Ann. § 32.31 (Felony) – Credit Card Abuse with a Loss of Less than $10,000

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N[259]	Y[260]	N	N	N	Y[261]

69. Tex. Penal Code Ann. § 32.34 (Felony) – Fraudulent Transfer of a Motor Vehicle with a Loss Greater than $10,000

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[262]	?[263]	N	N	Y[264]	Y[265]

70. Tex. Penal Code Ann. § 32.34 (Felony) – Fraudulent Transfer of a Motor Vehicle with a Loss of Less than $10,000

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N[266]	?[267]	N	N	N	Y[268]

71. Tex. Penal Code Ann. § 32.34 (Misdemeanor) – Fraudulent Transfer of a Motor Vehicle with a Loss Greater than $10,000

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[269]	?[270]	N	N	Y[271]	N

72. Tex. Penal Code Ann. § 32.34 (Misdemeanor) – Fraudulent Transfer of a Motor Vehicle with a Loss of Less than $10,000

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N[272]	?[273]	N	N	N	N

73. Tex. Penal Code Ann. § 32.41 (Misdemeanor) – Issuing a Bad Check with a Loss Greater than $10,000

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[274]	?[275]	N	N	Y[276]	N

74. Tex. Penal Code Ann. § 32.41 (Misdemeanor) – Issuing a Bad Check with a Loss of Less than $10,000

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N[277]	?[278]	N	N	N	N

75. Tex. Penal Code Ann. § 32.43 (Felony) – Commercial Bribery with a Sentence of at Least One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[279]	Y[280]	N	N	Y[281]	Y[282]

76. Tex. Penal Code Ann. § 32.43 (Felony) – Commercial Bribery with a Sentence of Less than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	Y[283]	N	N	N	Y[284]

77. Tex. Penal Code Ann. § 32.51 (Felony) – Fraudulent Use or Possession of Identifying Information

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[285]	Y[286]	N	N	Y[287]	Y[288]

78. Tex. Penal Code Ann. § 33A.02 (Felony) – Unauthorized Use of Telecom Services

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	N	N	N	N	Y[289]

79. Tex. Penal Code Ann. § 33A.02 (Misdemeanor) – Unauthorized Use of Telecom Services

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	N	N	N	N	N

80. Tex. Penal Code Ann. § 32A.04 (Felony) – Theft of Communication Service with a Sentence of at Least One Year or a Loss Greater than $10,000

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[290]	N[291]	N	N	Y[292]	Y[293]

81. Tex. Penal Code Ann. § 32A.04 (Misdemeanor) – Theft of Communication Service with a Sentence of Less than Year and a Loss of Less than $10,000

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N[294]	N[295]	N	N	N	N

82. Tex. Penal Code Ann. § 34.02 (Felony) – Money Laundering with a Loss Greater than $10,000

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[296]	Y[297]	N	N	Y[298]	Y[299]

83. Tex. Penal Code Ann. § 34.02 (Felony) – Money Laundering with a Loss of Less than $10,000

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N[300]	Y[301]	N	N	N	Y[302]

84. Tex. Penal Code Ann. § 35.02 (Felony) – Insurance Fraud Loss Greater than $10,000

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[303]	Y[304]	N	N	Y[305]	Y[306]

85. Tex. Penal Code Ann. § 35.02 (Misdemeanor) – Insurance Fraud Loss of Less than $10,000

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N[307]	Y[308]	N	N	N	N

86. Tex. Penal Code Ann. § 36.02 (Felony) – Bribery

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
?[309]	Y[310]	N	N	?[311]	Y[312]

87. Tex. Penal Code Ann. § 36.06 (Felony) – Retaliation

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N[313]	N	N[314]	N	N[315]	Y[316]

88. Tex. Penal Code Ann. § 37.02 (Misdemeanor) – Perjury with a Sentence of at Least One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[317]	?[318]	N	N	Y[319]	N

89. Tex. Penal Code Ann. § 37.02 (Misdemeanor) – Perjury with a Sentence of Less than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	?[320]	N	N	N	N

90. Tex. Penal Code Ann. § 37.02 (Misdemeanor) – Resisting Arrest with a Sentence of Exactly One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[321]	N[322]	N	N	Y[323]	N

91. Tex. Penal Code Ann. § 38.03 (Misdemeanor) – Resisting Arrest with Sentence of Less than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	N[324]	N	N	N	N

92. Tex. Penal Code Ann. § 38.03(d) (Felony) – Resisting Arrest with a Deadly Weapon

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[325]	?[326]	N	N	Y[327]	Y[328]

93. Tex. Penal Code Ann. § 38.04(a) (Misdemeanor) – Evading Arrest

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	?[329]	N	N	N	N

94. Tex. Penal Code Ann. § 38.04(b)(1)(A) (Felony) – Evading Arrest as a Second Misdemeanor with a Sentence Greater than One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	?[330]	N	N	N	Y[331]

95. Tex. Penal Code Ann. § 38.04(b)(1)(B) (Felony) or § 38.04(b)(2)(A) (Felony) – Evading Arrest with a Vehicle and a Sentence of at Least One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[332]	Y[333]	Y[334]	N	Y[335]	Y[336]

96. Tex. Penal Code Ann. § 38.04(b)(2)(B) (Felony) or § 38.04(b)(3) (Felony) – Evading Arrest with No Vehicle and Seriously Bodily Injury or Death with a Sentence of at Least One Year

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N[337]	?[338]	N[339]	N	N[340]	Y[341]

97. Tex. Penal Code Ann. § 38.06 (Misdemeanor) – Escape

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	N	N	N	N	N

98. Tex. Penal Code Ann. § 38.06(d) or (e) (Felony) – Escape

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	N	Y	N	Y	Y

99. Tex. Penal Code Ann. § 38.10 (Felony) – Bail Jumping and Failure to Appear

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[342]	N	N	N	Y[343]	Y[344]

100.Tex. Penal Code Ann. § 38.10 (Misdemeanor) – Bail Jumping and Failure to Appear

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	N[345]	N	N	N	?

101.Tex. Penal Code Ann. § 38.17 (Misdemeanor) – Failure to Stop or Report Aggravated Sexual Assault of a Child

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	Y[346]	N	N	N	N

102.Tex. Penal Code Ann. § 42.07 (Misdemeanor) – Harassment

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	?[347]	N	N	N	Y[348]

103.Tex. Penal Code Ann. § 42.072 (Felony) – Stalking

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	Stalk	+16	+12	+8	+4
N	Y[349]	?[350]	N	N	N	Y[351]

104.Tex. Penal Code Ann. § 42.09 (Felony) – Cruelty to Animals

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	?[352]	N	N	N	Y[353]

105.Tex. Penal Code Ann. § 42.09 (Misdemeanor) – Cruelty to Animals

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	?[354]	N	N	N	N

106.Tex. Penal Code Ann. § 42.10 (Felony) – Dog Fighting

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	?[355]	N	N	N	Y[356]

107.Tex. Penal Code Ann. § 42.10 (Misdemeanor) – Dog Fighting

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	?[357]	N	N	N	N

108.Tex. Penal Code Ann. § 43.02 (Felony) – Prostitution

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	Y[358]	N	N	N	Y[359]

109.Tex. Penal Code Ann. § 43.03 (Misdemeanor) – Promotion of Prostitution

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
?[360]	Y[361]	N	N	?[362]	N

110.Tex. Penal Code Ann. § 43.26 (Felony) – Possession or Promotion of Child Pornography

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
Y[363]	Y[364]	N	N	Y[365]	Y[366]

111.Tex. Penal Code Ann. § 46.02 (Felony) – Unlawful Carrying of Weapons

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	F.A.	+16	+12	+8	+4
N[367]	N[368]	Y[369]	N	N	N[370]	Y[371]

112.Tex. Penal Code Ann. § 46.02 (Misdemeanor) – Unlawful Carrying of Weapons

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	F.A.	+16	+12	+8	+4
N[372]	N[373]	Y[374]	N	N	N[375]	N

113.Tex. Penal Code Ann. § 46.05 (Felony) – Prohibited Weapons with a Sentence Greater than One Year

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	F.A.	+16	+12	+8	+4
?[376]	N[377]	Y[378]	N	N	?[379]	Y[380]

114.Tex. Penal Code Ann. § 46.05 (Misdemeanor) – Prohibited Weapons with a Sentence of Exactly One Year

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	F.A.	+16	+12	+8	+4
?[381]	N[382]	Y[383]	N	N	?[384]	N

115.Tex. Penal Code Ann. § 49.02 (Misdemeanor) – Public Intoxication

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	N	N	N	N	N

116.Tex. Penal Code Ann. § 49.07 (Felony) – Intoxication Assault

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N[385]	N[386]	N	N	N[387]	Y[388]

117.Tex. Penal Code Ann. § 49.08 (Felony) – Intoxication Manslaughter

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N[389]	?[390]	Y[391]	N	N	Y[392]

118.Tex. Penal Code Ann. § 49.09(b) (Felony) – Third DWI

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N[393]	N[394]	N	N	N	Y[395]

119.Tex. Penal Code Ann. § 49.09(a) (Class A Misdemeanor) – Second DWI

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	N[396]	N	N	N	N

120.Tex. Penal Code Ann. § 49.04 (Class B Misdemeanor) – First DWI

Immigration Status		U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	+16	+12	+8	+4
N	N	N	N	N	N

121.Tex. Health & Safety Code Ann. § 481.116 (Felony) – Possession of Controlled Substances as a First Time Offender

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	C.S.	+16	+12	+8	+4
?[397]	N	Y[398]	N	N	?[399]	Y[400]

122.Tex. Health & Safety Code Ann. § 481.117 (Felony) – Possession of Controlled Substances as a First Time Offender

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	C.S.	+16	+12	+8	+4
?[401]	N	Y[402]	N	N	?[403]	Y[404]

123.Tex. Health & Safety Code Ann. § 481.117 (Misdemeanor) – Possession of Controlled Substances as a First Time Offender

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	C.S.	+16	+12	+8	+4
?[405]	N	Y[406]	N	N	?[407]	N

124.Tex. Health & Safety Code Ann. § 481.119(b) (Misdemeanor) – Possession of Controlled Substances

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	C.S.	+16	+12	+8	+4
?[408]	N	Y[409]	N	N	?[410]	N

125.Tex. Health & Safety Code Ann. § 481.121 (Misdemeanor) – Possession of Controlled Substances

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	C.S.	+16	+12	+8	+4
?[411]	N	?[412]	N	N	?[413]	N

126.Tex. Health & Safety Code Ann. §§ 481.112 (Felony), 481.1121 (Felony), 481.113 (Felony), 481.114 (Felony), or 481.120 (Felony) – Manufacture or Delivery of a Controlled Substance with a Sentence Greater than Thirteen Months

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	C.S.	+16	+12	+8	+4
Y[414]	Y[415]	Y[416]	Y[417]	N	Y[418]	Y[419]

127.Tex. Health & Safety Code Ann. §§ 481.112 (Felony), 481.1121 (Felony), 481.113 (Felony), 481.114 (Felony), or 481.120 (Felony) – Manufacture or Delivery of a Controlled Substance with a Sentence of Less than Thirteen Months

Immigration Status			U.S.S.G. re 8 U.S.C. § 1326			
Agg. Fel.	CIMT	C.S.	+16	+12	+8	+4
Y[420]	Y[421]	Y[422]	N	Y[423]	Y[424]	Y[425]

[1] *See* United States v. Gomez-Gomez, 547 F.3d 242, 248 (5th Cir. 2008) ("For example, murder, like rape, is an aggravated felony that qualifies for an eight-level enhancement." (citing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 3(A); 8 U.S.C. § 1101(a)(43)(A))), *superseded by regulation*, U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2010), *as recognized in* United States v. Diaz-Corado, 648 F.3d 290, 294 (5th Cir. 2011).

[2] *See* Lopez-Meza, 22 I. & N. Dec. 1188, 1193 (BIA 1999) ("[C]rimes involving acts of baseness or depravity have been found to be crimes involving moral turpitude even though they have no element of fraud and, in some cases, no explicit element of evil intent (e.g., murder, rape, robbery, kidnapping, voluntary manslaughter, some involuntary manslaughter offenses, aggravated assaults, mayhem, theft offenses, spousal abuse, child abuse, and incest).").

[3]*See* United States v. Gomez-Gomez, 547 F.3d 242, 248 (5th Cir. 2008) ("Murder also always qualifies for the sixteen-level crime-of-violence enhancement because murder is an enumerated offense. The Sentencing Commission is aware of the redundancies contained in the guidelines, and has instructed courts to '[a]pply the [g]reatest' enhancement applicable." (citing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1) & cmt. 1(B)(iii) (2007))), *superseded by regulation*, U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2010), *as recognized in* U.S. v. Diaz-Corado, 648 F.3d 290, 294 (5th Cir. 2011).

[4]*See* United States v. Gomez-Gomez, 547 F.3d 242, 248 (5th Cir. 2008) ("For example, murder, like rape, is an aggravated felony that qualifies for an eight-level enhancement." (citing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 3(A) (2007); 8 U.S.C. § 1101(a)(43) (2006))), *superseded by regulation*, U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2010), *as recognized in* U.S. v. Diaz-Corado, 648 F.3d 290, 294 (5th Cir. 2011).

[5]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[6]This offense requires the specific intent to cause the death of an individual and is therefore a crime of violence pursuant to 18 U.S.C. Section 16(b). *See* United States v. Torres-Villalobos, 487 F.3d 607, 615 (8th Cir. 2007) ("'[Section 16(b)] suggests a higher degree of intent than negligent or merely accidental conduct' . . . . As with § 16(a), the 'use' of force described in § 16(b) requires a risk of 'active employment' of force, and not merely 'accidental or negligent conduct.'" (citing Leocal v. Ashcroft, 543 U.S. 1, 9, 11 (2004))). The Texas murder statute incorporates what at common law was voluntary manslaughter and makes the offense a felony of the second degree if the defendant can prove that "he caused the death under the immediate influence of sudden passion arising from an adequate cause." *See* TEX. PENAL CODE ANN. § 19.02(d) (West 2011); *In re* R.J.J., 959 S.W.2d 185, 186 (Tex. 1998). Therefore, while the offense may be labeled as a second-degree murder conviction, it is actually the analog for common law manslaughter. *Id.* Texas does not make an explicit statutory distinction between voluntary and involuntary manslaughter. *See* Gerald S. Reamey, *The Growing Role of Fortuity in Texas Criminal Law*, 47 S. TEX. L. REV. 59, 63 n.26 (2005). Instead, common law manslaughter is codified in Section 19.02 while the common law offense of involuntary manslaughter is codified Section 19.04. *See* TEX. PENAL CODE ANN. §§ 19.02(d), 19.04.

[7]*See* Lopez-Meza, 22 I. & N. Dec. 1188, 1193 (BIA 1999) ("[C]rimes involving acts of baseness or depravity have been found to be crimes involving moral turpitude even though they have no element of fraud and, in some cases, no explicit element of evil intent (e.g., murder, rape, robbery, kidnapping, voluntary manslaughter, some involuntary manslaughter offenses, aggravated assaults, mayhem, theft offenses, spousal abuse, child abuse, and incest).").

[8]*See* United States v. Gomez-Gomez, 547 F.3d 242, 248 (5th Cir. 2008) ("Murder also always qualifies for the sixteen-level crime-of-violence enhancement because murder is an enumerated offense. The Sentencing Commission is aware of the redundancies contained in the guidelines, and has instructed courts to '[a]pply the [g]reatest' enhancement applicable." (citing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1) & cmt. 1(B)(iii) (2007))), *superseded by regulation*, U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2010), *as recognized in* U.S. v. Diaz-Corado, 648 F.3d 290, 294 (5th Cir. 2011).

[9]*See* United States v. Gomez-Gomez, 547 F.3d 242, 248 (5th Cir. 2008) ("For example, murder, like rape, is an aggravated felony that qualifies for an eight-level enhancement." (citing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 3(A) (2007); 8 U.S.C. § 1101(a)(43)

(2006))), *superseded by regulation*, U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2010), *as recognized in* U.S. v. Diaz-Corado, 648 F.3d 290, 294 (5th Cir. 2011).

[10]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[11]*See, e.g.*, United States v. Dominguez-Hernandez, 98 F. App'x 331, 334 (5th Cir. 2004) (per curiam) (holding that "involuntary manslaughter is not a crime of violence under [8 U.S.C.] § 16" (citing United States v. Vargas-Duran, 356 F.3d 598, 604–05 (5th Cir. 2004) (en banc); United States v. Gracia-Cantu, 302 F.3d 308, 312–13 (5th Cir. 2002))); *see also* Hammoud, A044 699 511, 2008 WL 4146710, at *2 (BIA Aug. 26, 2008) ("Commission of the crime of involuntary manslaughter does not require such a confrontation, however, and we do not consider this risk of the use of physical force to be so great that it cannot fairly be characterized as 'substantial' within the meaning of § 16(b). The weight of authority among the Federal courts of appeals is to the same effect." (citing United States v. Torres-Villalobos, 487 F.3d 607, 615-17 (8th Cir. 2007) (holding that second-degree manslaughter under Minnesota law is not a "crime of violence" under Section 16(b)); Oyebanji v. Gonzales, 418 F.3d 260, 264–65 (3d Cir. 2005) (holding that reckless vehicular homicide under New Jersey law is not a 'crime of violence' under Section 16(b)); Bejarano-Urrutia v. Gonzales, 413 F.3d 444, 447 (4th Cir. 2005) (holding that involuntary manslaughter under Virginia law is not a 'crime of violence' under Section 16(b)); Jobson v. Ashcroft, 326 F.3d 367, 375-76 (2d Cir. 2003) (holding that second-degree manslaughter under New York law is not a 'crime of violence' under Section 16(b))).

[12]*See* Solon, 24 I. & N. Dec. 239, 240–41 (BIA 2007) ("Moral turpitude may also inhere in criminally reckless conduct, i.e., conduct that reflects a conscious disregard for a substantial and unjustifiable risk." (citing Franklin, 20 I. & N. Dec. 867, 869–70 (BIA 1994))); *see also* Torres-Varela, 23 I. & N. Dec. 78, 84 (BIA 2001) (noting that voluntary manslaughter and some involuntary manslaughter offenses are generally CIMTs).

[13]U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011) ("'Crime of violence' means any of the following offenses under federal, state, or local law: murder, *manslaughter* . . . ." (emphasis added)). The Fifth Circuit Court of Appeals appears to have interpreted the above-quoted language as including the involuntary manslaughter offense codified in Section 19.04. *See* United States v. Dominguez-Hernandez, 98 F. App'x 331, 333 (5th Cir. 2004) (per curiam).

[14]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[15]*See* Silva-Trevino, 24 I. & N. Dec. 687 (A.G. 2008). To appreciate the difficulty of accurately predicting whether this offense is a CIMT, please refer to the Article's discussion on *Silva-Trevino*. *See supra* Part IV.c.2.

[16]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[17]This is probably a crime-of-violence aggravated felony DPIO and likely satisfies 18 U.S.C. Section 16(b) because it involves a substantial risk that physical force against the person or property will be employed in its commission. *See* United States v. Riva, 440 F.3d 722, 724–25 (5th Cir. 2005) (holding that unlawful restraint of a child under seventeen is a crime of violence). *But see* United States v. Hernandez-Rodriguez, 135 F. App'x 661, 662 (5th Cir. 2005) (per curiam) (upholding the defendant's argument that "unlawful restraint offense did not necessarily require proof of an element involving the intentional use or threatened use of physical force

against a person and, thus, it is not a crime of violence"). The BIA has compared unlawful restraint to burglary of a building. *See* Kerr, A44 857 956, 2007 WL 2588583, at *3 (BIA Aug. 15, 2007) ("Like the burglar who, upon entering a building, necessarily disregards the substantial risk that he will be required to intentionally use physical force against the building's lawful occupants, an individual who intentionally and unlawfully confines or restrains another without consent necessarily disregards the substantial risk that in the course of committing that offense, he will have to use physical force against another, either to effect the victims restraint or confinement in the first instance or to overcome the victim's resistance, or both."). The BIA has approvingly cited the Second Circuit's opinion in *Dickson v. Ashcroft*, 346 F.3d 44, 49 (2d Cir. 2003) (holding that the unlawful imprisonment of a competent adult by means of force, intimidation, or deception in violation of New York law qualifies as a crime of violence under 18 U.S.C. Section 16). *See Kerr*, 2007 WL 2588583, at *3. Moreover, the Fifth Circuit has determined that false imprisonment constitutes a crime of violence for sentence enhancement purposes, noting that even if the restraint is accomplished by deception, it still involves a "serious potential for physical injury." *Riva*, 440 F.3d at 724–25 (addressing a conviction under Texas law for unlawful restraint of a person less than seventeen years of age). Secondly, the "felony" language in 18 U.S.C. Section 16(b) is controlled by the standard federal felony definition found in 18 U.S.C. Section 3559(a)(5) which requires the subject offense to be less than five years but more than one year to qualify as a federal felony. *See* 18 U.S.C. § 3559(a)(5) (2006). This scenario meets that definition. *See id.* Finally, if the actual sentence imposed is at least one year, the balance of the crime of violence aggravated felony DPIO's requirements are met, and this DPIO will be triggered. *See* 8 U.S.C. § 1101(a)(43)(F) (2006); U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 2–3(A) (2011).

[18]A conviction under this Texas statute and subsections requires exposing a person to a substantial risk of serious bodily injury, and all of the subsections under Sections 20.02(c)(1) and 20.02(c)(2) likely involve similar motives. *See* United States v. Riva, 440 F.3d 722, 724–25 (5th Cir. 2005). Such motives are "vicious and corrupt, and violate[] the duties owed between persons." *See* Mioten, A38 562 961, 2003 WL 23269873, at *1 (BIA Dec. 3, 2003).

[19]*See* United States v. Eugenio-Salvador, 207 F. App'x 409, 409 (5th Cir. 2006) (per curiam) ("Because [Texas Penal Code Section 20.02] does not require that such use of force be proved as an element of the offense, the district court plainly erred in assigning the 16-level enhancement." (citing United States v. Calderon-Pena, 383 F.3d 254, 259–61 (5th Cir. 2004); United States v. Garza-Lopez, 410 F.3d 268, 275 (5th Cir. 2005))).

[20]This is probably a crime-of-violence aggravated felony DPIO and likely satisfies 18 U.S.C. Section 16(b) because it involves a substantial risk that physical force against the person or property will be employed in its commission. *See* United States v. Riva, 440 F.3d 722, 724–25 (5th Cir. 2005) (holding that unlawful restraint of a child under seventeen is a crime of violence). *But see* United States v. Hernandez-Rodriguez, 135 F. App'x 661, 662 (5th Cir. 2005) (per curiam) (upholding the defendant's argument that "unlawful restraint offense did not necessarily require proof of an element involving the intentional use or threatened use of physical force against a person and, thus, it is not a crime of violence"). The BIA has compared unlawful restraint to burglary of a building. *See* Kerr, A44 857 956, 2007 WL 2588583, at *3 (BIA Aug. 15, 2007) ("Like the burglar who, upon entering a building, necessarily disregards the substantial risk that he will be required to intentionally use physical force against the building's lawful occupants, an individual who intentionally and unlawfully confines or restrains another without

consent necessarily disregards the substantial risk that in the course of committing that offense, he will have to use physical force against another, either to effect the victims restraint or confinement in the first instance or to overcome the victim's resistance, or both."). The BIA has approvingly cited the Second Circuit's opinion in *Dickson v. Ashcroft*, 346 F.3d 44, 49 (2d Cir. 2003) (holding that the unlawful imprisonment of a competent adult by means of force, intimidation, or deception in violation of New York law qualifies as a crime of violence under 18 U.S.C. Section 16). *See Kerr*, 2007 WL 2588583, at *3. Moreover, the Fifth Circuit has determined that false imprisonment constitutes a crime of violence for sentence enhancement purposes, noting that even if the restraint is accomplished by deception, it still involves a "serious potential for physical injury." *Riva*, 440 F.3d at 724–25 (addressing a conviction under Texas law for unlawful restraint of a person less than seventeen years of age). Secondly, the "felony" language in 18 U.S.C. Section 16(b) is controlled by the standard federal felony definition found in 18 U.S.C. Section 3559(a)(5) which requires the subject offense to be less than five years but more than one year to qualify as a federal felony. *See* 18 U.S.C. § 3559(a)(5) (2006). This scenario meets that definition. *See id.* Finally, if the actual sentence imposed is at least one year, the balance of the crime of violence aggravated felony DPIO's requirements are met, and this DPIO will be triggered. *See* 8 U.S.C. § 1101(a)(43)(F) (2006); U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 2–3(A) (2011).

[21]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[22]Although this could conceivably be a crime of violence under 18 U.S.C. Section 16, it would not rise to the level of being an aggravated felony DPIO because the sentence imposed is less than a year, which 8 U.S.C. Section 1101(a)(43)(F) requires. *See* 8 U.S.C. § 1101(a)(43)(F) (2006).

[23]*See* United States v. Eugenio-Salvador, 207 F. App'x 409, 409 (5th Cir. 2006) (per curiam) ("Because [Texas Penal Code Section 20.02] does not require that such use of force be proved as an element of the offense, the district court plainly erred in assigning the 16-level enhancement." (citing United States v. Calderon-Pena, 383 F.3d 254, 259–61 (5th Cir. 2004); United States v. Garza-Lopez, 410 F.3d 268, 275 (5th Cir. 2005))).

[24]*See* Albarran, A91 197 485, 2008 WL 3919056, at *2 (BIA July 25, 2008) ("We conclude that the respondent's attempted kidnapping offense qualifies as a 'crime of violence' under 18 U.S.C. § 16(b) because it is a 'felony' 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.'").

[25]This offense is usually a CIMT. *See* Solon, 24 I. & N. Dec. 239, 240 (BIA 2007) ("Moral turpitude may also inhere in criminally reckless conduct, i.e., conduct that reflects a conscious disregard for a substantial and unjustifiable risk." (citing Franklin, 20 I. & N. Dec. 867, 870–71 (BIA 1994); Torres-Varela, 23 I. & N. Dec. 78, 84 (BIA 2001) (noting that such crimes include murder, rape, statutory rape, robbery, kidnapping, voluntary manslaughter, some involuntary manslaughter offenses, mayhem, theft offenses, spousal abuse, child abuse, and incest))). Nevertheless, at least once, the Fifth Circuit Court of Appeals has refused to characterize a kidnapping statute as a CIMT. *See* Hamdan v. INS, 98 F.3d 183, 189 (5th Cir. 1996).

[26]*See* United States v. Moreno-Florean, 542 F.3d 445, 453 (5th Cir. 2008) (citing Garcia-Gonzalez, 168 F. App'x 564, 565 (5th Cir. 2006) (per curiam) ("Under [Section 20.03(a)], a person commits the offense of kidnapping if he 'intentionally or knowingly abducts another

person.' The elements of the Texas kidnapping offense are consistent with the ordinary, contemporary, and common understanding of the term as defined by Black's Law Dictionary. The district court's determination that Garcia-Gonzalez's offense level should be increased based on his prior kidnapping offense under § 2L1.2 was not a 'clear or obvious' error." (citing United States v. Izaguirre-Flores, 405 F.3d 270, 273-75 (5th Cir. 2005); United States v. Garcia-Mendez, 420 F.3d 454, 456 (5th Cir. 2005))).

[27]*See* Albarran, A91 197 485, 2008 WL 3919056, at *2 (BIA July 25, 2008) ("We conclude that the respondent's attempted kidnapping offense qualifies as a 'crime of violence' under 18 U.S.C. § 16(b) because it is a 'felony' 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.'").

[28]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[29]*See* Alvarado-Narvaez v. Gonzalez, 207 F. App'x 463, 464 (5th Cir. 2006) (per curiam) ("'[H]ad the petitioner's prior offenses been § 21.11(a)(1) offenses involving physical contact, we would clearly treat them as aggravated felonies.'" (citing United States v. Zavala-Sustaita, 214 F.3d 601, 604 n.3 (5th Cir. 2000))).

[30]*See* Hussein, A26 416 298, 2004 WL 1059601 at *1 (BIA Mar. 15, 2004) ("However, at the time of the respondent's conviction [under Section 21.11(a)(1)] on December 16, 1991, the respondent could have been charged with inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, as amended, as one convicted of a crime involving moral turpitude." (citing Tran, 21 I. & N. Dec. 291, 292 (BIA 1996); Danesh, 19 I. & N. Dec. 669 (BIA 1988))).

[31]Precedent forecloses the argument that violating Section 21.11(a)(1) is not a crime of violence for the purposes of the Sentencing Guidelines. *See* United States v. Mancera, 401 F. App'x 977, 979 (5th Cir. 2010) (per curiam) (stating that such an argument is directly foreclosed by circuit precedent), *cert. denied*, 131 S. Ct. 3025 (2011). Because this offense is considered "sexual abuse of a minor," it is a crime of violence. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2010).

[32]Precedent forecloses the argument that violating Section 21.11(a)(1) is not a crime of violence for the purposes of the Sentencing Guidelines. *See* United States v. Mancera, 401 F. App'x 977, 979 (5th Cir. 2010) (per curiam) (stating that such an argument is directly foreclosed by circuit precedent), *cert. denied*, 131 S. Ct. 3025 (June 20, 2011). Because this offense is considered "sexual abuse of a minor," it is a crime of violence. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011).

[33]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[34]Precedent forecloses the argument that violating Section 21.11(a)(1) is not a crime of violence for the purposes of the Sentencing Guidelines. *See* United States v. Mancera, 401 F. App'x 977, 979 (5th Cir. 2010) (per curiam) (stating that such an argument is directly foreclosed by circuit precedent), *cert. denied*, 131 S. Ct. 3025 (2011). Because this offense is considered "sexual abuse of a minor," it is a crime of violence. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011).

[35]The nature of this conviction "requires the actor to willfully and lewdly expose himself with the knowledge that the act will be offensive [and] involves a sufficiently corrupt or malicious mind to classify it as a crime involving moral turpitude." Orozco, A044 553 077, 2008 WL

4722691, at *1 (BIA Oct. 3, 2008) (applying the just-quoted language to the California indecent exposure criminal statute).

[36]*See* United States v. Garcia, 228 F. App'x 510, 510–11 (5th Cir. 2007) (per curiam) ("The 'sexual abuse of a minor' is a 'crime of violence' under § 2L1.2(b)(1)(A)(ii). [*Zavala-Sustaita*] held that a violation of § 21.11(a)(2) is 'sexual abuse of a minor' as that term is used in its 'ordinary, contemporary, [and] common meaning.' Although *Zavala-Sustaita* involved an enhancement imposed under a previous version of § 2L1.2, its reasoning remains sound law and is applicable here. . . . Accordingly, the district court did not err in enhancing Garcia's offense level pursuant to § 2L1.2(b)(1)(A)(ii)." (citing United States v. Zalava-Sustaita, 214 F.3d 601, 604 (5th Cir. 2000))).

[37]*See* United States v. Zalava-Sustaita, 214 F.3d 601, 607 (5th Cir. 2000) ("[W]e conclude that because a violation of Texas Penal Code § 21.11(a)(2) is 'sexual abuse of a minor,' the district court properly enhanced Zavala's sentence based on his prior convictions."); *see also* Rodriguez-Rodriguez, 22 I. & N. Dec. 991, 996 (BIA 1999) ("[W]e find that indecent exposure in the presence of a child by one intent on sexual arousal is clearly sexual abuse of a minor within the meaning of section 101(a)(43)(A) of the Act."). This conviction is clearly a sexual-abuse-of-a-minor aggravated felony DPIO, but it is also a crime-of-violence aggravated felony DPIO if the imposed sentence is at least one year. *See* 8 U.S.C. § 1101(a)(43)(F) (2006); United States v. Kirk, 111 F.3d 390, 394 (4th Cir. 1997) ("'[W]hen an older person attempts to sexually touch a child under the age of fourteen, there is always a substantial risk that physical force will be used to ensure the child's compliance.'" (citing United States v. Velazquez-Overa, 100 F.3d 418, 422 (5th Cir. 1996))).

[38]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[39]*See* United States v. Villegas-Hernandez, 468 F.3d 874, 885 (5th Cir. 2006) ("Villegas-Hernandez's prior conviction was not a felony under either state or federal law, and it therefore may not be considered a 'crime of violence' as defined in subsection 16(b). Nor does his assault conviction constitute a crime of violence under subsection 16(a), because 22.01(a)(1) does not include use of force as an element. Consequently, Villegas-Hernandez's prior conviction was not an 'aggravated felony' under guideline 2L1.2(b)(1)(C), and it was error to apply an eight-level enhancement under that guideline. Villegas-Hernandez preserved this error by objecting at trial."). Remember that the Sentencing Guidelines rely on the same definition as immigration judges must rely on in determining whether a crime-of-violence aggravated felony DPIO has been triggered. *Compare* U.S. SENTENCING GUIDELINES MANUEL § 2L1.2 cmt. 1(B)(iii) (2011) ("'Crime of violence' [includes] any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.") *with* 18 U.S.C. § 16(b) (2006) (defining "crime of violence" as "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"). So although the Fifth Circuit referred to 2L1.2(b)(1)(C), it indirectly ruled on the applicability of the crime-of-violence aggravated felony DPIO in *Villegas-Hernandez*. *See Villegas-Hernandez*, 468 F.3d at 885.

[40]*See* Mayorga-Ramirez, A91 485 389, 2007 WL 1492254, at *2 (BIA May 14, 2007) ("We have held that 'simple assault' offenses that result in injury generally do not involve moral turpitude. However, if the assault involves an aggravating factor, it might rise to the level of a CIMT. Crimes falling in this category include the willful infliction of corporal abuse on a family

member." (citations omitted)).

[41]Section 22.01(a)(1) is not a crime of violence under 18 U.S.C. Section 16(a) because it does not involve the use of force. *See* United States v. Villegas-Hernandez, 468 F.3d 874, 885 (5th Cir. 2006). Additionally, the most serious Texas misdemeanor, a Class A misdemeanor, is not punishable by more than a year. TEX. PENAL CODE ANN. § 12.21(2) (West 2011) (setting the maximum confinement for a Class A misdemeanor for a "term not to exceed one year"). The "felony" language in 18 U.S.C. Section 16(b) is controlled by the standard federal felony definition found in 18 U.S.C. Section 3559(a)(5), which requires the subject offense to be less than five years but more than one year to qualify as a federal felony. *See* 18 U.S.C. § 3559(a)(5) (2006); *see also* Martin 23 I. & N. Dec. 491, 493 (BIA 2002). A Texas conviction for a Class A misdemeanor therefore can never qualify as a felony for the purposes of Section 16(b). *See, e.g.*, Velasquez, 25 I. & N. Dec. 278, 280 (BIA 2010) ("[B]ecause the respondent's offense is not a felony under Federal law, it cannot constitute a crime of violence under 18 U.S.C. § 16(b)."). The domestic violence DPIO requires two components: (1) a crime of violence pursuant to 18 U.S.C. Section 16(b), and (2) a familial relationship. *See* 8 U.S.C. § 1227(a)(2)(E)(i) ("[T]he term 'crime of domestic violence' means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government."). As just explained, this offense does not qualify as a crime of violence, and therefore it cannot be a domestic violence DPIO. *See id.*

[42]The only manner in which a simple assault could be considered a 16-level enhancement would be if it was labeled as a crime of violence under the Sentencing Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A)(ii) (2011). Nevertheless Section 2L1.2(b)(1) clearly denotes that only "a conviction for a felony" is needed to enhance the sentence. *See id.* § 2L1.2(b)(1)(D) ("[For] a conviction for any other felony, increase by 4 levels . . . ."). In turn the term felony as the term is employed in Section 2L1.2(b)(1) is defined in Application Note 2. *Id.* § 2L1.2 cmt. 2 ("For the purposes of subsection (b)(1)(A), (B), and (D), 'felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year."). Simple assault under the Texas statute is punishable as a Class A misdemeanor which carries an imprisonment term that may not "exceed one year." *See* TEX. PENAL CODE ANN. § 12.21(2) (West 2011).

[43]*See* United States v. Villegas-Hernandez, 468 F.3d 874, 885 (5th Cir. 2006) ("Villegas-Hernandez's prior conviction was not a felony under either state or federal law, and it therefore may not be considered a 'crime of violence' as defined in subsection 16(b). Nor does his assault conviction constitute a crime of violence under subsection 16(a), because 22.01(a)(1) does not include use of force as an element. Consequently, Villegas-Hernandez's prior conviction was not an 'aggravated felony' under guideline 2L1.2(b)(1)(C), and it was error to apply an eight-level enhancement under that guideline. Villegas-Hernandez preserved this error by objecting at trial.").

[44]*See id.* at 884 ("Federal law, in turn, makes clear that the lowest class of felony within the federal system must be punishable by more than one year. As such, neither Texas nor federal law

permits us to categorize [Texas Penal Code Section 22.01] as a felony." (citations omitted)).

[45]*See id.* at 885 ("Villegas-Hernandez's prior conviction was not a felony under either state or federal law, and it therefore may not be considered a 'crime of violence' as defined in subsection 16(b). Nor does his assault conviction constitute a crime of violence under subsection 16(a), because 22.01(a)(1) does not include use of force as an element. Consequently, Villegas-Hernandez's prior conviction was not an 'aggravated felony' under guideline 2L1.2(b)(1)(C), and it was error to apply an eight-level enhancement under that guideline. Villegas-Hernandez preserved this error by objecting at trial.").

[46]*See* Mayorga-Ramirez, A91 485 389, 2007 WL 1492254, at *2 (BIA May 14, 2007) ("We have held that 'simple assault' offenses that result in injury generally do not involve moral turpitude. However, if the assault involves an aggravating factor, it might rise to the level of a CIMT. Crimes falling in this category include the willful infliction of corporal abuse on a family member." (citations omitted)).

[47]Section 22.01(a)(1) is not a crime of violence under 18 U.S.C. Section 16(a) because it does not involve the use of force. *See* United States v. Villegas-Hernandez, 468 F.3d 874, 885 (5th Cir. 2006). Additionally, the most serious Texas misdemeanor, a Class A misdemeanor, is not punishable by more than a year. TEX. PENAL CODE ANN. § 12.21(2) (West 2011) (setting the maximum confinement for a Class A misdemeanor for a "term not to exceed one year"). The "felony" language in 18 U.S.C. Section 16(b) is controlled by the standard federal felony definition found in 18 U.S.C. Section 3559(a)(5), which requires the subject offense to be less than five years but more than one year to qualify as a federal felony. *See* 18 U.S.C. § 3559(a)(5) (2006); *see also* Martin 23 I. & N. Dec. 491, 493 (BIA 2002). A Texas conviction for a Class A misdemeanor therefore can never qualify as a felony for the purposes of Section 16(b). *See, e.g.*, Velasquez, 25 I. & N. Dec. 278, 280 (BIA 2010) ("[B]ecause the respondent's offense is not a felony under Federal law, it cannot constitute a crime of violence under 18 U.S.C. § 16(b)."). The domestic violence DPIO requires two components: (1) a crime of violence pursuant to 18 U.S.C. Section 16(b), and (2) a familial relationship. *See* 8 U.S.C. § 1227(a)(2)(E)(i) ("[T]he term 'crime of domestic violence' means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government."). As just explained, this offense does not qualify as a crime of violence, and therefore it cannot be a domestic violence DPIO. *See id.*

[48]The only manner in which a simple assault could be considered a 16-level enhancement would be if it was labeled as a crime of violence under the Sentencing Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A)(ii) (2011). Nevertheless Section 2L1.2(b)(1) clearly denotes that only "a conviction for a felony" is needed to enhance the sentence. *See id.* § 2L1.2(b)(1)(D) ("[For] a conviction for any other felony, increase by 4 levels . . . ."). In turn the term felony as the term is employed in Section 2L1.2(b)(1) is defined in Application Note 2. *Id.* § 2L1.2 cmt. 2 ("For the purposes of subsection (b)(1)(A), (B), and (D), 'felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year."). Simple assault under the Texas statute is punishable as a Class A

misdemeanor which carries an imprisonment term that may not "exceed one year." *See* TEX. PENAL CODE ANN. § 12.21(2) (West 2011).

[49]*See* United States v. Villegas-Hernandez, 468 F.3d 874, 885 (5th Cir. 2006) ("Villegas-Hernandez's prior conviction was not a felony under either state or federal law, and it therefore may not be considered a 'crime of violence' as defined in subsection 16(b). Nor does his assault conviction constitute a crime of violence under subsection 16(a), because 22.01(a)(1) does not include use of force as an element. Consequently, Villegas-Hernandez's prior conviction was not an 'aggravated felony' under guideline 2L1.2(b)(1)(C), and it was error to apply an eight-level enhancement under that guideline. Villegas-Hernandez preserved this error by objecting at trial.").

[50]*See id.* at 884 ("Federal law, in turn, makes clear that the lowest class of felony within the federal system must be punishable by more than one year. As such, neither Texas nor federal law permits us to categorize [Texas Penal Code Section 22.01] as a felony." (citations omitted)).

[51]*See* Mayorga-Ramirez, A91 485 389, 2007 WL 1492254, at *2 (BIA May 14, 2007) ("We have held that 'simple assault' offenses that result in injury generally do not involve moral turpitude. However, if the assault involves an aggravating factor, it might rise to the level of a CIMT. Crimes falling in this category include the willful infliction of corporal abuse on a family member." (citations omitted)).

[52]This is a crime of violence pursuant to 18 U.S.C. Section 16(b). *See* Reyes-Olvera, A39 293 808, 2008 WL 1924639, at *3 (BIA Apr. 15, 2008) ("[Section] 22.01(a) qualifies as a crime of violence under 18 U.S.C. § 16(b) . . . ."). If the assault is carried out "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," then it will trigger the domestic violence DPIO. *See* 8 U.S.C. § 1227(a)(2)(E)(i) (2006).

[53]This offense is not an enumerated offense under the Sentencing Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011). Nor does it have as an element the use, attempted use, or threatened use of physical force so it cannot meet the Sentencing Guidelines' definition of crime of violence. *See id.*

[54]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[55]*See* Reyes-Olvera, A39 293 808, 2008 WL 1924639, at *3 (BIA Apr. 15, 2008) ("Our conclusion that the respondent's felony violation of Tex. Penal Code § 22.01 (a) qualifies as a crime of violence under 18 U.S.C. § 16(b) . . . .").

[56]*See* Mayorga-Ramirez, A91 485 389, 2007 WL 1492254, at *2 (BIA May 14, 2007) ("We have held that 'simple assault' offenses that result in injury generally do not involve moral turpitude. However, if the assault involves an aggravating factor, it might rise to the level of a CIMT. Crimes falling in this category include the willful infliction of corporal abuse on a family member." (citations omitted)).

[57]This is a crime of violence pursuant to 18 U.S.C. Section 16(b). *See* Reyes-Olvera, A39 293 808, 2008 WL 1924639, at *3 (BIA Apr. 15, 2008) ("[Section] 22.01(a) qualifies as a crime

of violence under 18 U.S.C. § 16(b) . . . ."). If the assault is carried out "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," then it will trigger the domestic violence DPIO. *See* 8 U.S.C. § 1227(a)(2)(E)(i) (2006).

[58]This offense is not an enumerated offense under the Sentencing Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011). Nor does it have as an element the use, attempted use, or threatened use of physical force so it cannot meet the Sentencing Guidelines' definition of crime of violence. *See id.*

[59]*See* Reyes-Olvera, A39 293 808, 2008 WL 1924639, at *3 (BIA Apr. 15, 2008) ("Our conclusion that the respondent's felony violation of Tex. Penal Code § 22.01(a) qualifies as a crime of violence under 18 U.S.C. § 16(b) . . . .").

[60]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[61]*See* Reyes-Olvera, A39 293 808, 2008 WL 1924639, at *3 (BIA Apr. 15, 2008) ("Our conclusion that the respondent's felony violation of Tex. Penal Code § 22.01(a) qualifies as a crime of violence under 18 U.S.C. § 16(b) . . . .").

[62]*See* Mayorga-Ramirez, A91 485 389, 2007 WL 1492254, at *2 (BIA May 14, 2007) ("We have held that 'simple assault' offenses that result in injury generally do not involve moral turpitude. However, if the assault involves an aggravating factor, it might rise to the level of a CIMT. Crimes falling in this category include the willful infliction of corporal abuse on a family member." (citations omitted)).

[63]This is a crime of violence pursuant to 18 U.S.C. Section 16(b). *See* Reyes-Olvera, A39 293 808, 2008 WL 1924639, at *3 (BIA Apr. 15, 2008) ("[Section] 22.01(a) qualifies as a crime of violence under 18 U.S.C. § 16(b) . . . ."). If the assault is carried out "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," then it will trigger the domestic violence DPIO. *See* 8 U.S.C. § 1227(a)(2)(E)(i) (2006).

[64]This offense is not an enumerated offense under the Sentencing Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011). Nor does it have as an element the use, attempted use, or threatened use of physical force so it cannot meet the Sentencing Guidelines' definition of crime of violence. *See id.*

[65]*See* Reyes-Olvera, A39 293 808, 2008 WL 1924639, at *3 (BIA Apr. 15, 2008) ("Our conclusion that the respondent's felony violation of Tex. Penal Code § 22.01 (a) qualifies as a crime of violence under 18 U.S.C. § 16(b) . . . .").

[66]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for

any other felony [enhances sentencing] by 4 levels . . . .").

[67]*See* Vargas-Chavez, A36 742 599, 2004 WL 880372, at *1 (BIA Mar. 5, 2004) ("Moreover, the offense has, as an element, the threatened use of physical force against the person of another. The offense therefore is a crime of violence as defined in 18 U.S.C. § 16(a)." (citation omitted) The court is describing Section 22.01(a)(2) via Section 22.02(a)(2).). Moreover, a crime of violence offense where the sentence imposed is at least a year meets the Section 1101 aggravated felony definition. *See* 8 U.S.C.§ 1101(a)(43)(F) (2006) ("The term 'aggravated felony' means—a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year.").

[68]*See, e.g.*, Garcia, A90 899 557, 2007 WL 1180971, at *2 (BIA Mar. 26, 2007) ("Indeed, an offense that involves an unfulfilled threat of injury or a non-violent touching is merely a simple assault, and as such it does not qualify as a crime involving moral turpitude . . . .").

[69]*See* Vargas-Chavez, A36 742 599, 2004 WL 880372, at *1 (BIA Mar. 5, 2004) ("Moreover, this offense has, as an element, the threatened use of physical force against the person of another. The offense therefore is a crime of violence as defined in 18 U.S.C. § 16(a)." (citation omitted). The court is describing from Section 22.01(a)(2) via Section 22.02(a)(2).) Couple this with a familial relationship, and this is probably a domestic violence DPIO. *See* 8 U.S.C. § 1227(a)(2)(E)(i) (2006) ("[T]he term "crime of domestic violence" means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.").

[70]This offense is not an enumerated offense under the Sentencing Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011). Nor does it have as an element the use, attempted use, or threatened use of physical force so it cannot meet the Sentencing Guidelines' definition of crime of violence. *See id.*

[71]*See* Vargas-Chavez, A36 742 599, 2004 WL 880372, at *1 (BIA Mar. 5, 2004) ("Moreover, the offense has, as an element, the threatened use of physical force against the person of another. The offense therefore is a crime of violence as defined in 18 U.S.C. § 16(a)." (citation omitted) The court is describing from Section 22.01(a)(2) via Section 22.02(a)(2).). Moreover, a crime of violence offense where the sentence imposed is at least a year meets the Section 1101 aggravated felony definition. *See* 8 U.S.C.§ 1101(a)(43)(F) (2006) ("The term 'aggravated felony' means—a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year.").

[72]*See* United States v. Villegas-Hernandez, 468 F.3d 874, 884 (5th Cir. 2006) ("Federal law, in turn, makes clear that the lowest class of felony within the federal system must be punishable by more than one year. As such, neither Texas nor federal law permits us to categorize [Section 22.01] as a felony." (citation omitted)). Additionally, it is not a crime-of-violence misdemeanor under the Sentencing Guidelines because it is not an enumerated offense nor does it have as an element the use, attempted use, or threatened use of physical force so it cannot meet the Sentencing Guidelines' definition of crime of violence. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011).

[73]This is possibly a crime of violence. *See* Vargas-Chavez, A36 742 599, 2004 WL 880372, at *1 (BIA Mar. 5, 2004) ("Moreover, this offense has, as an element, the threatened use of physical force against the person of another. The offense therefore is a crime of violence as defined in 18 U.S.C. § 16(a)." (citation omitted) The court is describing Section 22.01(a)(2) via Section 22.02(a)(2).). But, a crime of violence offense where the sentence imposed is less than a year does not meet the aggravated felony definition. *See* 8 U.S.C.§ 1101(a)(43)(F) (2006) ("The term 'aggravated felony' means—a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year.").

[74]*See, e.g.*, Garcia, A90 899 557, 2007 WL 1180971, at *2 (BIA Mar. 26, 2007) ("Indeed, an offense that involves an unfulfilled threat of injury or a non-violent touching is merely a simple assault, and as such it does not qualify as a crime involving moral turpitude . . . .").

[75]*See* Vargas-Chavez, A36 742 599, 2004 WL 880372, at *1 (BIA Mar. 5, 2004) ("Moreover, this offense has, as an element, the threatened use of physical force against the person of another. The offense therefore is a crime of violence as defined in 18 U.S.C. § 16(a)." (citation omitted) The court is describing from Section 22.01(a)(2) via Section 22.02(a)(2).). Couple this with a familial relationship, and this is probably a domestic violence DPIO. *See* 8 U.S.C. § 1227(a)(2)(E)(i) (2006) ("[T]he term "crime of domestic violence" means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.").

[76]This offense is not an enumerated offense under the Sentencing Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011). Nor does it have as an element the use, attempted use, or threatened use of physical force so it cannot meet the Sentencing Guidelines' definition of crime of violence. *See id.*

[77]This is possibly a crime of violence. *See* Vargas-Chavez, A36 742 599, 2004 WL 880372, at *1 (BIA Mar. 5, 2004) ("Moreover, this offense has, as an element, the threatened use of physical force against the person of another. The offense therefore is a crime of violence as defined in 18 U.S.C. § 16(a)." (citation omitted) The court is describing from Section 22.01(a)(2) via Section 22.02(a)(2).). But, a crime of violence offense where the sentence imposed is less than a year does not meet the aggravated felony definition. *See* 8 U.S.C.§ 1101(a)(43)(F) (2006) ("The term 'aggravated felony' means—a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year.").

[78]*See* United States v. Villegas-Hernandez, 468 F.3d 874, 884 (5th Cir. 2006) ("Federal law, in turn, makes clear that the lowest class of felony within the federal system must be punishable by more than one year. As such, neither Texas nor federal law permits us to categorize [Section 22.01] as a felony." (citation omitted)). Additionally, it is not a crime-of-violence misdemeanor under the Sentencing Guidelines because it is not an enumerated offense nor does it have as an element the use, attempted use, or threatened use of physical force so it cannot meet the Sentencing Guidelines' definition of crime of violence. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(iii) (2011).

[79]This is not an aggravated felony because it is not a crime of violence as defined in 18 U.S.C. Section 16. *See* Boswell, A44 849 755, 2006 WL 3203619, at *3 (BIA Sept. 20, 2006). Notwithstanding whether the sentence imposed in this scenario is at least one year, 8 U.S.C. Section 1101(a)(43)(F) would not apply because even if the sentence imposed is at least one year, this particular subsection is not considered a crime of violence for the purposes of 8 U.S.C. Section 1101(a)(43)(F). *See* Gonzalez-Garcia v. Gonzalez, 166 F. App'x 740, 744 (5th Cir. 2006) ("We find this reasoning persuasive and conclude that 'offensive or provocative contact' does not necessarily involve the use of physical force. Therefore, subsection (a)(3) of the Texas assault statute does not constitute a [crime of violence] and Gonzalez is not removable for that offense.").

[80]*See* Sanudo, 23 I. & N. Dec. 968, 971 (BIA 2006) ("Likewise, assault and battery offenses that necessarily involved the *intentional* infliction of *serious* bodily injury on another have been held to involve moral turpitude because such intentionally injurious conduct reflects a level of immorality that is greater than that associated with a simple offensive touching.") (implying that simple offensive touching is not a crime of moral turpitude).

[81]Because offensive touching is non-violent, it does not meet the definition of crime of violence 18 U.S.C. Section 16 regardless of the relationship or the sentence. *See* Sanudo, 23 I. & N. Dec. 968, 973 (BIA 2006).

[82]This offense is not an enumerated offense under the Sentencing Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011). Nor does it have as an element the use, attempted use, or threatened use of physical force so it cannot meet the Sentencing Guidelines' definition of crime of violence. *See id.*

[83]This is not an aggravated felony because it is not a crime of violence as defined in 18 U.S.C Section 16. *See* Boswell, A44 849 755, 2006 WL 3203619, at *3 (BIA Sept. 20, 2006). Notwithstanding whether the sentence imposed in this scenario is at least one year so 8 U.S.C. Section 1101(a)(43)(F) would not apply because even if the sentence imposed is at least one year, this particular subsection is not considered a crime of violence for the purposes of 8 U.S.C. Section 1101(a)(43)(F). *See* Gonzalez-Garcia v. Gonzalez, 166 F. App'x 740, 744 (5th Cir. 2006) ("We find this reasoning persuasive and conclude that 'offensive or provocative contact' does not necessarily involve the use of physical force. Therefore, subsection (a)(3) of the Texas assault statute does not constitute a [crime of violence] and Gonzalez is not removable for that offense.").

[84]*See* United States v. Villegas-Hernandez, 468 F.3d 874, 884 (5th Cir. 2006) ("Federal law, in turn, makes clear that the lowest class of felony within the federal system must be punishable by more than one year. As such, neither Texas nor federal law permits us to categorize [Section 22.01] as a felony." (citation omitted)). Additionally, it is not a crime-of-violence misdemeanor under the Sentencing Guidelines because it is not an enumerated offense nor does it have as an element the use, attempted use, or threatened use of physical force so it cannot meet the Sentencing Guidelines' definition of crime of violence. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(iii) (2011).

[85]This is not a crime of violence as defined in 18 U.S.C. Section 16. *See* Boswell, A44 849 755, 2006 WL 3203619, at *3 (BIA Sept. 20, 2006). Additionally the sentence imposed in this scenario is not at least one year so 8 U.S.C. Section 1101(a)(43)(F) would not apply. 8 U.S.C. § 1101(a)(43)(F) (2006).

[86]*See* Sanudo, 23 I. & N. Dec. 968, 971 (BIA 2006) ("Likewise, assault and battery offenses that necessarily involved the *intentional* infliction of *serious* bodily injury on another have been held to involve moral turpitude because such intentionally injurious conduct reflects a level of

immorality that is greater than that associated with a simple offensive touching.") (implying that simple offensive touching is not a crime of moral turpitude).

[87]Because offensive touching is non-violent, it does not meet the definition of crime of violence 18 U.S.C. Section 16 regardless of the relationship or the sentence. *See* Sanudo, 23 I. & N. Dec. 968, 973 (BIA 2006).

[88]This offense is not an enumerated offense under the Sentencing Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011). Nor does it have as an element the use, attempted use, or threatened use of physical force so it cannot meet the Sentencing Guidelines' definition of crime of violence. *See id.*

[89]This is not a crime of violence as defined in 18 U.S.C. Section 16. *See* Boswell, A44 849 755, 2006 WL 3203619, at *3 (BIA Sept. 20, 2006). Additionally the sentence imposed in this scenario is not at least one year so 8 U.S.C. Section 1101(a)(43)(F) would not apply. 8 U.S.C. § 1101(a)(43)(F) (2006).

[90]*See* United States v. Villegas-Hernandez, 468 F.3d 874, 884 (5th Cir. 2006) ("Federal law, in turn, makes clear that the lowest class of felony within the federal system must be punishable by more than one year. As such, neither Texas nor federal law permits us to categorize [Section 22.01] as a felony." (citation omitted)). Additionally, it is not a crime-of-violence misdemeanor under the Sentencing Guidelines because it is not an enumerated offense nor does it have as an element the use, attempted use, or threatened use of physical force so it cannot meet the Sentencing Guidelines' definition of crime of violence. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(iii) (2011).

[91]*See* Chihuahua-Rosales, A91 377 998, 2008 WL 1924614, at *3 (BIA Apr. 7, 2008) ("[A] conviction under section 22.02 of the Texas Penal Code is a crime that, by its nature, involves a substantial risk that physical force against the person or property of another may be used, and we therefore find no error in the Immigration Judge's finding that the respondent's conviction constitutes an aggravated felony/crime of violence under 18 U.S.C. § 16(b).").

[92]Although not as clear as aggravated assault with a deadly weapon, BIA's precedent seems to tilt the precautionary attorney into advising her client that a finding of moral turpitude is likely in these cases. *See* Solon, 24 I. & N. Dec. 239, 241–42 (BIA 2007). A specific intent to commit a physical injury is generally a CIMT. *See id.* If directed at a police officer, it is a CIMT. *See* Danesh, 19 I. & N. Dec. 669, 673 (BIA 1988) (holding that a specific intent to cause physical injury to a police officer is a CIMT because "bodily injury" was an essential element of the pertinent statute, which indicated that sufficient force must have been used to cause harm to the police officer.).

[93]This is a crime of violence pursuant to 18 U.S.C. Section 16(b). *See* Reyes-Olvera, A39 293 808, 2008 WL 1924639, at *3 (BIA Apr. 15, 2008) ("[Section] 22.01(a) qualifies as a crime of violence under 18 U.S.C. § 16(b) . . . ."). If the assault is carried out "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," then it will trigger the domestic violence DPIO. *See* 8 U.S.C. § 1227(a)(2)(E)(i) (2006).

[94]The Fifth Circuit Court of Appeals held in *United States v. Guillen-Alvarez* that section 22.02(a) was a crime of violence under U.S. Sentencing Guidelines Manual Section 2L1.2(b)(1)(A)(ii) because it constituted "aggravated assault," as referenced in that guideline's list of offenses which were crimes of violence. 489 F.3d 197, 199–200 (5th Cir. 2007). In *Guillen-Alvarez*, the Fifth Circuit specifically relied on the fact that Section 22.02(a) is predicated on "the two most common aggravating factors," which other states employ to elevate an ordinary assault offense to aggravated assault, namely "the causation of serious bodily injury and the use of a deadly weapon." *Id.* at 200.

[95]*See* Chihuahua-Rosales, A91 377 998, 2008 WL 1924614, at *3 (BIA Apr. 7, 2008) ("[A] conviction under section 22.02 of the Texas Penal Code is a crime that, by its nature, involves a substantial risk that physical force against the person or property of another may be used, and we therefore find no error in the Immigration Judge's finding that the respondent's conviction constitutes an aggravated felony/crime of violence under 18 U.S.C. § 16(b).").

[96]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[97]Although not as clear as aggravated assault with a deadly weapon, BIA's precedent seems to tilt the precautionary attorney into advising her client that a finding of moral turpitude is likely in these cases. *See* Solon, 24 I. & N. Dec. 239, 241–42 (BIA 2007). A specific intent to commit a physical injury is generally a CIMT. *See id.* If directed at a police officer, it is a CIMT. *See* Danesh, 19 I. & N. Dec. 669, 673 (BIA 1988) (holding that a specific intent to cause physical injury to a police officer is a CIMT because "bodily injury" was an essential element of the pertinent statute, which indicated that sufficient force must have been used to cause harm to the police officer.).

[98]This is a crime of violence pursuant to 18 U.S.C. Section 16(b). *See* Reyes-Olvera, A39 293 808, 2008 WL 1924639, at *3 (BIA Apr. 15, 2008) ("[Section] 22.01(a) qualifies as a crime of violence under 18 U.S.C. § 16(b) . . . ."). If the assault is carried out "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," then it will trigger the domestic violence DPIO. *See* 8 U.S.C. § 1227(a)(2)(E)(i) (2006).

[99]Although not as clear as aggravated assault with a deadly weapon, BIA's precedent seems to tilt the precautionary attorney into advising her client that a finding of moral turpitude is likely in these cases. *See* Solon, 24 I. & N. Dec. 239, 241–42 (BIA 2007). A specific intent to commit a physical injury is generally a CIMT. *See id.* If directed at a police officer, it is a CIMT. *See* Danesh, 19 I. & N. Dec. 669, 673 (BIA 1988) (holding that a specific intent to cause physical injury to a police officer is a CIMT because "bodily injury" was an essential element of the pertinent statute, which indicated that sufficient force must have been used to cause harm to the police officer.).

[100]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[101]*See* Chihuahua-Rosales, A91 377 998, 2008 WL 1924614, at *3 (BIA Apr. 7, 2008) ("[A]

conviction under section 22.02 of the Texas Penal Code is a crime that, by its nature, involves a substantial risk that physical force against the person or property of another may be used, and we therefore find no error in the Immigration Judge's finding that the respondent's conviction constitutes an aggravated felony/crime of violence under 18 U.S.C. § 16(b).").

[102]Assault with a deadly weapon is a CIMT. *See* Pichardo v. INS, 104 F.3d 756, 760 (5th Cir. 1997) (citing Medina, 15 I. & N. Dec. 611, 612 (BIA 1976)).

[103]If the weapon is a firearm, it will trigger the firearm and explosives DPIO. *See* 8 U.S.C § 1227(a)(2)(C) (2006). A weapon that qualifies as a firearm under Texas law will also qualify as one under federal law. Castenada v. Mukasey, 281 F. App'x 284, 289–90 & n.20 (5th Cir. 2008) ("Texas Penal Code § 46.01(3) defines 'firearm' as 'any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.' 18 U.S.C. § 921(a)(3) defines a firearm, *inter alia*, as 'any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.'").

[104]This is a crime of violence pursuant to 18 U.S.C. Section 16(b). *See* Reyes-Olvera, A39 293 808, 2008 WL 1924639, at *3 (BIA Apr. 15, 2008) ("[Section] 22.01(a) qualifies as a crime of violence under 18 U.S.C. § 16(b) . . . ."). If the assault is carried out "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," then it will trigger the domestic violence DPIO. *See* 8 U.S.C. § 1227(a)(2)(E)(i) (2006).

[105]The Fifth Circuit Court of Appeals held in *United States v. Guillen-Alvarez* that Section 22.02(a) was a crime of violence under U.S. Sentencing Guidelines Manual Section 2L1.2(b)(1)(A)(ii) because it constituted "aggravated assault," as referenced in that guideline's list of offenses which were crimes of violence. 489 F.3d 197, 199–200 (5th Cir. 2007). In *Guillen-Alvarez*, the Fifth Circuit specifically relied on the fact that Section 22.02(a) is predicated on "the two most common aggravating factors," which other states employ to elevate an ordinary assault offense to aggravated assault, namely "the causation of serious bodily injury and the use of a deadly weapon." *See id.* at 200.

[106]*See* Chihuahua-Rosales, A91 377 998, 2008 WL 1924614, at *3 (BIA Apr. 7, 2008) ("[A] conviction under section 22.02 of the Texas Penal Code is a crime that, by its nature, involves a substantial risk that physical force against the person or property of another may be used, and we therefore find no error in the Immigration Judge's finding that the respondent's conviction constitutes an aggravated felony/crime of violence under 18 U.S.C. § 16(b).").

[107]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[108]Assault with a deadly weapon is a CIMT. *See* Pichardo v. INS, 104 F.3d 756, 760 (5th Cir. 1997) (citing Medina, 15 I. & N. Dec. 611, 612 (BIA 1976)).

[109]If the weapon is a firearm, it will trigger the firearm and explosives DPIO. *See* 8 U.S.C § 1227(a)(2)(C) (2006). A weapon that qualifies as a firearm under Texas law will also qualify as one under federal law. Castaneda v. Mukasey, 281 F. App'x 284, 289–90, 289 n.20 (5th Cir.

2008) ("Texas Penal Code § 46.01(3) defines 'firearm' as 'any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.' 18 U.S.C. § 921(a)(3) defines a firearm, *inter alia*, as 'any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.'").

[110]This is a crime of violence pursuant to 18 U.S.C. Section 16(b). *See* Reyes-Olvera, A39 293 808, 2008 WL 1924639, at *3 (BIA Apr. 15, 2008) ("[Section] 22.01(a) qualifies as a crime of violence under 18 U.S.C. § 16(b) . . . ."). If the assault is carried out "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," then it will trigger the domestic violence DPIO. *See* 8 U.S.C. § 1227(a)(2)(E)(i) (2006).

[111]The Fifth Circuit Court of Appeals held in *United States v. Guillen-Alvarez* that Section 22.02(a) was a crime of violence under U.S. Sentencing Guidelines Manual Section 2L1.2(b)(1)(A)(ii) because it constituted "aggravated assault," as referenced in that guideline's list of offenses which were crimes of violence. 489 F.3d 197, 199–200 (5th Cir. 2007). In *Guillen-Alvarez*, the Fifth Circuit specifically relied on the fact that Section 22.02(a) is predicated on "the two most common aggravating factors," which other states employ to elevate an ordinary assault offense to aggravated assault, namely "the causation of serious bodily injury and the use of a deadly weapon." *See id.* at 200.

[112]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[113]*See* 8 U.S.C. § 1101(a)(43)(A) (2006) ("The term 'aggravated felony' means—murder, *rape*, or sexual abuse of a minor . . . ." (emphasis added)).

[114]*See* Torres-Varela, 23 I. & N. Dec. 78, 84 (BIA 2001) (noting that moral turpitude crimes include rape, statutory rape, spousal abuse, child abuse, and incest).

[115]It is a crime of violence pursuant to the guidelines because it will always involve "forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced)." *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011).

[116]*See* 8 U.S.C. § 1101(a)(43)(A) (2006) ("The term 'aggravated felony' means—murder, *rape*, or sexual abuse of a minor . . . ." (emphasis added)).

[117]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[118]*See* Calderon-Terrazas v. Ashcroft, 117 F. App'x 903, 904–05 (5th Cir. 2004) ("[C]rime of 'sexual assault of a child' under Texas Penal Code § 22.011 qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(A). 8 U.S.C. § 1101(a)(43)(A) includes within the scope of the term 'aggravated felony' the enumerated crimes of 'murder, rape, or sexual abuse of a minor.' In *United States v. Zavala-Sustaita*, this Court held that in determining whether a specific crime constituted 'sexual abuse of a minor' for § 1101(a)(43)(A) purposes, the words of the statute must be read according to 'their ordinary contemporary meaning.' Texas Penal Code § 22.011(a)(2)(A)

says that 'a person commits [the offense of sexual assault] if the person intentionally or knowingly causes the penetration of the anus or sexual organ of a child by any means[.]' This conduct clearly constitutes 'sexual abuse of a child[.]' Sexual abuse of a child is an enumerated crime in 8 U.S.C. § 1101(a)(43) and therefore expressly declared to be an 'aggravated felony[.]'" (citation omitted)).

[119]*See* Torres-Varela, 23 I. & N. Dec. 78, 84 (BIA 2001) (noting that moral turpitude crimes include rape, statutory rape, spousal abuse, child abuse, and incest).

[120]It is a crime of violence pursuant to the Guidelines because it will always involve "forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced)." *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011).

[121]*See* Calderon-Terrazas v. Ashcroft, 117 F. App'x 903, 904–05 (5th Cir. 2004) ("[C]rime of 'sexual assault of a child' under Texas Penal Code § 22.011 qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(A). 8 U.S.C. § 1101(a)(43)(A) includes within the scope of the term 'aggravated felony' the enumerated crimes of 'murder, rape, or sexual abuse of a minor.' In *United States v. Zavala-Sustaita*, this Court held that in determining whether a specific crime constituted 'sexual abuse of a minor' for § 1101(a)(43)(A) purposes, the words of the statute must be read according to 'their ordinary contemporary meaning.' Texas Penal Code § 22.011(a)(2)(A) says that 'a person commits [the offense of sexual assault] if the person intentionally or knowingly causes the penetration of the anus or sexual organ of a child by any means[.]' This conduct clearly constitutes 'sexual abuse of a child[.]' Sexual abuse of a child is an enumerated crime in 8 U.S.C. § 1101(a)(43) and therefore expressly declared to be an 'aggravated felony[.]'").

[122]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[123]*See* 8 U.S.C. § 1101(a)(43)(A) (2006) ("The term 'aggravated felony' means—murder, *rape*, or sexual abuse of a minor . . . ." (emphasis added)).

[124]*See* Torres-Varela, 23 I. & N. Dec. 78, 84 (BIA 2001) (noting that moral turpitude crimes include rape, statutory rape, spousal abuse, child abuse, and incest).

[125]It is a crime of violence pursuant to the guidelines because it will always involve "forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced)." *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011).

[126]*See* 8 U.S.C. § 1101(a)(43)(A) (2006) ("The term 'aggravated felony' means—murder, *rape*, or sexual abuse of a minor . . . ." (emphasis added)).

[127]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[128]This offense may be an aggravated felony DPIO. The law is unclear. A failure to act is probably not a crime of violence. *See* United States v. Gracia-Cantu, 302 F.3d 308, 313 (5th Cir. 2002) (largely exempting omissions). Nevertheless, intentionally causing bodily injury to a child requires physical force and is therefore a crime of violence under 18 U.S.C. Section 16. *See* Perez-Munoz v. Keisler, 507 F.3d 357, 364 (5th Cir. 2007).

[129]This is likely to be a CIMT because even though the injury may occur by omission, the omitted act may be contrary to accepted social morals. *See* Hussein, A26 416 298, 2004 WL 1059601, at *1 (BIA Mar. 15, 2004) ("However, at the time of the respondent's conviction [under Section 21.11(a)(1)] on December 16, 1991, the respondent could have been charged with

inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, as amended, as one convicted of a crime involving moral turpitude." (citing Tran, 21 I. & N. Dec. 291, 292 (BIA 1996); Danesh, 19 I. & N. Dec. 669 (BIA 1988))). However, criminally negligent injury may not constitute a CIMT. *See* Sweetser, 22 I. & N. Dec. 709, 713 (BIA 1999) ("[E]ither a crime is violent 'by its nature' or it is not. It cannot be a crime of violence 'by its nature' in some cases, but not in others." (citation omitted)).

[130]A noncitizen is deportable if after September 30, 1996, a conviction of "a crime of child abuse, child neglect, or child abandonment" is entered. 8 U.S.C. § 1227(a)(2)(E)(i) (2006). A search of relevant databases did not yield any guidance on the parameters of such a finding, but because of its relevance to this particular offense, the abundance of caution demands its listing.

[131]*See* United States v. Andino-Ortega, 608 F.3d 305, 311 (5th Cir. 2010) ("Because the offense of injury to a child, even where committed by an intentional act, does not require the use or attempted use of physical force, the offense does not meet the definition of a 'crime of violence' necessary for imposition of the 16-level enhancement . . . ."). This offense is not an enumerated offense under the relevant Sentencing Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011). Nor does it have as an element the use, attempted use, or threatened use of physical force so it cannot meet the Sentencing Guidelines' definition of "crime of violence." *See id.*

[132]This offense may be an aggravated felony DPIO. The law is unclear. A failure to act is probably not a crime of violence. *See* United States v. Gracia-Cantu, 302 F.3d 308, 313 (5th Cir. 2002) (largely exempting omissions). Nevertheless, intentionally causing bodily injury to a child requires physical force and is therefore a crime of violence under 18 U.S.C. Section 16. *See* Perez-Munoz v. Keisler, 507 F.3d 357, 364 (5th Cir. 2007).

[133]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[134]This is not an aggravated felony when the punishment does not exceed one year. *See* TEX. PENAL CODE ANN. § 22.04 (West 2011); *see also* TEX. PENAL CODE ANN. § 12.35 (West 2011). Although it may be a crime of violence pursuant to 18 U.S.C. Section 16, the crime-of-violence aggravated felony DPIO requires an imposed sentence of at least one year to trigger this particular DPIO. *See* 8 U.S.C. § 1101(a)(43)(F) (2006); United States v. Gracia-Cantu, 302 F.3d 308, 312–13 (5th Cir. 2002); Perez-Munoz v. Keisler, 507 F.3d 357, 363–64 (5th Cir. 2007).

[135]This is likely to be a CIMT because even though the injury may occur by omission, the omitted act may be contrary to accepted social morals. *See* Hussein, A26 416 298, 2004 WL 1059601, at *1 (BIA Mar. 15, 2004) ("However, at the time of the respondent's conviction [under Section 21.11(a)(1)] on December 16, 1991, the respondent could have been charged with inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, as amended, as one convicted of a crime involving moral turpitude." (citing Tran, 21 I. & N. Dec. 291, 292 (BIA 1996); Danesh, 19 I. & N. Dec. 669 (BIA 1988))). However, criminally negligent injury may not constitute a CIMT. *See* Sweetser, 22 I. & N. Dec. 709, 713 (BIA 1999) ("[E]ither a crime is violent 'by its nature' or it is not. It cannot be a crime of violence 'by its nature' in some cases, but not in others." (citation omitted)).

[136]A noncitizen is deportable if after September 30, 1996, a conviction of "a crime of child abuse, child neglect, or child abandonment" is entered. 8 U.S.C. § 1227(a)(2)(E)(i) (2006). A search of relevant databases did not yield any guidance on the parameters of such a finding, but because of its relevance to this particular offense, the abundance of caution demands its listing.

[137]*See* United States v. Andino-Ortega, 608 F.3d 305, 311 (5th Cir. 2010) ("Because the offense of injury to a child, even where committed by an intentional act, does not require the use or attempted use of physical force, the offense does not meet the definition of a 'crime of violence' necessary for imposition of the 16-level enhancement . . . ."). This offense is not an enumerated offense under the relevant Sentencing Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011). Nor does it have as an element the use, attempted use, or threatened use of physical force, so it cannot meet the Sentencing Guidelines' definition of "crime of violence." *See id.*

[138]This is not an aggravated felony when the punishment does not exceed one year. *See* TEX. PENAL CODE ANN. § 22.04 (West 2011); *see also* TEX. PENAL CODE ANN. § 12.35 (West 2011). Although it may be a crime of violence pursuant to 18 U.S.C. Section 16, the crime-of-violence aggravated felony DPIO requires an imposed sentence of at least one year to trigger this particular DPIO. *See* 8 U.S.C. § 1101(a)(43)(F) (2006); United States v. Gracia-Cantu, 302 F.3d 308, 312–13 (5th Cir. 2002); Perez-Munoz v. Keisler, 507 F.3d 357, 363–64 (5th Cir. 2007).

[139]First, because this is not a felony case, a 4-level enhancement is not applicable. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011); *see also* United States v. Andino-Ortega, 608 F.3d 305, 311 (5th Cir. 2010) ("Because the offense of injury to a child, even where committed by an intentional act, does not require the use or attempted use of physical force, the offense does not meet the definition of a 'crime of violence' necessary for imposition of the 16-level enhancement . . . ."). The "crime of violence" definition for the 16-level enhancement is the same as the three-or-more crime-of-violence misdemeanor enhancement. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D)–(E).

[140]This offense is not a crime of violence because it does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another, nor is it an offense that involves a substantial risk that physical force against anyone may be used in the course of committing the offense. *See* 18 U.S.C. § 16 (2006).

[141]Child abandonment is usually a CIMT because it requires willfulness on the part of the parent and the destitution of the child. *See* Rodriguez-Castro v. Gonzales, 427 F.3d 316, 323 (5th Cir. 2005). The instant Texas statute would likely constitute a CIMT because of its intentional *mens rea* and its exposure of a child to an unreasonable risk of harm. *See id.* at 321. Alternatively, endangering a child has been held to be a CIMT even though it can be done recklessly. *See id.* at 323.

[142]A noncitizen is deportable if after September 30, 1996, a conviction of "a crime of child abuse, child neglect, or child abandonment" is entered. 8 U.S.C. § 1227(a)(2)(E)(i) (2006). A search of relevant databases did not yield any guidance on the parameters of such a finding, but because of its relevance to this particular offense, the abundance of caution demands its listing.

[143]*See* United States v. Andino-Ortega, 608 F.3d 305, 311 (5th Cir. 2010) ("Because the offense of injury to a child, even where committed by an intentional act, does not require the use or attempted use of physical force, the offense does not meet the definition of a 'crime of violence' necessary for imposition of the 16-level enhancement . . . ."). This offense is not an enumerated offense under the relevant Sentencing Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011). Nor does it have as an element the use, attempted use, or threatened use of physical force, so it cannot meet the Sentencing Guidelines' definition of "crime of violence." *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011).

[144]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for

any other felony [enhances sentencing] by 4 levels . . . .").

[145]This offense would be considered a crime of violence pursuant to 18 U.S.C. Section 16 but would not rise to be an aggravated felony because its term of imprisonment is 180 days. *See* 8 U.S.C. § 1101(a)(43)(F) (2006); TEX. PENAL CODE ANN. § 12.22 (West 2011).

[146]This is a CIMT. *See* Ajami, 22 I. & N. Dec. 949, 952 (BIA 1999) (finding that the intentional transmission of threats is evidence of a vicious motive or a corrupt mind). Because the Texas statute criminalizes only intentional conduct, it is likely a CIMT. *See* TEX. PENAL CODE ANN. § 12.22 (West 2011).

[147]This offense most likely suffices the "crime of violence" definition. *See* 18 U.S.C. § 16 (2006). Couple that likelihood with a year or more sentence, and the defendant would trigger the crime-of-violence aggravated felony DPIO. *See* 8 U.S.C. § 1101(a)(43)(F) (2006).

[148]This is a CIMT. *See* Ajami, 22 I. & N. Dec. 949, 952 (BIA 1999) (finding that the intentional transmission of threats is evidence of a vicious motive or a corrupt mind). Because the Texas statute criminalizes only intentional conduct, it is likely a CIMT. *See* TEX. PENAL CODE ANN. § 12.22 (West 2011).

[149]This offense most likely suffices the "crime of violence" definition because the disjunctive portions of the statute all fit that definition's conduct. *See* 18 U.S.C. § 16 (2006). Couple that likelihood with a year or more sentence, and a noncitizen would meet the aggravated felony definition. *See* 8 U.S.C. § 1101(a)(43)(F) (2006).

[150]The specific case facts matter a great deal in relation to this enhancement. The "crime of violence" definition found in the Sentencing Guidelines specifically applies only to "the person of another" while the "crime of violence" definition found in 18 U.S.C. Section 16 applies both to the person of another and the "property of another." 18 U.S.C. § 16 (2006); U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) (2011). So in this specific case, if the defendant manages to get a sentence of at least one year, the situation will arise where the 8-level enhancement found in the Sentencing Guidelines will definitely apply; but, whether the 4-level enhancement for three or more misdemeanors involving crimes of violence will apply is largely up to the specific facts of the case. Note that the 4-level enhancement found in Section 2L1.2(b)(1)(D) does not apply because under the Sentencing Guidelines the defendant must have received a sentence for a crime punishable in excess of a year. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (b)(1)(D) (2011). Thus, this particular offense is beyond that enhancement's reach.

[151]This offense would be considered a crime of violence pursuant to 18 U.S.C. Section 16 but would not trigger the crime-of-violence aggravated felony DPIO because the maximum term of imprisonment (180 days) precludes a defendant from ever receiving a sentence imposed of at least one year as required by this particular DPIO. *See* 8 U.S.C. § 1101(a)(43)(F) (2006).

[152]This is a CIMT. *See* Ajami, 22 I. & N. Dec. 949, 952 (BIA 1999) (finding that the intentional transmission of threats is evidence of a vicious motive or a corrupt mind). Because the Texas statute criminalizes only intentional conduct, it is likely a CIMT. *See* TEX. PENAL CODE ANN. § 12.22 (West 2011).

[153]This offense would be considered a crime of violence pursuant to 18 U.S.C. Section 16 but would not trigger the crime-of-violence aggravated felony DPIO because the maximum term of imprisonment (180 days) precludes a defendant from ever receiving a sentence imposed of at least one year as required by this particular DPIO. *See* 8 U.S.C. § 1101(a)(43)(F) (2006).

[154]This offense most likely suffices the "crime of violence" definition. *See* 18 U.S.C. § 16

(2006). Couple that likelihood with a year or more sentence, and the defendant would trigger the crime-of-violence aggravated felony DPIO. *See* 8 U.S.C. § 1101(a)(43)(F) (2006).

[155]This is a CIMT. *See* Ajami, 22 I. & N. Dec. 949, 952 (BIA 1999) (finding that the intentional transmission of threats is evidence of a vicious motive or a corrupt mind). Because the Texas statute criminalizes only intentional conduct, it is likely a CIMT. *See* TEX. PENAL CODE ANN. § 12.22 (West 2011).

[156]This offense most likely suffices the "crime of violence" definition. *See* 18 U.S.C. § 16 (2006). Couple that likelihood with a year or more sentence, and the defendant would trigger the crime-of-violence aggravated felony DPIO. *See* 8 U.S.C. § 1101(a)(43)(F) (2006).

[157]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[158]This is a CIMT. *See* Ajami, 22 I. & N. Dec. 949, 952 (BIA 1999) (finding that the intentional transmission of threats is evidence of a vicious motive or a corrupt mind). Because the Texas statute criminalizes only intentional conduct, it is likely a CIMT. *See* TEX. PENAL CODE ANN. § 12.22 (West 2011).

[159]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[160]This is not a CIMT because the Texas statute does not require that the child be in destitute circumstances, in need of the support of the parent, have become or is likely to become a public charge, or that the health or the life of the child has been impaired as a result of the criminal non-support. *See* TEX. PENAL CODE ANN. § 25.05 (West 2011); Rodriquez-Castro v. Gonzales, 427 F.3d 316, 323 (5th Cir. 2005) ("BIA decisions in which failure to support a child has been found to be a CIMT involve willful and intentional acts that leave a child in destitute circumstances."); E—, 2 I. & N. Dec. 134, 145 (BIA 1944) (Conviction under Ohio statute did not involve a CIMT because it did not require the child be "destitute or in need of support from the father . . . in danger of becoming a public charge . . . and . . . the health or life of the child has not been impaired . . . .").

[161]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[162]*See* Ventura, A72 950 482, 2007 WL 3301629, at *1 (BIA Sept. 28, 2007) ("A protective order is issued to protect a party from a person the court deems a threat to the protected party's safety or well-being and a violation of such order could be considered to be inherently base and contrary to the duties owed between persons or to society in general." (citing Lopez-Meza, 22 I. & N. Dec. 1188 (BIA 1999))).

[163]*See* 8 U.S.C. § 1227(a)(2)(E)(ii) (2006) ("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.").

[164]*See* Ventura, A72 950 482, 2007 WL 3301629, at *1 (BIA Sept. 28, 2007) ("A protective order is issued to protect a party from a person the court deems a threat to the protected party's

safety or well-being and a violation of such order could be considered to be inherently base and contrary to the duties owed between persons or to society in general." (citing Lopez-Meza, 22 I. & N. Dec. 1188 (BIA 1999))).

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[166]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[167]*See* Trevino-Soliz, A44 573 945, 2006 WL 3712421, at *1 (BIA Nov. 24, 2006) ("We have found that the intentional starting of a fire creates the substantial risk of damaging the property of another, persons that may be on the property, or public employees who respond to the fire, and that arson is therefore a crime of violence under 18 U.S.C. § 16(b)."); *see also* Palacios-Pinera, 22 I. & N. Dec. 434, 437 (BIA1998).

[168]Arson generally has the necessary evil intent to qualify for a CIMT. *See, e.g.*, Mbea v. Gonzales, 482 F.3d 276, 278 (4th Cir. 2007); *see also, e.g.*, Vuksanovic v. U.S. Attorney Gen., 439 F.3d 1308, 1309 (11th Cir. 2006); Sakhi v. Ashcroft, 78 F. App'x 557, 558 (9th Cir. 2003).

[169]*See* United States v. Velez-Alderete, 569 F.3d 541, 546 (5th Cir. 2009) ("Turning to Texas's arson statute, we conclude that it falls within the meaning of this enumerated offense. Texas proscribes starting a fire 'with intent to destroy or damage' various types of property ranging from structures and vegetation on open-space land to vehicles when the perpetrator knows that the vehicle is insured or when he is reckless concerning the safety of the property of another. All of these variations involve a willful and malicious burning of property. . . . [T]he district court did not err in applying the 16-level enhancement to Velez-Alderete's offense level pursuant to [Sentencing Guideline Section] 2L1.2(b)(1)(A)(ii).").

[170]*See* Trevino-Soliz, A44 573 945, 2006 WL 3712421, at *1 (BIA Nov. 24, 2006) ("We have found that the intentional starting of a fire creates the substantial risk of damaging the property of another, persons that may be on the property, or public employees who respond to the fire, and that arson is therefore a crime of violence under 18 U.S.C. § 16(b)."); *see also* Palacios-Pinera, 22 I. & N. Dec. 434, 437 (BIA1998); U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2011).

[171]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[172]*See* United States v. Landeros-Gonzales, 262 F.3d 424, 427 (5th Cir. 2001) ("In sum, we cannot conclude that there is a substantial risk that a vandal will use 'destructive or violent force' in the course of unlawfully 'making marks' (such as inscriptions or drawings) on another person's property. Accordingly, Landeros's conviction is not a 'crime of violence' under 18 U.S.C. § 16 and, consequently, is not an 'aggravated felony' for the purposes of [Sentencing Guideline Section] 2L1.2(b)(1)(A).").

[173]*See* Herndon-Melendez, A28 668 187, 2006 WL 3088969, at *2 (BIA Sept. 11, 2006)

("The respondent contends that his conviction under section 28.03 of the Texas Penal Code is not a crime involving moral turpitude because there is no element of an 'evil intent.' We agree. We find that the offense of criminal mischief under Texas Penal Code § 28.03(b) is comparable with those types of offenses that we have consistently found not to involve moral turpitude." (citations omitted)).

[174]*See* United States v. Landeros-Gonzales, 262 F.3d 424, 427 (5th Cir. 2001) ("In sum, we cannot conclude that there is a substantial risk that a vandal will use 'destructive or violent force' in the course of unlawfully 'making marks' (such as inscriptions or drawings) on another person's property. Accordingly, Landeros's conviction is not a 'crime of violence' under 18 U.S.C. § 16 and, consequently, is not an 'aggravated felony' for the purposes of [Sentencing Guideline Section] 2L1.2(b)(1)(A).").

[175]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[176]*See* United States v. Landeros-Gonzales, 262 F.3d 424, 427 (5th Cir. 2001) ("In sum, we cannot conclude that there is a substantial risk that a vandal will use 'destructive or violent force' in the course of unlawfully 'making marks' (such as inscriptions or drawings) on another person's property. Accordingly, Landeros's conviction is not a 'crime of violence' under 18 U.S.C. § 16 and, consequently, is not an 'aggravated felony' for the purposes of [Sentencing Guideline Section] 2L1.2(b)(1)(A).").

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[178]*See* United States v. Landeros-Gonzales, 262 F.3d 424, 427 (5th Cir. 2001) ("In sum, we cannot conclude that there is a substantial risk that a vandal will use 'destructive or violent force' in the course of unlawfully 'making marks' (such as inscriptions or drawings) on another person's property. Accordingly, Landeros's conviction is not a 'crime of violence' under 18 U.S.C. § 16 and, consequently, is not an 'aggravated felony' for the purposes of [Sentencing Guideline Section] 2L1.2(b)(1)(A)."); *see also* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2011).

[179]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[180]*See* 8 U.S.C. § 1101(a)(43)(F)–(G) (2006) ("The term 'aggravated felony' means—(F) a crime of violence (as defined in section 16 of Title 18, 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.").

[181]The BIA has consistently held that robbery is a CIMT. *See* Mayers v. INS, No. 95-60100, 1995 WL 696761, at *1 (5th Cir. Oct. 19, 1995) (per curiam) (noting that "[b]ecause attempted robbery requires a corrupt mind, we agree with the BIA that attempted robbery is a crime of moral turpitude, and therefore the BIA did not err in finding [Defendant] deportable . . . ." (citing Ashby v. INS, 961 F.2d 555, 556 (5th Cir. 1992))).

[182]*See* United States v. Ortega-Alferes, 327 F. App'x 508, 508 (5th Cir. 2009) (per curiam) ("Robbery is an enumerated crime of violence under § 2L1.2." (citing U.S. SENTENCING

GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(iii) (2010))). In *United States v. Santiesteban-Hernandez*, the Fifth Circuit Court of Appeals held that the definition of robbery by threats under Texas Penal Code Section 29.02 substantially corresponds to the generic, contemporary meaning of robbery and thus qualifies as an enumerated offense under Section 2L1.2. 469 F.3d 376, 378–82 (5th Cir. 2006).

[183]*See* 8 U.S.C. § 1101(a)(43)(F)–(G) (2006) ("The term 'aggravated felony' means—(F) a crime of violence (as defined in section 16 of Title 18, 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."); *see also* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2011).

[184]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2010) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

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[186]*See* United States v. Ortega-Alferes, 327 F. App'x 508, 508 (5th Cir. 2009) (per curiam) ("Robbery is an enumerated crime of violence under § 2L1.2." (citing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(iii) (2010))). In *United States v. Santiesteban-Hernandez*, the Fifth Circuit Court of Appeals held that the definition of robbery by threats under Texas Penal Code Section 29.02 substantially corresponds to the generic, contemporary meaning of robbery and thus qualifies as an enumerated offense under Section 2L1.2. 469 F.3d 376, 378-82 (5th Cir. 2006).

[187]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[188]*See* 8 U.S.C. § 1101(a)(43)(F)–(G) (2006) ("The term 'aggravated felony' means—(F) a crime of violence (as defined in section 16 of Title 18, 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.").

[189]The BIA has consistently held that robbery is a CIMT. *See* Mayers v. INS, No. 95-60100, 1995 WL 696761, at *1 (5th Cir. Oct. 19, 1995) (per curiam) (noting that "[b]ecause attempted robbery requires a corrupt mind, we agree with the BIA that attempted robbery is a crime of moral turpitude, and therefore the BIA did not err in finding [Defendant] deportable . . . ." (citing Ashby v. INS, 961 F.2d 555, 556 (5th Cir. 1992))).

[190]Texas aggravated robbery is within Sentencing Guideline Section 2L1.2's definition of the type of crime for which the enhancement is warranted. *See* TEX. PENAL CODE Ann. § 29.03(a) (West 2011); U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, cmt. 1(B)(iii) (2010); United States v. Perez-Islas, 156 F. App'x 667, 668 (5th Cir. 2005) ("Robbery is a specifically enumerated 'crime of violence' for enhancement purposes under [Sentencing Guideline Section] 2L1.2." (citing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, cmt. 1(B)(iii) (2010))).

[191]*See* 8 U.S.C. § 1101(a)(43)(F)–(G) (2006) ("The term 'aggravated felony' means—(F) a crime of violence (as defined in section 16 of Title 18, 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.");

see also U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2011).

[192]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

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[195]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[196]*See* Fragoso-Blas, A013 650 969, 2010 WL 3536754, at *1 (BIA Aug. 24, 2010) (noting that burglary of a habitation in violation of Texas Penal Code Section 30.02(c)(2) satisfied the definition of an aggravated felony as defined under Section 101(a)(43)(G) of the INA); *see also* 8 U.S.C. § 1101(a)(43)(G) (2006) (including "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year").

[197]*See, e.g.*, Rojas, A91 471 930, 2007 WL 4707500, at *1 (BIA Oct. 30, 2007) ("Contrary to the respondent's assertion on appeal, we find that section 30.02(a) of the Texas Penal Code is a crime in which moral turpitude necessarily inheres.").

[198]*See* United States v. Linares-Hernandez, 284 F. App'x 128, 129 (5th Cir. 2008) (per curiam) ("Because we have held that an offense under § 30.02(a)(1) constitutes a crime of violence for purposes of § 2L1.2, the district court did not err in applying the enhancement." (citing United States v. Gomez-Guerra, 485 F.3d 301, 304 & n.3 (5th Cir. 2007); United States v. Garcia-Mendez, 420 F.3d 454, 456-57 (5th Cir. 2005))).

[199]*See* Fragoso-Blas, A013 650 969, 2010 WL 3536754, at *1 (BIA Aug. 24, 2010) (noting that burglary of a habitation in violation of Texas Penal Code Section 30.02(c)(2) satisfied the definition of an aggravated felony as defined under Section 101(a)(43)(G) of the INA); *see also* 8 U.S.C. § 1101(a)(43)(G) (2006) (including "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year"); *see also* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2011).

[200]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

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[204]*See* Fragoso-Blas, A013 650 969, 2010 WL 3536754, at *1 (BIA Aug. 24, 2010) (noting that burglary of a habitation in violation of Texas Penal Code Section 30.02(c)(2) satisfied the definition of an aggravated felony as defined under Section 101(a)(43)(G) of the INA); *see also* 8 U.S.C. § 1101(a)(43)(G) (2006) (including "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year"); *see also* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2011).

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[208]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[209]The Texas offense of burglary of a building is not a crime of violence, for federal sentencing purposes, which distinguishes it from burglary of a habitation. *See* United States v. Mendoza-Sanchez, 456 F.3d 479, 483 (5th Cir. 2006) ("Moreover, this court has held that the Texas offense of burglary of a building . . . is not the equivalent of the enumerated offense of burglary of a dwelling." (citing United States v. Rodriguez-Rodriguez, 388 F.3d 466, 467 & n.6 (5th Cir. 2004))). However, it is still an aggravated felony pursuant to Section 1101. *See* 8 U.S.C. § 1101(a)(43)(F) (2006).

[210]*See, e.g.*, Rojas, A91 471 930, 2007 WL 4707500, at *1 (BIA Oct. 30, 2007) ("Contrary to the respondent's assertion on appeal, we find that section 30.02(a) of the Texas Penal Code is a crime in which moral turpitude necessarily inheres.").

[211]The Texas offense of burglary of a building is not a crime of violence, for federal sentencing purposes, which distinguishes it from burglary of a habitation. *See* United States v. Mendoza-Sanchez, 456 F.3d 479, 483 (5th Cir. 2006) ("Moreover, this court has held that the Texas offense of burglary of a building . . . is not the equivalent of the enumerated offense of burglary of a dwelling." (citing United States v. Rodriguez-Rodriguez, 388 F.3d 466, 467 & n.6 (5th Cir. 2004))). However, it is still an aggravated felony pursuant to Section 1101. *See* 8 U.S.C. § 1101(a)(43)(F) (2006); *see also* U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(C) (2011).

[212]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[213]*See, e.g.*, Rojas, A91 471 930, 2007 WL 4707500, at *1 (BIA Oct. 30, 2007) ("Contrary to the respondent's assertion on appeal, we find that section 30.02(a) of the Texas Penal Code is a crime in which moral turpitude necessarily inheres.").

[214]Pleading to a less-than-a-year sentence will fail to trigger the aggravated felony DPIO. *See* 8 U.S.C. § 1101(a)(43)(F) (2006). Nevertheless, the Sentencing Guidelines for Sections 1326(a) and (b) are concerned only with convictions. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1) (2011). So, even if the defendant receives less than a year, thus avoiding the aggravated felony label, that defendant's sentence will probably still be enhanced if the defendant returns after having been deported. *See id.* § 2L1.2(b)(1)(D) (stating that for "a conviction for any other felony, increase by 4 levels").

[215]*See* Santos v. Reno, 228 F.3d 591, 598 (5th Cir. 2000) ("'[B]urglary of a vehicle' qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), which provides that the term 'aggravated felony' includes 'a crime of violence . . . .'").

[216]*See, e.g.*, Rivera-Leon, A74 571 223, 2004 WL 848585, at *1 (BIA Feb. 26, 2004) ("We find that the respondent's conviction for burglary of a vehicle, a Class A misdemeanor, pursuant to section 30.04 of the Texas Penal Code, is sufficient to support the conclusion that he was convicted of a crime involving moral turpitude. We agree with the DHS's assertion that a conviction does not need to be a felony conviction in order to constitute a crime involving moral turpitude." (citing Short, 20 I. & N. Dec. 136, 139 (BIA 1989)) (citations omitted)).

[217]*See* Santos v. Reno, 228 F.3d 591, 598 (5th Cir. 2000) ("'[B]urglary of a vehicle' qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), which provides that the term 'aggravated felony' includes 'a crime of violence . . . .'"); *see also* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2011).

[218]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[219]*See, e.g.*, Rivera-Leon, A74 571 223, 2004 WL 848585, at *1 (BIA Feb. 26, 2004) ("We find that the respondent's conviction for burglary of a vehicle, a Class A misdemeanor, pursuant to section 30.04 of the Texas Penal Code, is sufficient to support the conclusion that he was convicted of a crime involving moral turpitude. We agree with the DHS's assertion that a conviction does not need to be a felony conviction in order to constitute a crime involving moral turpitude." (citing Short, 20 I. & N. Dec. 136, 139 (BIA 1989)) (citations omitted)).

[220]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[221]*See* Santos v. Reno, 228 F.3d 591, 598 (5th Cir. 2000) ("'[B]urglary of a vehicle' qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), which provides that the term 'aggravated felony' includes 'a crime of violence . . . .'").

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[223]*See* Santos v. Reno, 228 F.3d 591, 598 (5th Cir. 2000) ("'[B]urglary of a vehicle' qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), which provides that the term 'aggravated felony' includes 'a crime of violence . . . .'").

[224]While the defendant will avoid the harsher penalties attendant to crimes of violence, aggravated felonies, or other felonies, if the defendant has "three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, [then his offense score will]

increase by 4 levels." *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(E) (2011). The defendant's sentence will be enhanced pursuant to Sentencing Guidelines Section 4B1.2(a), which has a broader definition of crime of violence than that found in 18 U.S.C. Section 16(b). *Compare* 18 U.S.C. § 16(b) (2006), *with* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a). Moreover, while *United States v. Chapa-Garza* changed the BIA's practice of applying 18 U.S.C. Section 16(b) to rule that a DUI was a crime of violence, the same cannot be said if one analyzes a DUI charge under the U.S. Sentencing Guidelines Manual Section 4B1.2 rubric employed by the sentencing guidelines when one faces federal criminal charges. *See* United States v. Chapa-Garza, 243 F.3d 921, 927 (5th Cir. 2001); *see also* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (defining crime of violence).

[225]*See, e.g.*, Rivera-Leon, A74 571 223, 2004 WL 848585, at *1 (BIA Feb. 26, 2004) ("We find that the respondent's conviction for burglary of a vehicle, a Class A misdemeanor, pursuant to section 30.04 of the Texas Penal Code, is sufficient to support the conclusion that he was convicted of a crime involving moral turpitude. We agree with the DHS's assertion that a conviction does not need to be a felony conviction in order to constitute a crime involving moral turpitude." (citing Short, 20 I. & N. Dec. 136, 139 (BIA 1989)) (internal citations omitted)).

[226]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[227]*See* 8 U.S.C. § 1101(a)(43)(G) (2006) (defining "aggravated felony" as "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year").

[228]*See* Brown, A018 134 905, 2008 WL 4420059, at *1 (BIA Sept. 19, 2008) ("The Texas courts assume that 'theft' involves the intent to permanently deprive another of property. We have no reason to assume otherwise" (citations omitted)). The BIA dismissed Brown's appeal challenging the labeling of his theft conviction as a CIMT. *Id.* at *2.

[229]*See* 8 U.S.C. § 1101(a)(43)(G) (2006) (defining "aggravated felony" as "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year").

[230]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

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[236]*See* United States v. Armendariz-Moreno, 571 F.3d 490, 491 (5th Cir. 2009) (per curiam) ("The risk of physical force may exist where the defendant commits the offense of unauthorized use of a vehicle, but the crime itself has no essential element of violent and aggressive conduct.").

[237]*See* Almanza-Arenas, 24 I. & N. Dec. 771, 773 (BIA 2009). In analyzing a California statute that fused the generic theft offense with the generic joy-riding offense, the BIA seemed willing to draw a distinction, as to moral turpitude, between the two. *Id.* ("[The immigration judge] determined that section 10851 of the California Vehicle Code is a divisible statute because it could include the act of joyriding—defined as a crime of general intent to temporarily use a vehicle without authorization—as well as an actual theft offense, which requires a specific intent to deprive the owner vehicle of title to or possession of a vehicle, either temporarily or permanently. Because the respondent failed to provide evidence to prove that his crime was outside the scope of 'theft,' and thus not a crime involving moral turpitude, the Immigration Judge concluded that he failed to establish his eligibility for cancellation of removal." (footnotes omitted)).

[238]*See* United States v. Rodriguez-Rodriguez, 388 F.3d 466, 470 (5th Cir. 2004) (per curiam) ("[W]e conclude that Rodriguez's Texas offense of burglary of a building committed between 1974 and 1990 and his UUMV offense committed in 1992 are not crimes of violence within the meaning of [Sentencing Guideline Section] 2L1.2(b)(1)(A)(ii) because neither offense as defined by state law is listed in Application Note 1(B)(ii)(II) or has as an element the use, attempted use, or threatened use of physical force against the person of another.").

[239]*See* United States v. Armendariz-Moreno, 571 F.3d 490, 491 (5th Cir. 2009) (per curiam) ("The risk of physical force may exist where the defendant commits the offense of unauthorized use of a vehicle, but the crime itself has no essential element of violent and aggressive conduct.").

[240]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[241]*See* 8 U.S.C. § 1101(a)(43)(R) (2006) (defining "aggravated felony" as "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").

[242]It is probably not a CIMT because there is no evil intent required. *See* TEX. PENAL CODE ANN. § 31.11 (West 2011); State Bar v. Heard, 603 S.W.2d 829, 834–35 (Tex. 1980) (finding that "any crime of which fraud is a necessary element is a crime involving moral turpitude" (citing Jordan v. De George, 341 U.S. 223, 227 (1951) ("In every deportation case where fraud has been proved, federal courts have held that the crime in issue involved moral turpitude."))). However, the statute does require knowingly and intentionally altering identification, markings, and acting knowingly and intentionally is usually sufficient for a finding that this offense is a CIMT. *See* Garcia-Maldonado v. Gonzales, 491 F.3d 284, 289–90 (5th Cir. 2007) (finding that failure to stop and render aid after involvement in an accident, which involves intentionally and knowingly leaving the scene, is a CIMT); Tran, 21 I. & N. Dec. 291, 293 (BIA 1996) (stating that a crime involves moral turpitude when knowing or intentional conduct is an element of a morally reprehensible crime).

[243]*See* 8 U.S.C. § 1101(a)(43)(R) (2006) (defining "aggravated felony" as "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").

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[245]*See* 8 U.S.C. § 1101(a)(43)(R) (2006) (defining "aggravated felony" as "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").

[246]*See, e.g.*, Sinju, A45 072 486, 2008 WL 3861917, at *1 (BIA July 17, 2008) (identifying forgery, as defined by Texas Penal Code Section 32.21(d), as a crime of moral turpitude). It is a CIMT because it contains as an element the intent to defraud or harm another. *See* TEX. PENAL CODE ANN. § 32.21(d) (West 2011); State Bar v. Heard, 603 S.W.2d 829, 834–35 (Tex. 1980) ("[A]ny crime of which fraud is a necessary element is a crime involving moral turpitude." (citing Jordan v. De George, 341 U.S. 223, 227 (1951) ("In every deportation case where fraud has been proved, federal courts have held that the crime in issue involved moral turpitude.")); Turton v. State Bar., 775 S.W.2d 712, 717 (Tex. App.—San Antonio 1989, writ denied) (noting that "conviction of some crimes establishes moral turpitude . . . [including] crimes which necessarily involve an intent to defraud . . . ." (citing *In re* Mostman, 765 P.2d 448, 454 (Cal. 1989))).

[247]*See* 8 U.S.C. § 1101(a)(43)(R) (2006) (defining "aggravated felony" as "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").

[248]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

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[250]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[251]*See* 8 U.S.C. § 1101(a)(43)(R) (2006) (defining "aggravated felony" as "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").

[252]*See, e.g.*, Sinju, A45 072 486, 2008 WL 3861917, at *1 (BIA July 17, 2008) (identifying

Texas Penal Code Section 32.21(d) as a crime of moral turpitude). It is a CIMT because it contains an intent to defraud or harm another as an element. *See* TEX. PENAL CODE ANN. § 32.21(b) (West 2010). While the *Sinju* case dealt specifically with Section 32.21(d), Section 32.21(d) merely makes the underlying offense a state jail felony rather than a Class A misdemeanor depending on the type of instrument that is forged. *See* TEX. PENAL CODE ANN. §§ 32.21(c)–(d). For immigration CIMT purposes however, it is Section 32.21(b) that makes it doubtless that this offense would be considered a CIMT. *See Sinju*, 2008 WL 3861917, at *1; State Bar v. Heard, 603 S.W.2d 829, 834–35 (Tex. 1980) ("[A]ny crime of which fraud is a necessary element is a crime involving moral turpitude." (citing Jordan v. De George, 341 U.S. 223, 227 (1951) ("In every deportation case where fraud has been proved, federal courts have held that the crime in issue involved moral turpitude."))).

[253]*See* 8 U.S.C. § 1101(a)(43)(R) (2006) (defining "aggravated felony" as "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").

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[255]This offense is an aggravated felony if the actual loss to the victim is more than $10,000. 8 U.S.C. § 1101(a)(43)(M) (2006).

[256]*See, e.g.*, Aoun, A72 8224 506, 2004 WL 2952182, at *2 (BIA Nov. 10, 2004) ("We also agree with [the] Immigration Judge that the respondent's two convictions, considered together, render him deportable under section 237(a)(2)(A)(ii) of the Act, as an alien convicted at any time after admission of two or more crimes involving moral turpitude not arising from a single scheme of criminal misconduct."). The *Aoun* Defendant was convicted of attempted credit card abuse in violation of the Texas Penal Code Section 32.31. *See id.* at *1.

[257]This offense is an aggravated felony if the actual loss to the victim is more than $10,000. 8 U.S.C. § 1101(a)(43)(M) (2006).

[258]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[259]This offense is probably not an aggravated felony because of the actual loss to the victim being lower than $10,000. 8 U.S.C. § 1101(a)(43)(M)(i). But there are some precautions that should be taken after the Supreme Court's ruling in *Nijhawan*. Nijhawan v. Holder, 129 S. Ct. 2294, 2302 (2009) ("We conclude that Congress did not intend subparagraph (M)(i)'s monetary threshold to be applied categorically, *i.e.*, to only those fraud and deceit crimes generically defined to include that threshold. Rather, the monetary threshold applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion."). After

Nijhawan, evidence that could satisfy the immigration judge by clear and convincing evidence is fair game for a finding of removability. *See id.* at 2303.

[260]*See, e.g.*, Aoun, A72 8224 506, 2004 WL 2952182, at *2 (BIA Nov. 10, 2004) ("We also agree with [the] Immigration Judge that the respondent's two convictions, considered together, render him deportable under section 237(a)(2)(A)(ii) of the Act, as an alien convicted at any time after admission of two or more crimes involving moral turpitude not arising from a single scheme of criminal misconduct."). The *Aoun* Defendant was convicted of attempted credit card abuse in violation of the Texas Penal Code Section 32.31. *See id.* at *1.

[261]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[262]This offense is an aggravated felony if the vehicle is worth more than $10,000. 8 U.S.C. § 1101(a)(43)(M) (2006).

[263]This statute is divisible and so an overall prediction proves difficult. *See* TEX. PENAL CODE ANN. § 32.34 (West 2011). Nevertheless, sections requiring the intent to defraud are usually CIMTs while the other two sections are arguably not CIMTs because they do not contain the intent to defraud. *See* State Bar v. Heard, 603 S.W.2d 829, 834–35 (Tex. 1980) ("[A]ny crime of which fraud is a necessary element is a crime involving moral turpitude." (citing Jordan v. De George, 341 U.S. 223, 227 (1951) ("In every deportation case where fraud has been proved, federal courts have held that the crime in issue involved moral turpitude."))); Turton v. State Bar, 775 S.W.2d 712, 717 (Tex. App.—San Antonio 1989, writ denied) (noting that "conviction of some crimes establishes moral turpitude . . . [including] crimes which necessarily involve an intent to defraud . . . ." (citing *In re* Mostman, 765 P.2d 448, 454 (Cal. 1989))).

[264]This offense is an aggravated felony if the vehicle is worth more than $10,000. 8 U.S.C. § 1101(a)(43)(M) (2006).

[265]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[266]This offense is probably not an aggravated felony because of the actual loss to the victim being lower than $10,000. 8 U.S.C. § 1101(a)(43)(M)(i) (2006). But there are some precautions that should be taken after the Supreme Court's ruling in *Nijhawan*. Nijhawan v. Holder, 129 S. Ct. 2294, 2302 (2009) ("We conclude that Congress did not intend subparagraph (M)(i)'s monetary threshold to be applied categorically, *i.e.*, to only those fraud and deceit crimes generically defined to include that threshold. Rather, the monetary threshold applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion."). After *Nijhawan*, evidence that could satisfy the immigration judge by clear and convincing evidence is fair game for a finding of removability. *See id.* at 2303.

[267]This statute is divisible and so an overall prediction proves difficult. *See* TEX. PENAL CODE ANN. § 32.34 (West 2011). Nevertheless, sections requiring the intent to defraud are usually CIMTs while the other two sections are arguably not CIMTs because they do not contain the intent to defraud. *See* State Bar v. Heard, 603 S.W.2d 829, 834–35 (Tex. 1980) ("[A]ny crime of which fraud is a necessary element is a crime involving moral turpitude." (citing Jordan v. De George, 341 U.S. 223, 227 (1951) ("In every deportation case where fraud has been proved, federal courts have held that the crime in issue involved moral turpitude."))); Turton v. State Bar, 775 S.W.2d 712, 717 (Tex. App.—San Antonio 1989, writ denied) (noting that "conviction of some crimes establishes moral turpitude . . . [including] crimes which necessarily involve an intent to defraud . . . ." (citing *In re* Mostman, 765 P.2d 448, 454 (Cal. 1989))).

[268]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[269]This offense is an aggravated felony if the vehicle is worth more than $10,000. 8 U.S.C. § 1101(a)(43)(M) (2006).

[270]This statute is divisible and so an overall prediction proves difficult. *See* TEX. PENAL CODE ANN. § 32.34 (West 2011). Nevertheless, sections requiring the intent to defraud are usually CIMTs while the other two sections are arguably not CIMTs because they do not contain the intent to defraud. *See* State Bar v. Heard, 603 S.W.2d 829, 834–35 (Tex. 1980) ("[A]ny crime of which fraud is a necessary element is a crime involving moral turpitude." (citing Jordan v. De George, 341 U.S. 223, 227 (1951) ("In every deportation case where fraud has been proved, federal courts have held that the crime in issue involved moral turpitude."))); Turton v. State Bar, 775 S.W.2d 712, 717 (Tex. App.—San Antonio 1989, writ denied) (noting that "conviction of some crimes establishes moral turpitude . . . [including] crimes which necessarily involve an intent to defraud . . . ." (citing *In re* Mostman, 765 P.2d 448, 454 (Cal. 1989))).

[271]This offense is an aggravated felony if the actual loss to the victim is more than $10,000. 8 U.S.C. § 1101(a)(43)(M) (2006).

[272]This offense is probably not an aggravated felony because of the actual loss to the victim being lower than $10,000. 8 U.S.C. § 1101(a)(43)(M)(i) (2006). But there are some precautions that should be taken after the Supreme Court's ruling in *Nijhawan*. Nijhawan v. Holder, 129 S. Ct. 2294, 2302 (2009) ("We conclude that Congress did not intend subparagraph (M)(i)'s monetary threshold to be applied categorically, *i.e.*, to only those fraud and deceit crimes generically defined to include that threshold. Rather, the monetary threshold applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion."). After *Nijhawan*, evidence that could satisfy the immigration judge by clear and convincing evidence is fair game for a finding of removability. *See id.* at 2303.

[273]This statute is divisible and so an overall prediction proves difficult. *See* TEX. PENAL CODE ANN. § 32.34 (West 2011). Nevertheless, sections requiring the intent to defraud are usually CIMTs while the other two sections are arguably not CIMTs because they do not contain the intent to defraud. *See* State Bar v. Heard, 603 S.W.2d 829, 834–35 (Tex. 1980) ("[A]ny crime of which fraud is a necessary element is a crime involving moral turpitude." (citing Jordan v. De George, 341 U.S. 223, 227 (1951) ("In every deportation case where fraud has been proved, federal courts have held that the crime in issue involved moral turpitude."))); Turton v. State Bar, 775 S.W.2d 712, 717 (Tex. App.—San Antonio 1989, writ denied) (noting that "conviction of some crimes establishes moral turpitude . . . [including] crimes which necessarily involve an intent to defraud . . . ." (citing *In re* Mostman, 765 P.2d 448, 454 (Cal. 1989))).

[274]This offense is an aggravated felony if the vehicle is worth more than $10,000. 8 U.S.C. § 1101(a)(43)(M) (2006).

[275]The Fifth Circuit has approvingly cited LaFave and Scott on this issue. *See* Alfred v. INS, 42 F.3d 641, 641 (5th Cir. 1994) (per curiam) (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 32 n.56 (1st ed. 1972)); *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 32 n.56 (5th ed. 2010) (noting that "most theft crimes . . . [including] bad check violations . . . have been generally held to involve moral turpitude . . . ."). The more the statute resembles a theft statute in the intent-to-deprive-or-defraud sense, the more likely it is to be a CIMT. *See* Dall. Cnty. Bail Bond Bd. v. Mason, 773 S.W.2d 586, 588 (Tex. App.—Dallas 1989, no writ) (holding that issuing a bad check in this

particular instance was not a CIMT since there was no intent to defraud).

[276]This offense is an aggravated felony if the actual loss to the victim is more than $10,000. 8 U.S.C. § 1101(a)(43)(M) (2006).

[277]This offense is probably not an aggravated felony because of the actual loss to the victim being lower than $10,000. 8 U.S.C. § 1101(a)(43)(M)(i). But there are some precautions that should be taken after the Supreme Court's ruling in *Nijhawan*. Nijhawan v. Holder, 129 S. Ct. 2294, 2302 (2009) ("We conclude that Congress did not intend subparagraph (M)(i)'s monetary threshold to be applied categorically, *i.e.*, to only those fraud and deceit crimes generically defined to include that threshold. Rather, the monetary threshold applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion."). After *Nijhawan*, evidence that could satisfy the immigration judge by clear and convincing evidence is fair game for a finding of removability. *See id.* at 2303.

[278]The Fifth Circuit has approvingly cited LaFave and Scott on this issue. *See* Alfred v. INS, 42 F.3d 641, 641 (5th Cir. 1994) (per curiam) (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 32 n.56 (1st ed. 1972)); *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 32 n.56 (5th ed. 2010) (noting that "most theft crimes . . . [including] bad check violations . . . have been generally held to involve moral turpitude . . . ."). The more the statute resembles a theft statute in the intent-to-deprive-or-defraud sense, the more likely it is to be a CIMT. *See* Dall. Cnty. Bail Bond Bd. v. Mason, 773 S.W.2d 586, 588 (Tex. App.—Dallas 1989, no writ) (holding that issuing a bad check in this particular instance was not a CIMT since there was no intent to defraud).

[279]*See* 8 U.S.C. § 1101(a)(43)(R) (2006) (defining "aggravated felony" as "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").

[280]*See* Fuentes-Cruz v. Gonzales, 489 F.3d 724, 726 (5th Cir. 2007) (per curiam) (stating that "bribery is a crime involving moral turpitude" (citing Okabe v. INS, 671 F.2d 863, 865 (5th Cir. 1982))).

[281]*See* 8 U.S.C. § 1101(a)(43)(R) (2006) (defining "aggravated felony" as "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").

[282]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[283]*See* Fuentes-Cruz v. Gonzales, 489 F.3d 724, 726 (5th Cir. 2007) (per curiam) (stating that "bribery is a crime involving moral turpitude" (citing Okabe v. INS, 671 F.2d 863, 865 (5th Cir. 1982))).

[284]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[285]This offense is an aggravated felony if the actual loss to the victim is more than $10,000. 8 U.S.C. § 1101(a)(43)(M) (2006).

[286]Fraudulent use or possession of identifying information is likely a CIMT as it includes the element of intent to defraud or harm another. *See* Silva-Trevino, 24 I. & N. Dec. 687, 706 n.5 (BIA 2008) (citing Kochlani, 24 I. & N. Dec. 128, 130–31 (A.G. 2007)). To appreciate the difficulty of accurately predicting whether this offense is a CIMT, please refer to the Article's discussion on *Silva-Trevino*. *See supra* Part IV.C.2.

[287]Fraudulent use or possession of identifying information may be an aggravated felony if the vehicle is worth more than $10,000. *See* 8 U.S.C. § 1101(a)(43)(M) (2006).

[288]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[289]*See id.*

[290]This is an aggravated felony if the defendant is sentenced to at least one year. *See* 8 U.S.C. § 1101(a)(43)(G) (2010). Additionally, it is an aggravated felony if the loss to the victim is more than $10,000. *See id.* at § 1101(a)(43)(M).

[291]This is not a CIMT because there is no intent to deprive anyone of anything but instead, the use is done "without authority" or with the intent to "divert[] [a] telecommunications service." *See* TEX. PENAL CODE ANN. § 33A.02(a) (West 2011); Kochlani, 24 I. & N. Dec. 128, 130–31 (BIA 2007) (stating that crimes involve moral turpitude when an element includes a specific intent to defraud or a conviction requires that the defendant willfully or knowingly committed an act).

[292]This is an aggravated felony if the defendant is sentenced to at least one year. *See* 8 U.S.C. § 1101(a)(43)(G) (2010). Additionally, it is an aggravated felony if the loss to the victim is more than $10,000. *See id.* at § 1101(a)(43)(M).

[293]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[294]This offense is probably not an aggravated felony because of the actual loss to the victim being lower than $10,000. 8 U.S.C. § 1101(a)(43)(M)(i) (2006). But there are some precautions that should be taken after the Supreme Court's ruling in *Nijhawan*. Nijhawan v. Holder, 129 S. Ct. 2294, 2302 (2009) ("We conclude that Congress did not intend subparagraph (M)(i)'s monetary threshold to be applied categorically, *i.e.*, to only those fraud and deceit crimes generically defined to include that threshold. Rather, the monetary threshold applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion."). After *Nijhawan*, evidence that could satisfy the immigration judge by clear and convincing evidence is fair game for a finding of removability. *See id.* at 2303.

[295]This is not a CIMT because there is no intent to deprive anyone of anything but instead, the use is done "without authority" or with the intent to "divert[] [a] telecommunications service." *See* TEX. PENAL CODE ANN. § 33A.02(a) (West 2011); Kochlani, 24 I. & N. Dec. 128, 130–31 (BIA 2007) (stating that crimes involve moral turpitude when an element includes a specific intent to defraud or a conviction requires that the defendant willfully or knowingly committed an act).

[296]This is an aggravated felony DPIO if loss to the victim is more than $10,000. *See* 8 U.S.C. § 1101(a)(43)(D) (2006).

[297]This is a CIMT because it involves a knowing mens rea regarding the proceeds of criminal activity. *See* Smalley v. Ashcroft, 354 F.3d 332, 336–38 (5th Cir. 2003) (stating that the defendant's intent to money launder constitutes a CIMT).

[298]This is an aggravated felony DPIO if loss to the victim is more than $10,000. *See* 8 U.S.C. § 1101(a)(43)(D) (2006).

[299]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[300]This offense is probably not an aggravated felony because of the actual loss to the victim being lower than $10,000. 8 U.S.C. § 1101(a)(43)(M)(i) (2006). But there are some precautions that should be taken after the Supreme Court's ruling in *Nijhawan*. Nijhawan v. Holder, 129 S.

Ct. 2294, 2302 (2009) ("We conclude that Congress did not intend subparagraph (M)(i)'s monetary threshold to be applied categorically, *i.e.*, to only those fraud and deceit crimes generically defined to include that threshold. Rather, the monetary threshold applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion."). After *Nijhawan*, evidence that could satisfy the immigration judge by clear and convincing evidence is fair game for a finding of removability. *See id.* at 2303.

[301]This is a CIMT because it involves a knowing mens rea regarding the proceeds of criminal activity. *See* Smalley v. Ashcroft, 354 F.3d 332, 336–38 (5th Cir. 2003) (stating that the defendant's intent to money launder constitutes a crime against moral turpitude).

[302]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[303]This is an aggravated felony DPIO if loss to the victim is more than $10,000. *See* 8 U.S.C. § 1101(a)(43)(D) (2006).

[304]This is a CIMT because it includes the element of intent to defraud or deceive. *See* Martinez v. Mukasey, 508 F.3d 255, 259 (5th Cir. 2007) (per curiam); Kochlani, 24 I. & N. Dec. 128, 130–31 (BIA 2007) (stating that crimes involve moral turpitude when an element includes a specific intent to defraud).

[305]This is an aggravated felony DPIO if loss to the victim is more than $10,000. *See* 8 U.S.C. § 1101(a)(43)(D) (2006).

[306]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[307]This offense is probably not an aggravated felony because of the actual loss to the victim being lower than $10,000. 8 U.S.C. § 1101(a)(43)(M)(i). But there are some precautions that should be taken after the Supreme Court's ruling in *Nijhawan*. Nijhawan v. Holder, 129 S. Ct. 2294, 2302 (2009) ("We conclude that Congress did not intend subparagraph (M)(i)'s monetary threshold to be applied categorically, *i.e.*, to only those fraud and deceit crimes generically defined to include that threshold. Rather, the monetary threshold applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion."). After *Nijhawan*, evidence that could satisfy the immigration judge by clear and convincing evidence is fair game for a finding of removability. *See id.* at 2303.

[308]This is a CIMT because it includes the element of intent to defraud or deceive. *See* Martinez v. Mukasey, 508 F.3d 255, 259 (5th Cir. 2007) (per curiam); Kochlani, 24 I. & N. Dec. 128, 130–31 (BIA 2007) (stating that CIMTs when an element includes a specific intent to defraud).

[309]This is an aggravated felony if the person bribed was a witness and the term of imprisonment is at least one year. *See* 8 U.S.C. § 1101(a)(43)(S) (2006). The Texas statute is divisible, so it proves difficult to predict in advance the immigration consequences of the entire statute. *See* TEX. PENAL CODE ANN. § 36.02 (West 2011).

[310]All bribery offenses are crimes that involve moral turpitude. *See* Gruenangerl, 25 I. & N. Dec. 351, 358 n.8 (BIA 2010) (citing Fuentes-Cruz v. Gonzales, 489 F.3d 724, 726 (5th Cir. 2007) (per curiam); Okabe v. INS, 671 F.2d 863, 865 (5th Cir. 1982); United States *ex rel.* Sollazzo v. Esperdy, 285 F.2d 341, 342 (2d Cir. 1961) ("There can be no question but that any crime of bribery involves moral turpitude . . . .")).

[311]This is an aggravated felony if the person bribed was a witness and the term of imprisonment is at least one year. *See* 8 U.S.C. § 1101(a)(43)(S) (2006). The Texas statute is

divisible, so it proves difficult to predict in advance the immigration consequences of the entire statute. *See* TEX. PENAL CODE ANN. § 36.02 (West 2011).

[312]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[313]This is not a crime of violence. *See* 18 U.S.C. § 16 (2006); *see, e.g.*, Persad, A31 227 178, 2005 WL 952472, at *1 (BIA April 13, 2005) (finding no error in the immigration judge's finding that Section 36.06(a)(1) is not a crime of violence under 8 U.S.C. Section 1101(a)(43)(F)).

[314]This conviction is not a crime of violence for the purposes of the 16-level sentencing enhancement. *See* United States v. Martinez-Mata, 393 F.3d 625, 629 (5th Cir. 2004) ("For the foregoing reasons, we conclude that Martinez-Mata's forty-six month sentence should not have included the sixteen-level 'crime of violence' enhancement under § 2L1.2.").

[315]This conviction is not a crime of violence. *See* 18 U.S.C. § 16 (2006); *see, e.g.*, Persad, A31 227 178, 2005 WL 952472, at *1 (BIA April 13, 2005) (finding no error in the immigration judge's finding that Section 36.06(a)(1) is not a crime of violence under 8 U.S.C. Section 1101(a)(43)(F)).

[316]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[317]This is an aggravated felony DPIO if the term of imprisonment imposed is at least one year. *See* 8 U.S.C. § 1101(a)(43)(S) (2006).

[318]Perjury is usually a CIMT only if the statute contains materiality as an element. *See* L—, 1 I. & N. Dec. 324, 327 (BIA 1942). Texas's perjury statute does not contain a materiality element. *See* TEX. PENAL CODE ANN. § 37.02 (West 2011). However, it does contain the intent to deceive, so it may nonetheless be a CIMT. *See id.* However, Texas's aggravated perjury statute does contain a materiality element. *See* TEX. PENAL CODE ANN. § 37.04 (West 2011).

[319]This is an aggravated felony DPIO if the term of imprisonment imposed is at least one year. *See* 8 U.S.C. § 1101(a)(43)(S) (2006).

[320]Perjury is usually a CIMT only if the statute contains materiality as an element. *See* L—, 1 I. & N. Dec. 324, 327 (BIA 1942). Texas's perjury statute does not contain a materiality element. *See* TEX. PENAL CODE ANN. § 37.02 (West 2011). However, it does contain the intent to deceive, so it may nonetheless be a CIMT. *See id.* However, Texas's aggravated perjury statute does contain a materiality element. *See id.* § 37.04.

[321]Resisting arrest is an aggravated felony because it is considered an offense involving the obstruction of justice. *See* 8 U.S.C. § 1101(a)(43)(S) (2006) (defining "aggravated felony" means—"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 . . . ."); Tex. Penal Code Ann. § 38.03(d) (West 2011).

[322]*See, e.g.*, Garcia-Lopez, A38 096 900, 2007 WL 4699842, at *2 (BIA Nov. 2, 2007) (stating that Section 38.03(a) of the Texas Penal Code does not amount to a CIMT).

[323]Resisting arrest is an aggravated felony because it is considered an offense involving the obstruction of justice. *See* 8 U.S.C. § 1101(a)(43)(S) (defining "aggravated felony" means—"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 . . . ."); TEX. PENAL CODE ANN. § 38.03(d) (West 2011).

[324]*See, e.g.*, Garcia-Lopez, A38 096 900, 2007 WL 4699842, at *2 (BIA Nov. 2, 2007)

(stating that Section 38.03(a) of the Texas Penal Code does not amount to a CIMT).

[325]Resisting arrest is an aggravated felony because it is considered an offense involving the obstruction of justice. *See* 8 U.S.C. § 1101(a)(43)(S) (2006) (defining "aggravated felony" means—"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 . . . ."); TEX. PENAL CODE ANN. § 38.03(d) (West 2011).

[326]Generally resisting arrest by itself is not a CIMT. *See, e.g.*, Garcia-Lopez, A38 096 900, 2007 WL 4699842, at *2 (BIA Nov. 2, 2007) (stating that Section 38.03(a) of the Texas Penal Code does not amount to a CIMT). The introduction of a deadly weapon, however, will likely trigger the CIMT DPIO. *See*, e.g., Nunez-Montanez, A088 356 625, 2008 WL 4222227, at *1 (BIA Aug. 27, 2008) (implying that if the defendant used a deadly weapon, resisting arrest may become a CIMT for immigration purposes).

[327]This is an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(S) (2006) (defining "aggravated felony" as "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 . . . ."); TEX. PENAL CODE ANN. § 38.03(d) (West 2011). Pursuant to the Sentencing Guidelines, an 8-level enhancement is applicable. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2011) ("[A] conviction for an aggravated felony [enhances sentencing] by 8 levels . . . .").

[328]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[329]*See* Silva-Trevino, 24 I. & N. Dec. 687 (A.G. 2008). To appreciate the difficulty of accurately predicting whether this offense is a CIMT, please refer to the Article's discussion on *Silva-Trevino*. *See supra* Part IV.c.2.

[330]*See* Silva-Trevino, 24 I. & N. Dec. 687 (A.G. 2008). To appreciate the difficulty of accurately predicting whether this offense is a CIMT, please refer to the Article's discussion on *Silva-Trevino*. *See supra* Part IV.c.2.

[331]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[332]*See* Sotelo-Soto, A043 798 420, 2010 WL 334697, at *2 (BIA Jan. 21, 2010) ("Having made these findings regarding the ordinary case, we conclude that the Fifth Circuit decision that the offense of evading arrest or detention with a motor vehicle is a violent felony, carries over to the definition of crime of violence under 18 U.S.C. § 16(b) of the Act."). A crime of violence pursuant to 18 U.S.C. Section 16 is also defined as an aggravated felony, with some restrictions. *See* 8 U.S.C. § 1101(a)(43)(F) (2006).

[333]*See, e.g.*, Brena, A089 783 725, 2010 WL 3536733, at *1 (BIA Aug. 24, 2010) ("[T]he Immigration Judge, after pointing out that the United States Court of Appeals for the Fifth Circuit has held that the fleeing by vehicle is purposeful, violent, and aggressive, and will typically lead to a confrontation with the officer being disobeyed, a confrontation fraught with risk of violence, and finding that the respondent's offense is one that shocks the public conscience and contrary to the accepted rules of morality, concludes that the respondent's offense is a crime involving moral turpitude.").

[334]*See* United States v. Banks, 409 F. App'x 749, 750 (5th Cir. 2011) (per curiam) (noting that the "contention, that [a] Texas conviction for evading arrest with a motor vehicle is not a 'crime of violence' under Guideline § 4B1.2, is foreclosed by *Harrimon*" (citing United States v. Mendoza, 397 F. App'x 941, 942 (5th Cir. 2010) (per curiam), *petition for cert. filed* (U.S. Jan. 25,

2011) (No. 10-8583))); United States v. Harrimon, 568 F.3d 531, 537 (5th Cir. 2009) ("[T]he district court erred as a matter of law in concluding that a violation of Texas Penal Code § 38.04(b)(1) (evading arrest or detention by use of a vehicle) is not a 'violent felony' . . . ."). Although the Fifth Circuit Court of Appeals was dealing directly with Texas Penal Code Section 38.04(b)(1)(B), there is arguably no relevant distinction between Section 38.04(b)(1)(B) and Section 38.04(b)(2)(A) because the former offense becomes the latter offense merely by being convicted a second time in addition to having used a vehicle. *See* TEX. PENAL CODE ANN. § 38.04(b)(1)(B), (2)(A) (West 2011). Pursuant to U.S. Sentencing Guidelines, a 16-level enhancement is applicable. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2011) ("[A] conviction for a felony that is . . . a crime of violence . . . [enhances sentencing] by 16 levels . . . .").

[335]*See* United States v. Sanchez-Ledezma, 630 F.3d 447, 451 (5th Cir. 2011) ("Evading arrest with a motor vehicle is, by the logic of *Harrimon*, a 'crime of violence' for purposes of § 16(b), and therefore an 'aggravated felony' for purposes of § 1101(a)(43)(F)."), *cert. denied*, 131 S. Ct. 3024 (2011). Pursuant to the Sentencing Guidelines, an 8-level enhancement is applicable. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2011) ("[A] conviction for an aggravated felony [enhances sentencing] by 8 levels . . . .").

[336]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[337]Because this particular offense does not include a vehicle, the immigration consequences are far less severe than when a defendant employs a vehicle to evade police. *See* Sotelo-Soto, A043 798 420, 2010 WL 334697, at *2 (BIA Jan. 21, 2010) ("Having made these findings regarding the ordinary case, we conclude that the Fifth Circuit decision that the offense of evading arrest or detention with a motor vehicle is a violent felony, carries over to the definition of crime of violence under 18 U.S.C. § 16(b) of the Act."). A crime of violence pursuant to 18 U.S.C. Section 16 is also defined as an aggravated felony, with some restrictions. *See* 8 U.S.C. § 1101(a)(43)(F) (2006). Because employment of the vehicle transforms this offense into an aggravated felony, the absence of this particular fact makes all the difference.

[338]*See* Silva-Trevino, 24 I. & N. Dec. 687 (A.G. 2008). To appreciate the difficulty of accurately predicting whether this offense is a CIMT, please refer to the Article's discussion on *Silva-Trevino*. *See supra* Part IV.c.2.

[339]Because this particular offense does not include a vehicle, the consequences are far less severe than when a defendant employs a vehicle to evade the police. *See, e.g.*, United States v. Banks, 409 F. App'x 749, 750 (5th Cir. 2011) (noting that the "contention, that Texas conviction for evading arrest with a motor vehicle is not a 'crime of violence' under Guideline § 4B1.2, is foreclosed by *Harrimon*" (citing United States v. Harrimon, 568 F.3d 531 (5th Cir. 2009) ("[T]he district court erred as a matter of law in concluding that a violation of Texas Penal Code § 38.04(b)(1) (evading arrest or detention by use of a vehicle) is not a 'violent felony' . . . .")).

[340]Because this particular offense does not include a vehicle, the immigration consequences are far less severe than when a defendant employs a vehicle to evade police. *See, e.g.*, Sotelo-Soto, A043 798 420, 2010 WL 334697, at *2 (BIA Jan. 21, 2010) ("Having made these findings regarding the ordinary case, we conclude that the Fifth Circuit decision that the offense of evading arrest or detention with a motor vehicle is a violent felony, carries over to the definition of crime of violence under 18 U.S.C. § 16(b) of the Act."). A crime of violence pursuant to 18 U.S.C. Section 16 is also defined as an aggravated felony, with some restrictions. *See* 8 U.S.C.

§ 1101(a)(43)(F) (2006). Because employment of the vehicle transforms this offense into an aggravated felony, the absence of this particular fact makes all the difference.

[341]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[342]*See* 8 U.S.C. § 1101(a)(43)(T) (2006) ("The term 'aggravated felony' means—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 . . . ."). Any defendant that jumps bail on a felony will always be subject to a prison term of at least two years because the least serious felony charge in Texas is a state jail felony, which is punishable "by confinement in a state jail for any term of not more than two years or less than 180 days." TEX. PENAL CODE ANN. § 12.35(a) (West 2011). Because a state jail felony carries a sentence of up to two years, 8 U.S.C. Section 1101(a)(43)(T) would apply in any situation in which a defendant absconds on a Texas felony charge. *See* 8 U.S.C. § 1101(a)(43)(T) (2006).

[343]*See* 8 U.S.C. § 1101(a)(43)(T) (2006) ("The term 'aggravated felony' means—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 . . . ."). Any defendant that jumps bail on a felony will always be subject to a prison term of at least two years because the least serious felony charge in Texas is a state jail felony, which is punishable "by confinement in a state jail for any term of not more than two years or less than 180 days." TEX. PENAL CODE ANN. § 12.35(a) (West 2011). Because a state jail felony carries a sentence of up to two years, 8 U.S.C. Section 1101(a)(43)(T) would apply in any situation in which a defendant absconds on a Texas felony charge. *See* 8 U.S.C. § 1101(a)(43)(T) (2006). Pursuant to U.S. Sentencing Guidelines, an 8-level enhancement is applicable. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2011) ("[A] conviction for an aggravated felony [enhances sentencing] by 8 levels . . . .").

[344]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[345]This is probably not a CIMT because the statute does not involve force or fraud. *See* Silva-Trevino, 24 I. & N. Dec. 687, 703 n.3 (A.G. 2008).

[346]This would likely be considered a CIMT since it plainly violates societal morals to fail to intercede in such a situation, but nevertheless the inquiry is highly fact intensive. *See* Silva-Trevino, 24 I. & N. Dec. 687, 705 (A.G. 2008). To appreciate the difficulty of accurately predicting whether this offense is a CIMT, please refer to the Article's discussion on *Silva-Trevino*. *See supra* Part IV.c.2.

[347]This is a divisible statute. Subsection (2) is most likely a CIMT, while other sections are arguably not CIMTs. *See* TEX. PENAL CODE ANN. § 42.07 (West 2011). For a discussion of divisible statutes, refer to the Article. *See supra* Part IV.c.

[348]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(E) (2011) ("[T]hree or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses [enhance sentencing] by 4 levels . . . ."). Depending on the specific circumstances, this may be a crime of violence misdemeanor. *See, e.g.*, United States v. Ayala-Bermudes, No. 02-41092, 2003 WL 1098848, at *1 (5th Cir. 2003) (finding no clear or obvious error in district court's finding that a Harassment conviction was a crime of violence for the purposes of 2L1(b)(1)(E)).

[349]This would likely be considered a CIMT because the Texas stalking statute usually requires the transmission of threats or conduct that is seen as threatening. *See* TEX. PENAL CODE

ANN. § 42.072(a)(1) (West 2011). This is considered by the BIA to be evidence of "vicious motive or a corrupt mind." *See* Ajami, 22 I. & N. Dec. 949, 952 (BIA 1999) ("We find that the intentional transmission of threats is evidence of a vicious motive or a corrupt mind. Accordingly, we agree with the Immigration Judge that the respondent was convicted of a [CIMT] and is therefore subject to removal.").

[350]*See* 8 U.S.C. § 1227(a)(2)(E)(i) (2006) ("Any alien who at any time after admission is convicted of . . . a crime of stalking . . . is deportable.").

[351]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[352]This is a divisible statute. Subsection (2) is most likely a CIMT, while other sections are arguably not CIMTs. *See* TEX. PENAL CODE ANN. § 42.07 (West 2011). For a discussion of divisible statutes, refer to the Article. *See supra* Part IV.B.

[353]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[354]This is a divisible statute. Most sections are not likely to constitute CIMTs. *See* Silva-Trevino, 24 I. & N. Dec. 687, 704 (A.G. 2008). To appreciate the difficulty of accurately predicting whether this offense is a CIMT, please refer to the Article's discussion on *Silva-Trevino*. *See supra* Part IV.

[355]This is a divisible statute. Most sections are not likely to constitute CIMTs. *See Silva-Trevino*, 24 I. & N. Dec. 687, 704 (A.G. 2008). To appreciate the difficulty of accurately predicting whether this offense is a CIMT, please refer to the Article's discussion on *Silva-Trevino*. *See supra* Part IV.

[356]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[357]This is a divisible statute. Most sections are not likely to constitute CIMTs. *See* Silva-Trevino, 24 I. & N. Dec. 687, 704 (A.G. 2008).

[358]This is a divisible statute. Most sections are not likely to constitute CIMTs. *See* Silva-Trevino, 24 I. & N. Dec. 687, 704 (A.G. 2008). To appreciate the difficulty of accurately predicting whether this offense is a CIMT, please refer to the Article's discussion on *Silva-Trevino*. *See supra* Part IV.C.2.

[359]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[360]This conviction may qualify as an aggravated felony depending on the circumstances. *See, e.g.*, Luna-Perez, A41 863 135, 2008 WL 486940, at *2 (BIA Jan. 31, 2008) ("The Immigration Judge correctly concluded that to be an aggravated felony the respondent's offense need only *relate to* the owning, controlling, managing, or supervision of a prostitution business. . . . Nonetheless, we are unable to conclude that 'solicit[ing] another to engage in sexual conduct with another person for compensation' under Tex. Penal. Code Ann. § 43.03(a)(2) relates to the owning, controlling, managing, or supervising of a prostitution business. Such an offense could be committed by individuals with no affiliation to a 'prostitution business.' Such an offense could also be committed by someone with no ownership, control, management, or supervisory role in a prostitution business.").

[361]This is plainly a CIMT. *See* Lambert, 11 I. & N. Dec. 340, 342 (BIA 1965) (holding that renting or letting rooms with knowledge that the rooms are to be used for lewdness, assignation,

or prostitution is a CIMT).

[362]This conviction may qualify as an aggravated felony depending on the circumstances. *See, e.g.*, Luna-Perez, A41 863 135, 2008 WL 486940, at *2 (BIA Jan. 31, 2008) ("The Immigration Judge correctly concluded that to be an aggravated felony the respondent's offense need only *relate to* the owning, controlling, managing, or supervision of a prostitution business. . . . Nonetheless, we are unable to conclude that 'solicit[ing] another to engage in sexual conduct with another person for compensation' under Tex. Penal. Code Ann. § 43.03(a)(2) relates to the owning, controlling, managing, or supervising of a prostitution business. Such an offense could be committed by individuals with no affiliation to a 'prostitution business.' Such an offense could also be committed by someone with no ownership, control, management, or supervisory role in a prostitution business."). Pursuant to the Sentencing Guidelines, an 8-level enhancement is applicable. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2011) ("[A] conviction for an aggravated felony [enhances sentencing] by 8 levels . . . .").

[363]This conviction qualifies as an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(I) (2006); *see, e.g.*, Yusafi, A75 297 046, 2008 WL 339652, at *2 (BIA Jan. 5, 2008) ("[T]he respondent's offense of conviction under section 43.26(a) of the Texas Penal Code is an 'offense described in' 18 U.S.C. § 2252(a)(4)(B), thereby qualifying it as an aggravated felony under section 101(a)(43)(I) of the Act.").

[364]This is a CIMT because it is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general . . . ." *See* Silva-Trevino, 24 I. & N. Dec. 687, 705 (A.G. 2008).

[365]This conviction qualifies as an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(I) (2006); *see, e.g.*, Yusafi, A75 297 046, 2008 WL 339652, at *2 (BIA Jan. 5, 2008) ("[T]he respondent's offense of conviction under section 43.26(a) of the Texas Penal Code is an 'offense described in' 18 U.S.C. § 2252(a)(4)(B), thereby qualifying it as an aggravated felony under section 101(a)(43)(I) of the Act."). Pursuant to U.S. Sentencing Guidelines, an 8-level enhancement is applicable. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2011) ("[A] conviction for an aggravated felony [enhances sentencing] by 8 levels . . . .").

[366]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[367]*See* United States v. Hernandez-Neave, 291 F.3d 296, 300 (5th Cir. 2001) ("We hold that the unlawful carrying of a handgun on premises which have been licensed or permitted to sell alcoholic beverages, while a felony under Texas law, is not a 'crime of violence' under 18 U.S.C. § 16(b) and is therefore not an 'aggravated felony' under [Sentencing Guidelines] § 2L1.2.").

[368]Since there is usually no intent to use the weapon, this statute is simple possession, and simply possessing a weapon is not a CIMT because it is not "base, vile, or depraved, [or] contrary to the accepted rules of morality . . . ." *See* Silva-Trevino, 24 I. & N. Dec. 687, 706 (A.G. 2008).

[369]*See* 8 U.S.C. § 1227(a)(2)(C) (2006) ("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) in violation of any law is deportable.").

[370]*See* United States v. Hernandez-Neave, 291 F.3d 296, 300 (5th Cir. 2001) ("We hold that the unlawful carrying of a handgun on premises which have been licensed or permitted to sell alcoholic beverages, while a felony under Texas law, is not a 'crime of violence' under 18 U.S.C.

§ 16(b) and is therefore not an 'aggravated felony' under [Sentencing Guidelines] § 2L1.2."); U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) ("[A] conviction for an aggravated felony [enhances sentencing] by 8 levels . . . .").

[371]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2010) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[372]*See* United States v. Hernandez-Neave, 291 F.3d 296, 300 (5th Cir. 2001) ("We hold that the unlawful carrying of a handgun on premises which have been licensed or permitted to sell alcoholic beverages, while a felony under Texas law, is not a 'crime of violence' under 18 U.S.C. § 16(b) and is therefore not an 'aggravated felony' under [Sentencing Guidelines] § 2L1.2.").

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[376]Conflicting case law makes it difficult to predict an outcome in this situation. The unlawful possession of an unregistered firearm could be a crime of violence under 18 U.S.C. Section 16(b). *See, e.g.*, United States v. Rivas-Palacios, 244 F.3d 396, 397–98 (5th Cir. 2001) (per curiam). On the other hand, possession of a short-barrel firearm is not a crime of violence. United States v. Diaz-Diaz, 327 F.3d 410, 414 (5th Cir. 2003). A crime of violence where the term of imprisonment is at least one year is an aggravated felony. 8 U.S.C. § 1101(a)(43)(F) (2006).

[377]Since there is usually no intent to use the weapon, this statute is simple possession, and simply possessing a weapon is not a CIMT because it is not "base, vile, or depraved, [or] contrary to the accepted rules of morality . . . ." *See* Silva-Trevino, 24 I. & N. Dec. 687, 706 (A.G. 2008).

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[380]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[381]Conflicting case law makes it difficult to predict an outcome in this situation. The unlawful possession of an unregistered firearm could be a crime of violence under 18 U.S.C. Section 16(b). *See, e.g.*, United States v. Rivas-Palacios, 244 F.3d 396, 397–98 (5th Cir. 2001) (per curiam). On the other hand, possession of a short-barrel firearm is not a crime of violence. United States v. Diaz-Diaz, 327 F.3d 410, 414 (5th Cir. 2003). A crime of violence where the term of imprisonment is at least one year is an aggravated felony. 8 U.S.C. § 1101(a)(43)(F) (2006).

[382]Since there is usually no intent to use the weapon, this statute is simple possession, and simply possessing a weapon is not a CIMT because it is not "base, vile, or depraved, [or] contrary to the accepted rules of morality . . . ." *See* Silva-Trevino, 24 I. & N. Dec. 687, 706 (A.G. 2008).

[383]*See* 8 U.S.C. § 1227(a)(2)(C) (2006) ("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) in violation of any law is deportable.").

[384]Conflicting case law makes it difficult to predict an outcome in this situation. The unlawful possession of an unregistered firearm could be a crime of violence under 18 U.S.C. Section 16(b). *See, e.g.*, United States v. Rivas-Palacios, 244 F.3d 396, 397–98 (5th Cir. 2001) (per curiam). On the other hand, possession of a short-barrel firearm is not a crime of violence. United States v. Diaz-Diaz, 327 F.3d 410, 414 (5th Cir. 2003). A crime of violence where the term of imprisonment is at least one year is an aggravated felony. 8 U.S.C. § 1101(a)(43)(F) (2006).

[385]*See* United States v. Izaguirre-Flores, 405 F.3d 270, 273 n.11 (5th Cir. 2005) ("Looking only at the fact of Vargas-Duran's conviction and the statutory definition of intoxication assault, it is clear that the intentional use of force against the person of another is not a necessary component of the offense." (quoting United States v. Vargas-Duran, 356 F.3d 598, 606 (5th Cir. 2004) (en banc))). Without the intentional use of force, intoxication assault would not likely be a crime of violence under 18 U.S.C. Section 16(a), and thus, would not be an aggravated felony pursuant to 8 U.S.C. Section 1101(a)(43)(F). *See* 8 U.S.C. § 1101(a)(43)(F) (2006); 18 U.S.C. § 16(a) (2006); TEX. PENAL CODE ANN. § 49.07 (West 2011).

[386]This is not a CIMT because it can commonly be committed by accident or mistake in the absence of evil intent. *See* United States v. Izaguirre-Flores, 405 F.3d 270, 273 n.11 (5th Cir. 2005) ("Looking only at the fact of Vargas-Duran's conviction and the statutory definition of intoxication assault, it is clear that the intentional use of force against the person of another is not a necessary component of the offense." (quoting United States v. Vargas-Duran, 356 F.3d 598, 606 (5th Cir. 2004) (en banc))). To be a CIMT, one of the elements of the crime must be some form of scienter, such as intent. Silva-Trevino, 24 I. & N. Dec. 687, 706 (A.G. 2008).

[387]*See* United States v. Izaguirre-Flores, 405 F.3d 270, 273 n.11 (5th Cir. 2005) ("Looking only at the fact of Vargas-Duran's conviction and the statutory definition of intoxication assault, it is clear that the intentional use of force against the person of another is not a necessary component of the offense." (quoting United States v. Vargas-Duran, 356 F.3d 598, 606 (5th Cir. 2004) (en banc))). Without the intentional use of force, intoxication assault would not likely be a crime of violence under 18 U.S.C. Section 16(a), and thus, would not be an aggravated felony pursuant to 8

U.S.C. Section 1101(a)(43)(F). *See* 8 U.S.C. § 1101(a)(43)(F) (2006); 18 U.S.C. § 16(a) (2006); TEX. PENAL CODE ANN. § 49.07 (West 2011).

[388]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[389]*See, e.g.*, United States v. Dominguez-Hernandez, 98 F. App'x 331, 334 (5th Cir. 2004) (per curiam) (holding that "involuntary manslaughter is not a crime of violence under [8 U.S.C.] § 16" (citing United States v. Vargas-Duran, 356 F.3d 598, 605 (5th Cir. 2004) (en banc); United States v. Gracia-Cantu, 302 F.3d 308, 312 (5th Cir. 2002)); *see also* Hammoud, A044 699 511, 2008 WL 4146710, at *2 (BIA Aug. 26, 2008) ("Commission of the crime of involuntary manslaughter does not require such a confrontation, however, and we do not consider this risk of the use of physical force to be so great that it cannot fairly be characterized as 'substantial' within the meaning of § 16(b). The weight of authority among the Federal courts of appeals is to the same effect." (citing United States v. Torres-Villalobos, 487 F.3d 607, 615-17 (8th Cir. 2007) (holding that second-degree manslaughter under Minnesota law is not a "crime of violence" under Section 16(b)); Oyebanji v. Gonzales, 418 F.3d 260, 264 (3d Cir. 2005) (holding that reckless vehicular homicide under New Jersey law is not a "crime of violence" under Section 16(b)); Bejarano-Urrutia v. Gonzales, 413 F.3d 444, 447 (4th Cir. 2005) (holding that involuntary manslaughter under Virginia law is not a "crime of violence" under Section 16(b)); Jobson v. Ashcroft, 326 F.3d 367, 375-76 (2d Cir. 2003) (holding that second-degree manslaughter under New York law is not a "crime of violence" under Section 16(b))).

[390]*See* Solon, 24 I. & N. Dec. 239, 240 (BIA 2007) ("Moral turpitude may also inhere in criminally reckless conduct, i.e., conduct that reflects a conscious disregard for a substantial and unjustifiable risk." (citing Franklin, 20 I. & N. Dec. 867, 869–70 (BIA 1994))); *see also* Torres-Varela, 23 I. & N. Dec. 78, 84 (BIA 2001) (noting that voluntary manslaughter and some involuntary manslaughter offenses are generally CIMTs).

[391]*See* United States v. Ambrosio, No. 02-50361, 2002 WL 31718502 (5th Cir. Nov. 14, 2002) ("[T]he offenses listed in the guideline are eligible as enhancement offenses without regard to elements under various state laws. Manslaughter is a listed offense. Ambrosio's argument that his offense is not a listed offense because it was intoxication manslaughter fails." (citing United States v. Rayo-Valdez, 302 F.3d 314, 316 (5th Cir. 2002); United States v. Fry, 51 F.3d 543, 546 (5th Cir. 1995))). The Sentencing Guidelines commentary for Section 2L1.2 also lists manslaughter but does not distinguish between voluntary and involuntary manslaughter, and so a 16-level enhancement is applicable. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2011) ("[A] conviction for a felony that is . . . a crime of violence . . . [enhances sentencing] by 16 levels . . . .); U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iii) ("'Crime of violence' means any of the following offenses under federal, state, or local law: murder, manslaughter . . . .").

[392]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[393]United States v. Chapa-Garza, 243 F.3d 921, 927 (5th Cir. 2001) ("[W]e hold that felony DWI is not a crime of violence as defined by 18 U.S.C. § 16(b)."); *see also* 8 U.S.C. § 1101(a)(43)(F) (2006) ("The term 'aggravated felony' means—a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year . . . ."). Because a DWI is not a crime of violence and is not separately defined as an aggravated felony under 8 U.S.C. Section 1101(a)(43), it is not an

aggravated felony. *See* 8 U.S.C. § 1101(a)(43).

[394]Driving under the influence is not a CIMT according to the BIA. *See* Valles-Moreno, A76 700 382, 2006 WL 3922279, at *2 n.1 (BIA Dec. 27, 2006) (citing Torres-Varela, 23 I. & N. Dec. 78, 85 (BIA 2001); Lopez-Meza, 22 I. & N. Dec. 1188, 1194 (A.G. 1999)).

[395]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[396]Driving under the influence is not a CIMT according to the BIA. *See* Valles-Moreno, A76 700 382, 2006 WL 3922279, at *2 n.1 (BIA Dec. 27, 2006) (citing Torres-Varela, 23 I. & N. Dec. 78, 85 (BIA 2001); Lopez-Meza, 22 I. & N. Dec. 1188, 1194 (A.G. 1999)).

[397]Concern should arise, as to possible immigration consequences, only on the second misdemeanor conviction under this offense. *See* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2581 (2010) ("Thus, except for simple possession offenses involving isolated categories of drugs not presently at issue, only *recidivist* simple possession offenses are 'punishable' as a federal 'felony' under the Controlled Substances Act, 18 U.S.C. § 924(c)(2). And thus only a conviction within this particular category of simple possession offenses might, conceivably, be an 'aggravated felony' under 8 U.S.C. § 1101(a)(43).").

[398]*See* TEX. HEALTH & SAFETY CODE ANN. § 481.116(a) (West 2010) ("Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 2 . . . ."). Marijuana is not in Penalty Group 2. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.103 (listing all controlled substances in Penalty Group 2); *see* 8 U.S.C. § 1227(a)(2)(B)(i) (2006) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

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[400]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

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[402]*See* 8 U.S.C. § 1227(a)(2)(B)(i) (2006) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30

grams or less of marijuana, is deportable."); TEX. HEALTH & SAFETY CODE ANN. § 481.117(a) (West 2010) ("Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 3 . . . ."). Marijuana is not in Penalty Group 3. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.104 (listing all controlled substances in Penalty Group 3).

[403]Concern should arise, as to possible immigration consequences, only on the second misdemeanor conviction under this offense. *See* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2581 (2010) ("Thus, except for simple possession offenses involving isolated categories of drugs not presently at issue, only *recidivist* simple possession offenses are 'punishable' as a federal 'felony' under the Controlled Substances Act, 18 U.S.C. § 924(c)(2). And thus only a conviction within this particular category of simple possession offenses might, conceivably, be an 'aggravated felony' under 8 U.S.C. § 1101(a)(43).").

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

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[412]This will usually make the defendant subject to deportation proceedings. Specifically, Section 481.121(b)(1) could potentially be a non-consequential plea so long as the amount possessed is less than thirty grams, but the balance of the statute would probably make this defendant subject to deportation proceedings. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.121(b)(1) (West 2010) ("[An offense is] a Class B misdemeanor if the amount of marihuana possessed is two ounces or less . . . ."); *see also* 8 U.S.C. § 1227(a)(2)(B)(i) (2006) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

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[414]This is an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(B) (2006); Chavez-Rueda, A43 804 540, 2008 WL 1734679, at *2 (BIA Mar. 27, 2008) ("The respondent's conviction for possession with intent to deliver a controlled substance, cocaine, qualifies as an aggravated felony under section 101 (a)(43)(B) of the Act because it is analogous to possession with intent to distribute cocaine under the [Controlled Substances Act].") (citing 21 U.S.C. §§ 802(44), 841(a)(1) (2006)).

[415]This crime involves moral turpitude. *See* Khourn, 21 I. & N. Dec. 1041, 1047 (BIA 1997) ("[P]articipation in illicit drug trafficking is a crime involving moral turpitude."); *see also* Silva-Trevino, 24 I. & N. Dec. 687, 706 (A.G. 2008) (stating that a finding of moral turpitude requires reprehensible conduct with some form of scienter, such as intent or knowledge); TEX. HEALTH &

SAFETY CODE ANN. § 481.112(a) ("[A] person commits an offense if the person *knowingly* manufactures, delivers, or possesses with *intent* to deliver a controlled substance . . . ." (emphasis added)).

[416]*See* 8 U.S.C. § 1227(a)(2)(B)(i) (2006) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

[417]Please note that even the offer to sell constitutes "delivery" under the Sentencing Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. 1(B)(iv) (2011) ("'Drug trafficking offense' means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, *or offer to sell* a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." (emphasis added)). *But see* United States v. Gonzalez, 484 F.3d 712, 714–15 (5th Cir. 2007) ("[O]ffering to sell a controlled substance lies outside section 2L1.2's definition of 'drug trafficking offense' . . . .); United States v. Morales-Martinez, 496 F.3d 356, 358 (5th Cir. 2007). A sixteen-level enhancement is applicable. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A)(i) ("[A] conviction for a felony that is a drug trafficking offense for which the sentence imposed exceeded 13 months . . . [enhances sentencing] by 16 levels . . . .").

[418]This is an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(B) (2006); Chavez-Rueda, A43 804 540, 2008 WL 1734679, at *2 (BIA Mar. 27, 2008) ("The respondent's conviction for possession with intent to deliver a controlled substance, cocaine, qualifies as an aggravated felony under section [1]101 (a)(43)(B) of the Act because it is analogous to possession with intent to distribute cocaine under the [Controlled Substances Act].") (citing 21 U.S.C. §§ 802(44), 841(a)(1) (2006)).

[419]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").

[420]This is an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(B) (2006); Chavez-Rueda, A43 804 540, 2008 WL 1734679, at *2 (BIA Mar. 27, 2008) ("The respondent's conviction for possession with intent to deliver a controlled substance, cocaine, qualifies as an aggravated felony under section [1]101 (a)(43)(B) of the Act because it is analogous to possession with intent to distribute cocaine under the [Controlled Substances Act].") (citing 21 U.S.C. §§ 802(44), 841(a)(1) (2006)).

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[424]This is an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(B) (2006); Chavez-Rueda, A43 804 540, 2008 WL 1734679, at *2 (BIA Mar. 27, 2008) ("The respondent's conviction for possession with intent to deliver a controlled substance, cocaine, qualifies as an aggravated felony under section [1]101 (a)(43)(B) of the Act because it is analogous to possession with intent to distribute cocaine under the [Controlled Substances Act].") (citing 21 U.S.C. §§ 802(44), 841(a)(1) (2006)).

[425]*See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(D) (2011) ("[A] conviction for any other felony [enhances sentencing] by 4 levels . . . .").