

Guide to Representing Non-Citizen Criminal Defendants in Pennsylvania

Last Revised October 2016

INTRODUCTION: REPRESENTING NONCITIZEN DEFENDANTS IN PENNSYLVANIA

Purpose of the Chart: Under the decision of the Supreme Court in *Padilla v. Kentucky*, 599 U.S.356 (2010), the Sixth Amendment requires defense counsel to provide immigration advice to defendants regarding the deportation consequences of pending criminal charges. The purpose of this guide is to provide an introductory tool for criminal defense attorneys to assist in navigating the complex field of immigration law, and to aide attorneys in complying with their constitutional and ethical obligations by offering a starting point for analysis. What this guide does NOT intend to do is to replace the need for individual research in each case that takes into account the particularities of each client's situation. Competent advice about the best criminal disposition in an individual noncitizen defendant's case will depend on that individual's prior criminal record, his or her immigration status, the status of immediate relatives and a number of other factors. This guide does not purport to provide legal advice or to give an opinion as to the immigration consequences that might result from a criminal disposition in a particular case.

For practice advisories and developments in the law following *Padilla*, please visit www.defendingimmigrants.org.

Note to Immigration Attorneys on Using the Chart. This chart was primarily written for criminal defense attorneys. The conclusions in each category represent a conservative view of the law, meant to guide criminal defense counsel away from potentially dangerous options and toward safer ones. Thus, immigration counsel should not rely on the conclusions in the chart in deciding whether to pursue defense against removal. An offense may be listed as a "probably" as an aggravated felony or other adverse category here even if there are strong arguments to the contrary that might prevail in immigration proceedings. We have included a column of suggestions for immigration counsel consisting of ideas for arguments against a finding of deportability or inadmissibility for certain statutes. Many of our ideas are untested and this column does not constitute legal advice.

Sending comments about the Chart: Contact us if you disagree with an analysis, see a relevant new case, want to suggest other offenses to be analyzed or to propose other alternate "safer" pleas, or want to say how the chart works for you or how it could be improved. Send email to Immigration@philadefender.org. This address will not answer legal questions.

The authors would like to thank the Defending Immigrants Partnership for their help, mentorship and support in this project. Additionally, we would like to thank Katherine Brady and Jorge Baron for their permission to liberally borrow their materials for the introductory portion of this chart. We would also like to thank Caitlin Barry, Abel Rodriguez and Marla Samora, our past and present immigration specialists from our partnership with Nationalities Service Center. We would also like to thank the law school students who have contributed to this project, including Elisa Cannizzaro, Whitney Viets, Rebecca Hufstader, Grace Osa-Edoh, Daniella Lees, and Bradley Napier.

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Table of Contents

| | |
|-------------------------------------------------------------------------------------------------|----|
| Dispelling Some Dangerous Myths Regarding Immigration Consequences of Criminal Convictions..... | 6 |
| What are the categories of crimes that can trigger immigration consequences?..... | 8 |
| Representation DO’s and DON’Ts..... | 9 |
| Definition of a Conviction & “Sentence Imposed” in Pennsylvania..... | 11 |
| Sample Referral Sheet..... | 12 |

Chart Index

Inchoate Crimes..... 13

- 18 Pa.C.S §901 Attempt
- 18 Pa.C.S. § 902 Solicitation
- 18 Pa.C.S. § 903 Conspiracy

Homicide..... 13-14

- 18 Pa.C.S. § 2502 Murder
- 18 Pa.C.S. § 2503 Voluntary Manslaughter
- 18 Pa.C.S. § 2504 Involuntary Manslaughter

Assault..... 14-20

- 18 Pa.C.S. § 2701 Simple Assault
- 18 Pa.C.S. § 2702 Aggravated Assault
- 18 Pa.C.S. § 2705 Recklessly Endangering Another Person
- 18 Pa.C.S. § 2706 Making Terroristic Threats
- 18 Pa.C.S. § 2709 Harassment
- 18 Pa.C.S. § 2709.1 Stalking
- 18 Pa.C.S. § 2901 Kidnapping
- 18 Pa.C.S. § 2902 Unlawful Restraint
- 18 Pa.C.S. § 2903 False Imprisonment
- 18 Pa.C.S. § 2904 Interference with Custody of Children
- 18 Pa.C.S. § 2910 Luring Child into Motor Vehicle or Structure

Sexual Offenses..... 20-24

- 18 Pa.C.S. § 3121 Rape (Intentional or Knowing)
- 18 Pa.C.S. § 3122.1 Statutory Sexual Assault
- 18 Pa.C.S. § 3123 Involuntary Deviate Sexual Intercourse
- 18 Pa.C.S. § 3124.1 Sexual Assault
- 18 Pa.C.S. § 3124.2 Institutional Sexual Assault
- 18 Pa.C.S. § 3125 Aggravated Indecent Assault

- 18 Pa.C.S. § 3126 Indecent Assault Generally
- 18 Pa.C.S. § 3127 Indecent Exposure
- 18 Pa.C.S. § 4915.1 Failure to Comply with Registration Requirements

Property Destruction..... 24-26

- 18 Pa.C.S. § 3301 Arson Endangering Person
- 18 Pa.C.S. § 3304 Criminal Mischief

Burglary and Criminal Intrusion..... 27-30

- 18 Pa.C.S. § 3502 Burglary
- 18 Pa.C.S. § 3503 Criminal Trespass

Robbery..... 30

- 18 Pa.C.S. § 3701 Robbery
- 18 Pa.C.S. § 3702 Robbery of a Motor Vehicle

Theft Offenses..... 30-32

- 18 Pa.C.S. § 3921 Theft by Unlawful Taking
- 18 Pa.C.S. § 3922 Theft by Deception
- 18 Pa.C.S. § 3925 Receiving Stolen Property
- 18 Pa.C.S. § 3926 Theft of Services
- 18 Pa.C.S. § 3928 Unauthorized Use of an Automobile
- 18 Pa.C.S. § 3929 Retail Theft
- 18 Pa.C.S. § 3934 Theft From a Motor Vehicle

Forgery and Fraudulent Practices..... 32-34

- 18 Pa.C.S. § 4101 Forgery
- 18 Pa.C.S. § 4105 Bad Checks
- 18 Pa.C.S. § 4106 Access Device Fraud
- 18 Pa.C.S. § 4107 Deceptive or Fraudulent Business Practices
- 18 Pa.C.S. § 4116 Copying; Recording Devices
- 18 Pa.C.S. § 4119 Trademark Counterfeiting
- 18 Pa.C.S. § 4120 Identity Theft

Offenses Against the Family..... 34

- 18 Pa.C.S. § 4304 Endangering Welfare of Children

Falsification..... 34-35

- 18 Pa.C.S. § 4902 Perjury
- 18 Pa.C.S. § 4903 False Swearing
- 18 Pa.C.S. § 4904 Unsworn Falsification
- 18 Pa.C.S. § 4905 False Alarms to Agencies of Public Safety
- 18 Pa.C.S. § 4906 False Reports to Law Enforcement

- 18 Pa.C.S. § 4914 False ID to Law Enforcement Officer

Obstruction..... 35-36

- 18 Pa.C.S. § 4910 Tampering with or Fabricating Physical Evidence
- 18 Pa.C.S. § 5101 Obstructing Administration of Law or Other Governmental Function
- 18 Pa.C.S. § 5104 Resisting Arrest
- 18 Pa.C.S. § 5104.1 Disarming a Law Enforcement Officer
- 18 Pa.C.S. § 5105 Hindering Apprehension or Prosecution
- 18 Pa.C.S. § 5124 Default in Required Appearance (Failure to Appear)
- 18 Pa.C.S. § 5503 Disorderly Conduct

Prostitution..... 36-38

- 18 Pa.C.S. § 5902 Prostitution

Firearms Offenses..... 38

- 18 Pa.C.S. § 6105 Persons Not to Possess, Use, Manufacture, Control, Sell or Transfer Firearms
- 18 Pa.C.S. § 6106 Firearms Not to be Carried Without a License
- 18 Pa.C.S. § 6108 Firearms Not to be Carried on Public Streets in Philadelphia

Minors..... 39-40

- 18 Pa.C.S. § 6301 Corruption of Minors
- 18 Pa.C.S. § 6310.2 Manufacture or Sale of False Identification Card
- 18 Pa.C.S. § 6310.3 Carrying a False Identification Card
- 18 Pa.C.S. § 6312 Sexual Abuse of Children: Photographing, Videotaping, Depicting on Computer or Filming Sexual Acts

Domestic Violence, Protection Orders, and Child Support..... 41

- 23 Pa.C.S. § 6114 Contempt of Violation of Protection Order

Controlled Substances..... 41-43

- 35 Pa.C.S § 780-113 Controlled Substance Offenses

Traffic Offenses..... 43-44

- 75 Pa.C.S § 1543 Driving While Suspended
- 75 Pa.C.S § 3732 Homicide by Vehicle
- 75 Pa.C.S § 3733 Fleeing and Eluding Police
- 75 Pa.C.S § 3735 Aggravated Assault by DUI
- 75 Pa.C.S § 3742 Accidents Involving Death or Personal Injury
- 75 Pa.C.S § 3743 Accidents in Attended Vehicle
- 75 Pa.C.S § 3802 Driving While Under the Influence of Alcohol or Controlled Substance

Misc......

44-45

- 18 Pa.C.S. § 907 Possession of an Instrument of Crime
- 18 Pa.C.S. § 5513 Gambling Devices, Gambling
- 18 Pa.C.S. § 7512 Communication Facility
- 62 Pa.C.S. § 481 Welfare Fraud

DISPELLING SOME DANGEROUS MYTHS REGARDING IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS

Defense attorneys should understand that the intersection of federal immigration law and Pennsylvania criminal law often leads to results that are counterintuitive. The following are some of the misconceptions about this area of the law most often heard from defense practitioners. The primary lesson to be conveyed is that the immigration consequences of a criminal conviction must be considered in every case involving a defendant who is not a U.S. citizen.

MYTH: Immigration consequences are only an issue if the person is here “illegally.”

WRONG. Criminal charges or convictions may lead to deportation for any individual who is not a citizen of the United States. A noncitizen defendant could face immigration consequences even if he or she has been in this country since an early age, has been a lawful permanent resident (i.e. “green-card” holder), is married to a United States citizen or has citizen children, has assimilated completely into our society and has never had a prior criminal conviction. The defendant’s status may impact what kind of consequences he or she faces, but all noncitizens could face deportation as long as they have not naturalized.

MYTH: Immigration consequences are only an issue if the conviction is a felony.

WRONG. Even the most drastic of immigration consequences can result from convictions that are only misdemeanors under Pennsylvania law. Indeed, many misdemeanor convictions under Pennsylvania law could be classified as “aggravated felonies” under immigration law (this is the case even though the offenses were neither “aggravated” nor “felonies”). Of course, the fact that an offense is a felony is often relevant to the potential immigration consequences, and certain felony convictions are more likely to have drastic consequences, but misdemeanors are in no way outside the scope of immigration law.

MYTH: There will be no immigration consequences if the defendant does not serve time.

MYTH: There will be no immigration consequences if the defendant serves only a year or less.

MYTH: There will be no immigration consequences if the sentence is suspended.

WRONG, WRONG, and WRONG. The term of imprisonment imposed for a particular conviction may be important in determining the immigration consequences of the conviction, but it also may not be relevant at all. In some circumstances, the length of a term of imprisonment will be critically important: for instance, some convictions will qualify as an “aggravated felony” only if a sentence of 1 year OR more is imposed. **(Under Pennsylvania sentencing, it is the maximum term of imprisonment imposed that is used to determine whether a sentence is 1 year or more; see below for more information on sentencing).** Remember, however, that the length of the sentence is relevant only in some cases. In many situations, it will not matter that the defendant was not sentenced to any jail time: the mere fact of conviction will trigger immigration consequences regardless of sentence.

MYTH: If the person is here “illegally,” it doesn’t matter what they’re convicted of since they’ll get deported anyway.

WRONG. A noncitizen without legal status at a particular point could be eligible to obtain lawful immigration status in a number of different ways. Many, if not most, of those avenues could be foreclosed by certain types of criminal convictions. There are also many discretionary waivers of deportation for which a noncitizen could qualify, but again many of these waivers are not available to those convicted of certain offenses. But even if a person will not be able to avoid deportation in the end, criminal convictions can have harsh additional consequences. For instance, most noncitizens being deported because of a criminal conviction will face mandatory detention pending their removal. Many may be ineligible for a type of relief called “voluntary departure,” which allows them to depart the country on their own and therefore avoid additional sanctions. Finally, if an undocumented individual reenters the country after being deported, she or he may face federal criminal charges if they are caught by immigration authorities, and the potential sentences they would face are much longer if they were deported subsequent to certain types of criminal convictions. For all of these reasons, immigration consequences comprise an issue that is important to every noncitizen defendant.

MYTH: The record in this particular case will be sealed or expunged, so there won't be any immigration consequences.

WRONG. Immigration practitioners have found that nothing is “sealed” for purposes of immigration law. Applicants for immigration benefits are often required to provide information for all prior arrests and convictions. Defense attorneys are therefore advised to assume that all criminal records will be available to immigration authorities and could trigger immigration consequences—regardless of the fact that those records are considered “sealed” as a matter of state law. A conviction will still exist for purposes of immigration law even if the conviction was expunged or sealed. Often times, expungement of a conviction poses additional hardships for the noncitizen because they are unable to demonstrate to the immigration officer the nature of the offense.

MYTH: This issue is just too complicated and there's nothing I can really do about it.

MYTH: My clients just want to avoid serving time and they won't care about the immigration consequences.

WRONG and WRONG. This area of the law is undoubtedly complex and the lines that are drawn by immigration law do not always make intuitive sense. However, there are very simple things that a defense attorney can do to improve a client's chances in immigration court if he or she is alert to particularly dangerous dispositions. In addition, it is certainly the case that many criminal defendants will be more concerned about the more imminent prospect of serving time (or getting out of jail) than they will be about the future immigration consequences. Defense attorneys should recognize, however, that many noncitizens may be operating under the erroneous assumption that a particular conviction will not affect their immigration status: for instance, a defendant may think that because he is a “permanent” resident he cannot be deported. The ultimate decision about how to proceed is of course up to the client, but defense attorneys have a constitutional and professional obligation to ensure that the client is properly informed. Defense attorneys should keep in mind that the decisions made during the criminal proceedings will be crucial in framing any subsequent immigration proceedings. Clients should be made aware that there may be little an immigration attorney can do down the line if immigration consequences are not addressed during the criminal proceeding.

WHAT ARE THE CATEGORIES OF CRIMES THAT CAN TRIGGER IMMIGRATION CONSEQUENCES?

It is important to note that any criminal conviction—and in some cases, criminal *conduct*, even if it does not lead to a conviction—could have consequences for the immigration status of a noncitizen. The reason is that many decisions as to whether to grant a particular immigration benefit—including naturalization—are left to the discretion of federal immigration authorities. And criminal conduct or a criminal conviction of any kind can be taken into account by those authorities in making discretionary determinations.

Certain classes of convictions, however, trigger automatic provisions of immigration law which render a noncitizen deportable (or “removable”). Many of those same classes of convictions will make a noncitizen ineligible for discretionary waivers or other forms of relief that may allow them to stay in the country even if they are considered deportable. The following is a brief overview of these categories:

Aggravated Felony (AF):

For lawful permanent residents and individuals seeking asylum, this will be the worst category of criminal offenses for immigration purposes. Its name is misleading because the offense need be neither “aggravated” (as that term may be commonly understood) nor a “felony” under state law for it to be an “aggravated felony.” The list of what this category includes is long, but the most common offenses charged as aggravated felonies are: murder, rape, sexual abuse of a minor, drug-trafficking crimes (which may include certain simple drug possessions offenses), and certain subcategories of crimes which meet a certain threshold: for example “crimes of violence,” “burglary” or “theft offenses” for which a sentence of 1 year OR more is imposed, or “fraud” offenses in which the loss to the victim exceeds \$10,000. When a noncitizen’s conviction falls into this category, the consequences are severe: the individual will face mandatory detention and almost certain deportation and will be ineligible for virtually all forms of relief. In addition, if the noncitizen returns illegally to the United States, he or she will face criminal penalties of up to 20 years in federal prison.

Controlled Substances Offenses (CS):

This is another category that will result in drastic immigration consequences for most noncitizens. This category encompasses offenses “relating to” a controlled substance as defined by federal law, and it therefore encompasses simple possession and distribution offenses involving substances covered by *federal* drug schedules (if the substance is regulated only by the state, it is not covered). A conviction in this category often renders undocumented immigrants ineligible to apply for legal status (and therefore subjects them to mandatory deportation).

Crimes Involving Moral Turpitude (CIMT):

A broad category of criminal offenses, this category is as vague as its title suggests. One often feels that the courts’ take on “moral turpitude” is the same as their take on “obscenity”: they know it when they see it. However, there is considerable case law guiding this analysis. Generally, the following types of crimes are found to be CIMTs: offenses involving theft or an intent to defraud; offenses involving intent to cause bodily harm, or offenses involving recklessness that result in serious bodily harm; and most offenses involving sexual conduct. CIMTs do not render a noncitizen removable in every case—the impact of a CIMT will depend on the immigration status, timing of the offense, prior criminal record, and actual and potential sentence for the offense.

Crime Against Children (CAC)

Another broad category of crimes that encompasses any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that qualifies as maltreatment, and harms a minor’s mental or physical well-being, regardless of proof of actual injury or harm to the child.

Other categories: Other categories of offenses are more specific: crimes of domestic violence (CODV), firearm offenses, etc.... Many of these categories of offenses will have their greatest negative impact on noncitizens who have been lawfully admitted to the country, especially lawful permanent residents (LPRs). Unlike Aggravated Felonies, these categories of offenses will often (but not always) preserve a lawful permanent resident’s eligibility for discretionary waivers of deportation.

REPRESENTATION DO'S AND DON'TS

What are the things to AVOID when representing a noncitizen defendant?

As noted earlier, a comprehensive assessment of what offenses should be avoided in a particular case requires knowledge of the individual's past criminal history, his or her immigration status, and many other factors regarding his family circumstances and the specifics of the offense. However, recognizing that each case will present its own circumstances, criminal defense attorneys should keep in mind the following *general* guidance:

- ✓ **Avoid a “conviction” whenever possible:** Although even just some forms of criminal-related conduct can have immigration consequences, most immigration issues arise after a conviction. Obviously, obtaining an outright dismissal or a nolle prosequi would be ideal. However, Pennsylvania also provides a number of pre-trial diversion programs, some of which do not require an admission of guilt or a “no contest” plea and which lead to dispositions that would not be considered “convictions” for immigration purposes. The best option in Pennsylvania is the Accelerated Rehabilitative Disposition (ARD) program, which does not require an admission or finding of guilt and which is not considered a conviction for immigration purposes. Defense attorneys should note, however, that some of Pennsylvania's pretrial diversion programs do require an admission of guilt. Therefore these programs will NOT prevent immigration consequences, such as the Section 17 drug treatment program which is considered a conviction for immigration purposes. For cases involving juveniles, delinquency adjudications in Pennsylvania are not considered convictions; however remember there are certain types of conduct, particularly if it is related to controlled substances, which may have independent immigration consequences.
- ✓ **Avoid an “Aggravated Felony”:** In most situations, and especially when a defendant is a lawful permanent resident (LPR) (also known as a “green-card holder”), a conviction for an aggravated felony will have the worst immigration consequences. Practitioners should be particularly careful with the subcategories of “aggravated felony” that hinge on sentence or amount of loss: here, simple changes to a plea agreement can make huge differences.
- ✓ **Avoid a “Controlled Substance Offense”:** Virtually all drug offenses will result in harsh immigration consequences for most noncitizens. The only exception is a first offense for simple possession of 30 grams or less of marijuana (30g = 1.05 ounces), which will not trigger deportability for a lawful permanent resident (but which may affect ability to return from travel abroad). Other controlled substance offenses will make a lawful permanent resident deportable, and some will bar relief from deportation. Most undocumented immigrants with a drug offense will be barred from getting legal status, unless it is a first conviction for simple possession of 30 grams or less of marijuana.
- ✓ **Avoid “Crimes of Domestic Violence,” “Firearm Offenses,” and others:** these categories have particularly serious consequences for lawful permanent residents (LPRs). Other kinds of convictions to be avoided in this area are: crimes of stalking, crimes against children, and violations of protective orders.
- ✓ **Avoid a “Crime Involving Moral Turpitude” (CIMT):** Depending on the individual's status and prior criminal history, this category may make the person removable; however, it *may* leave open more avenues for relief than would a conviction for an aggravated felony. If a CIMT cannot be avoided completely, but the defendant does not have any prior convictions for an offense that would be considered a CIMT, a defense attorney should consider the following options:
 - *If the defendant is a Lawful Permanent Resident (LPR), but has been admitted lawfully for less than five years:* avoid conviction for a CIMT for which a sentence of more than one year may be imposed (i.e. first and second degree misdemeanors and all felonies).

- *If the defendant is a Lawful Permanent Resident (LPR) or other Alien lawfully admitted:* avoid a conviction for 2 or more CIMTS not arising out of a single scheme of criminal misconduct to prevent deportability.
- *If the defendant is undocumented:* avoid a conviction for a CIMT with a maximum possible sentence of more than one year (i.e., avoid all second and third degree misdemeanors and felonies) and obtain a maximum sentence imposed of six months or less. This should preserve the client’s eligibility for the “petty offense exception” if they are otherwise eligible to apply for lawful status.

What are the things to DO when representing a noncitizen defendant?

- ✓ **Ask detailed questions about client’s current immigration status:** This information is essential to an attorney’s ability to provide specific and accurate immigration advice. We have provided a sample intake form in this guide, however additional information may be needed depending on the details of a particular client’s situation.
- ✓ **Conduct independent research into the immigration consequences of pending charges:** This guide offers a starting point for analysis, but updated research into recent case law that takes into account the individual details of a client’s situation and defense priorities is *always* necessary.
- ✓ **Communicate your specific, detailed conclusions regarding the immigration consequences of pending charges to your client:** Under *Padilla v. Kentucky*, it is an attorney’s constitutional obligation to advise a noncitizen client of the deportation consequences of their criminal charges.
- ✓ **Urge client to consider pre-trial diversion programs, if applicable:** In many situations, if an outright dismissal is not possible, a pre-trial diversion program like ARD that avoids a “conviction” for immigration purposes will be the best possible outcome for a defendant. Although these programs impose significant requirements, a client should be advised of the benefits in the immigration context.
- ✓ **Pay careful attention to crafting a plea agreement:** In many situations, small changes to how the plea agreement is crafted can have a huge impact on the consequences stemming from the conviction. For instance:
 - If the conviction is one which could constitute an aggravated felony if a sentence of 1 year or more is imposed, a plea agreement with a sentence (whether suspended or to be served) of 364 days instead of 1 year may well make the difference between an essentially permanent deportation and possibly no immigration consequences at all.
 - Consider crafting pleas to charges that do not trigger immigration consequences, or that trigger less serious categories (for instance, it is often better to plea to a CIMT than to plea to an aggravated felony).

DEFINITION OF A CONVICTION & “SENTENCE IMPOSED” IN PENNSYLVANIA

Definition of “conviction” for immigration purposes. A conviction occurs where there is a formal judgment of guilt. A conviction can also exist where the adjudication of guilt is withheld and two conditions are met:

- a judge or jury has found the alien guilty, the alien has entered a plea of guilty or nolo contendere, or the alien has admitted sufficient facts to warrant a finding of guilt; AND
- Some form of punishment, penalty, or confinement on the alien’s liberty has been ordered.

Definition of “sentence imposed” for immigration purposes. The immigration statute defines sentence imposed as the “period of incarceration or confinement ordered by a court of law, regardless of suspension of the imposition or execution of that imprisonment in whole or in part.” Thus, a plea plus confinement, regardless of suspension or execution of the sentence will be a conviction. Under Pennsylvania’s minimum/maximum sentencing structure the “sentence imposed” for immigration purposes is the maximum sentence imposed. Example: 11 ½ to 23 months is a sentence of one year or more. A sentence of 5 1/2 to 11 months is not.

- This language refers to the sentence actually imposed, not to the potential sentence.
- It does not include the period of probation, although the additional sentence imposed by a court after a probation or parole violation is included within the “sentence imposed.”
- A condition of probation that requires a period of incarceration or confinement, such as an in-patient treatment facility, will count towards a sentence of confinement.
- It includes the entire sentence imposed even if the client has been immediately paroled and never actually served any period of incarceration.
- It includes the aggregation of consecutive sentences on a single charge.
- House arrest with electronic monitoring satisfies the definition of imprisonment.

How to get a sentence of less than one year. Often counsel can avoid having an offense classed as an aggravated felony by creative plea bargaining. *Some (but not all) aggravated felony grounds are only triggered by a sentence of a year or more. For such offenses, the key is to avoid any one count from being punished by a sentence of one year or more.* If needed, counsel can still negotiate significant jail time for the defendant. If immigration concerns are important, counsel might:

- bargain for the maximum sentence being less than one year on a single count;
- plead to two or more counts, with less than a one year sentence imposed for each, to be served consecutively;
- plead to an additional or substitute offense that does not have immigration consequences, and take the jail time on that;
- waive credit for time already served or prospective “good time” credits and persuade the judge to take this into consideration in imposing a shorter official sentence, that will result in the same amount of time actually incarcerated as under the originally proposed sentence;
- rather than take a probation violation that adds time to the sentence for the original conviction, ask for a new conviction (one without immigration consequences) and take the time on the new count.

Vacated sentences: Vacating a sentence *nunc pro tunc* and imposing a revised sentence of less than 365 days will prevent some convictions from being considered aggravated felonies. Vacating a sentence can be for any reason, including avoiding immigration consequences. This will not eliminate a conviction but will help avoid certain aggravated felonies. This will only help avoid an aggravated felony that is triggered by a one year sentence. Remember that many aggravated felony categories do not have any sentencing requirement.

The petty offense exception. The above definition of “sentence imposed” also applies to persons attempting to qualify for the “petty offense” exception to the moral turpitude ground of inadmissibility, which holds that a person who has committed only one crime involving moral turpitude is not inadmissible if the offense has a maximum *possible* sentence of one year or less and a sentence *imposed* of six months or less.

ATTORNEY WORK PRODUCT
PLEASE REVIEW WITH CLIENT—DO NOT HAND OUT THIS FORM
PLACE THIS FORM INSIDE FILE BEFORE ENTERING ANY COURTROOM

REFERRAL

CLIENT _____ A# _____

PP# _____ DOCKET # _____

CLIENT / FAMILY CONTACT _____

IMMIGRATION ATTORNEY _____

PRIOR DEPORTATION ORDER? Y N COPY OF DOCUMENTATION? Y N

COUNTRY OF ORIGIN _____ DATE OF 1st ENTRY TO U.S. _____

IMMIGRATION STATUS AT TIME OF ENTRY TO U.S.:

- UNDOCUMENTED LPR / GREEN CARD HOLDER
 TEMPORARY VISA HOLDER OTHER _____

CURRENT IMMIGRATION STATUS (check all that apply):

- UNDOCUMENTED LPR / GREEN CARD HOLDER

DATE OF LAST ENTRY _____ SINCE WHEN? _____

- REFUGEE APPLICATION PENDING

SINCE WHEN? _____ FOR WHAT? _____

- ASYLEE OTHER _____

FAMILY TIES IN U.S.:

SPOUSE: USC LPR UNDOCUMENTED

PARTNER: USC LPR UNDOCUMENTED

CHILDREN: USC LPR UNDOCUMENTED [AGES _____]

MOTHER: USC; NATURALIZATION DATE: _____ LPR UNDOCUMENTED

FATHER: USC; NATURALIZATION DATE: _____ LPR UNDOCUMENTED

USC GRANDPARENT? YES NO

COMMENTS _____

REFERRED BY _____ REFERRAL DATE _____

Immigration Consequences of Selected Pennsylvania Offenses: A Quick Reference Chart

| Offense | Aggravated Felony (AF) | Crime Involving Moral Turpitude (CIMT) | Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc. | Alternate Pleas and Practice Tips |
|--------------------------------------------------------|---------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Inchoate Crimes | | | | |
| <i>18 Pa. C.S. § 901 (Generally)</i> Attempt | Attempt to commit an aggravated felony is itself an aggravated felony. | Attempt to commit a CIMT is a CIMT, unless the underlying offense has a mental state of recklessness. Attempt to commit a crime with a reckless mental state is not a CIMT. | Attempt to commit any controlled substance or firearm offense is generally a controlled substance or firearm offense. Attempt to commit a CODV or crimes against child offense may be a CODV or crimes against child offense. | Tip for criminal defense attorneys: Look to plead an underlying offense that is not a CIMT, AF, ground of inadmissibility, and/or ground of deportability. |
| <i>18 Pa. C.S. § 902</i> Solicitation | Solicitation to commit an aggravated felony will be an aggravated felony. | Solicitation to commit a CIMT is a CIMT. | Solicitation to commit any controlled substance, CODV, firearm or other offense is probably a CODV, firearm or other offense. | Tip for criminal defense attorneys: Look to plead an underlying offense that is not a CIMT, AF, ground of inadmissibility, and/or ground of deportability. |
| <i>18 Pa. C.S. § 903</i> Conspiracy | Conspiracy to commit an aggravated felony is itself an aggravated felony. | Conspiracy to commit a CIMT is generally a CIMT. | Conspiracy to commit any controlled substance, CODV, firearm or other offense is generally a controlled substance, CODV, firearm or other offense. | Tip for criminal defense attorneys: Look to plead an underlying offense that is not a CIMT, AF, ground of inadmissibility, and/or ground of deportability. |
| Homicide | | | | |
| <i>18 Pa. C.S. § 2502</i> Murder | Yes. | Yes. | CODV: Yes, if against co-parent, current or former spouse, or person with whom the defendant is or was co-habiting. | |

Immigration Consequences of Selected Pennsylvania Offenses: A Quick Reference Chart

| Offense | Aggravated Felony (AF) | Crime Involving Moral Turpitude (CIMT) | Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc. | Alternate Pleas and Practice Tips |
|--------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>18 Pa. C.S. § 2503</i> Voluntary manslaughter | Yes, crime of violence AF if term of imprisonment is imposed of one year or more. | Yes. | CODV: Yes, if against co-parent, current or former spouse, or person with whom the defendant is or was co-habiting. | |
| <i>18 Pa. C.S. § 2504</i> Involuntary manslaughter | Reckless: Possibly, if graded as a second degree felony for victim under 12 years of age and a sentence of one year or more imprisonment is imposed. Otherwise, no. Grossly negligent: No. | Reckless: Yes. Negligent: No. | Crimes Against Child: Probably, if graded as a second degree felony for victim under 12 years of age. | Tip for criminal attorneys: Try to plead specifically to a grossly negligent act to avoid CIMT and AF. |
| Assault | | | | |
| <i>18 Pa. C.S. § 2701(a)(1)</i> Simple Assault | Intentional or knowing: Yes if a term of imprisonment of one year or more is imposed. Reckless: No, because not a crime of violence. | Intentional or knowing: Yes. Reckless: No. | CODV: Intentional or knowing: Probably, if against co-parent, current or former spouse, or person with whom the defendant is or was co-habiting. Reckless: No, because not a crime of violence. Crimes Against Child: Sentencing enhancement under (b)(2) for assault against child under 12 probably will qualify. | Simple assault 2701(a)(2) is preferable. Otherwise, attempt to specify reckless mental state on the record or plead generally to the language of the statute with no mention of the level of intent. If the case involves a protected relationship, scrub the record of any reference to the relationship to avoid a CODV. Tip for immigration attorneys: If mens rea is not specified in subsection, argument against divisibility of (a)(1). Argument against CIMT is that statute includes reckless assault, which does not meet mental state requirement. |

Immigration Consequences of Selected Pennsylvania Offenses: A Quick Reference Chart

| Offense | Aggravated Felony (AF) | Crime Involving Moral Turpitude (CIMT) | Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc. | Alternate Pleas and Practice Tips |
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| <p><i>18 Pa. C.S. § 2701 (a)(2)</i> Simple Assault (negligently)</p> | No. | No. | <p>CODV: No.</p> <p>Firearm: Possible, if gun mentioned on record.</p> <p>Crimes Against Child: Sentencing enhancement for assault against child under 12 could qualify.</p> | <p>Tip for criminal attorneys: Make sure the record is clear that client is pleading to or convicted of (a)(2).</p> |
| <p><i>18 Pa. C.S. § 2701 (a)(3)</i> Simple Assault (physical menace)</p> | Yes, crime of violence AF if term of imprisonment of one year or more is imposed. | Probably. | <p>CODV: Yes, if against co-parent, current or former spouse, or person with whom the defendant is or was co-habiting.</p> <p>Crimes Against Child: Sentencing enhancement for assault against child under 12 would qualify.</p> | <p>Tip for criminal attorneys: If conduct clearly meets the (a)(3) standards, plead to 2701(a) generally with no mention of subsection on the record to avoid AF and CIMT. Try to keep record clean of any specific intent, relationship between parties, and age of complainant. Avoid sentence enhancement for child under 12 to avoid crimes against child. Keep term of imprisonment to 364 days or less to avoid AF.</p> <p>Tip for immigration attorneys: If subsection is not specified in the record, argument against AF and CIMT could be that statute includes negligent conduct. See advice for 2701(a)(1) above.</p> |

Immigration Consequences of Selected Pennsylvania Offenses: A Quick Reference Chart

| Offense | Aggravated Felony (AF) | Crime Involving Moral Turpitude (CIMT) | Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc. | Alternate Pleas and Practice Tips |
|---------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>18 Pa. C.S. § 2702(a)(1)</i> Aggravated Assault | Probably AF as crime of violence if term of imprisonment of one year or more is imposed. | Yes. Mental state of at least recklessness with element of serious bodily injury is a CIMT. | CODV: Probably, if against co-parent, current or former spouse, or person with whom the defendant is or was co-habiting. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Plea specifically to reckless conduct or leave record vague as to the level of intent to try to avoid AF and CODV. Tip for immigration attorneys: If mental state is not specified in the record of conviction and the government bears the burden of proving the elements of the conviction, this should not be an AF as a crime of violence because the statute includes reckless conduct. |
| <i>18 Pa. C.S. § 2702(a)(2)</i> Aggravated Assault | Probably AF as crime of violence if term of imprisonment of one year or more is imposed. | Yes. Mental state of at least recklessness with element of serious bodily injury is a CIMT. | CODV: Probably if against co-parent, current or former spouse, or person with whom the defendant is or was co-habiting. CAC: possibly if victim is a minor. | Tip for criminal attorneys: See advice above. Tip for immigration attorneys: see advice above |
| <i>18 Pa. C.S. § 2702(a)(3)-(a)(6)</i> Aggravated Assault | Yes, crime of violence AF if term of imprisonment of one year or more is imposed if convicted under (a)(4) or (a)(6). Probably crime of violence AF if convicted under (a)(3) or (a)(5) if term of imprisonment of a year or more is imposed. | Yes, if convicted under (a)(3),(4) and (5). Probably under (a)(6). | CODV: Yes, if against co-parent, current or former spouse, or person with whom the defendant is or was co-habiting. CAC: (a)(3), (a)(5), (6) possibly if victim is a minor. Firearms: (a)(4) probably if weapon specified is a firearm. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. |

Immigration Consequences of Selected Pennsylvania Offenses: A Quick Reference Chart

| Offense | Aggravated Felony (AF) | Crime Involving Moral Turpitude (CIMT) | Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc. | Alternate Pleas and Practice Tips |
|---------------------------------------------------------------------------|------------------------------------------------------------------------------------------|--------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>18 Pa. C.S. § 2702(a)(7)</i> Aggravated Assault | Probably AF as crime of violence if term of imprisonment of one year or more is imposed. | Probably. | CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting, co-habited with or co-parent with. CAC: possibly if victim is a minor. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Tip for immigration attorneys: Argument against AF could be that crime could be strict liability offense, so would not rise to the level of intent necessary for an AF or a CIMT. |
| <i>18 Pa. C.S. § 2702(a)(8)</i> Aggravated Assault | Probably AF as crime of violence if term of imprisonment of one year or more is imposed. | Intentional or knowing: Yes Reckless: Possibly. | Crimes Against Child: Probably if victim is a minor. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. |
| <i>18 Pa. C.S. § 2702(a)(9)</i> Aggravated Assault | Probably AF as crime of violence if term of imprisonment of one year or more is imposed. | Yes. | Crimes Against Child: Probably if victim is a minor. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. |
| <i>18 Pa. C.S. § 2705</i> Recklessly Endangering Another Person | No. | No. | CODV: No, because not a crime of violence. | Tip for criminal attorneys: Try to scrub any reference to a protected domestic relationship to avoid any possibility of a CODV. |
| <i>18 Pa. C.S. § 2706(a)(1)</i> Making Terroristic Threats | Yes, crime of violence AF if term of imprisonment of one year or more is imposed. | Probably. | CODV: Yes, if against current or former spouse, person with whom the defendant is currently co-habiting, co-habited with or co-parent with. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Harassment may be a safer alternative. Tip for immigration attorneys: <u>Boykun v. Ashcroft</u> only addressed the previous version of terroristic threats statute, which was not subdivided. In dicta, the court stated that the analysis would not change; however, there is a strong argument that this statute now includes multiple forms of conduct which would not be AFs or CIMTs. |

Immigration Consequences of Selected Pennsylvania Offenses: A Quick Reference Chart

| Offense | Aggravated Felony (AF) | Crime Involving Moral Turpitude (CIMT) | Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc. | Alternate Pleas and Practice Tips |
|-------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>18 Pa. C.S. § 2706 (a)(2), (a)(3)</i> Making Terroristic Threats | Probably AF as crime of violence if term of imprisonment of one year or more is imposed. | Maybe. | CODV: Probably if against current or former spouse, person with whom the defendant is currently co-habiting, co-habited with or co-parent with. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Harassment may be a safer alternative. Tip for immigration attorneys: See above. |
| <i>18 Pa. C.S. § 2709(a)(1)-(a)(3) S</i> Harassment | No. Not an AF as a crime of violence because this is generally a summary offense which is not subject to a 1-year term of imprisonment, provided no sentencing enhancement for violation of order under 23 Pa.C.S. § 6108. | Probably not. | CODV: (a)(1) may be CODV if against current or former spouse, person with whom the defendant is currently co-habiting, co-habited with or co-parent with. Sections (a)(2), (a)(3) might be “stalking” ground of deportability. | Tip for criminal attorneys: To avoid potential CIMT or CODV, plea specifically to (a)(3) and cite language of subsection regardless of relationship. Tip for immigration attorneys: Argument against CIMT could be that intent is only to “harass or annoy,” with no requirement of injury or threat. |
| <i>18 Pa. C.S. § 2709 (a)(4)-(7) M3</i> Harassment | No. | Probably not. | Crime of Stalking: Maybe. | Tip for criminal attorneys: Subsection (a)(3) is a safer alternative. See above. |
| <i>18 Pa. C.S. § 2709.1</i> Stalking | Possible crime of violence AF if a term of imprisonment of one year or more is imposed and crime is graded as a felony. Probably not AF for a misdemeanor conviction, especially under (a)(2). | Probably. | Crime of Stalking: Yes. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less and have crime graded as a misdemeanor to avoid AF. Avoid sentence enhancement for victim under 12 to avoid crime against child. Tip for immigration attorneys: Argument against AF could be that PA statute is broader than the statute in <u>Malta Espinoza</u> and would include activity that did not constitute AF. |

Immigration Consequences of Selected Pennsylvania Offenses: A Quick Reference Chart

| Offense | Aggravated Felony (AF) | Crime Involving Moral Turpitude (CIMT) | Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc. | Alternate Pleas and Practice Tips |
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| <i>18 Pa. C.S. § 2901</i> Kidnapping | Probably AF as crime of violence if term of imprisonment of one year or more is imposed. | Yes. | CODV: Probably if against co-parent, current or former spouse, or person with whom the defendant is or was co-habiting. Crimes Against Child: Conviction under (a.1) would qualify. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Avoid any reference to relationship between the parties or age of victim to avoid CODV and crimes against child. Keep record clear of injury or threats and specify that crime was accomplished by deception, not force, to possibly avoid AF. Tip for immigration attorneys: Argument against AF could be that statute includes unlawful confinement accomplished by deception or without the consent of a parent, which may not be crime of violence. |
| <i>18 Pa. C.S. § 2902</i> Unlawful Restraint | May be crime of violence AF if term of imprisonment of one year or more is imposed. | Yes. | CODV: Possible if against co-parent, current or former spouse, or person with whom the defendant is or was co-habiting. Crimes Against Child: Sections (b) and (c) would probably qualify. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Avoid any reference to relationship between the parties to avoid CODV. Avoid sections involving minors to avoid crimes against child. |
| <i>18 Pa. C.S. § 2903</i> False Imprisonment | Probably not under 2903(a). Possible under 2903(b) and (c). | Possibly. | CODV: Probably not. Crimes Against Child: Sections (b) and (c) might qualify. | Tip for criminal attorneys: Keep record clear of any use or threat of force or injury to avoid AF and CIMT. Avoid sections involving minors to avoid crimes against child. Tip for immigration attorneys: Argument against AF as crime of violence could be that under PA case law, the only requirements for a conviction under this statute are (1) detention and (2) the unlawfulness of the detention. |

Immigration Consequences of Selected Pennsylvania Offenses: A Quick Reference Chart

| Offense | Aggravated Felony (AF) | Crime Involving Moral Turpitude (CIMT) | Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc. | Alternate Pleas and Practice Tips |
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| <i>18 Pa. C.S. § 2904</i> Interference with custody of children | Probably not. | Probably. | CODV: Probably not. Crimes Against Child: Probably. | Tip for criminal attorneys: Keep record clear of any use or threat of force to avoid CIMT. Tip for immigration attorneys: Possible argument against CIMT is that simple interference with liberty does not rise to the level of CIMT. |
| <i>18 Pa. C.S. § 2910</i> Luring child into motor vehicle or structure | Probably not. | Probably. | Crimes Against Child: Probably. | |
| Sexual Offenses | | | | |
| <i>18 Pa. C.S. § 3121</i> Rape (intentional or knowing) | Yes, regardless of sentence imposed. | Yes. | CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with. Crimes Against Child: yes. | |
| <i>18 Pa. C.S. § 3122.1</i> Statutory Sexual Assault | Yes, crime of violence AF if term of imprisonment of one year or more is imposed Also AF as sexual abuse of a minor regardless of sentence imposed. | Yes. | CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with. Crimes Against Child: Yes. | |

Immigration Consequences of Selected Pennsylvania Offenses: A Quick Reference Chart

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| <i>18 Pa. C.S. § 3123(a)(1) – (2)</i> Involuntary Deviate Sexual Intercourse | Yes, crime of violence AF if term of imprisonment of one year or more is imposed Possible AF as rape regardless of sentence imposed. | Yes. | CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with. | |
| <i>18 Pa. C.S. § 3123(a)(3) – (5)</i> Involuntary Deviate Sexual Intercourse where victim cannot consent | Yes, crime of violence AF if term of imprisonment of one year or more is imposed because victim is unable to give consent. Probably also AF as rape. | Yes. | CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with. | |
| <i>18 Pa. C.S. § 3123(a)(7)</i> Involuntary Deviate Sexual Intercourse where victim is less than 16 | Yes. AF as sexual abuse of a minor regardless of sentence imposed. | Yes. | Crimes Against Child: yes. | |
| <i>18 Pa. C.S. § 3123(b)</i> Involuntary Deviate Sexual Intercourse With a Child less than 13 | Yes. AF as sexual abuse of a minor regardless of sentence imposed. | Yes. | Crimes Against Child: yes. | |
| <i>18 Pa. C.S. § 3123(c)</i> Involuntary Deviate Sexual Intercourse with a Child with Serious Bodily Injury | Yes. AF as sexual abuse of a minor regardless of sentence imposed. Also AF as a crime of violence if a term of imprisonment of one year or more is imposed. | Yes. | Crimes Against Child: Yes. | |

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| <i>18 Pa. C.S. § 3124.1</i> Sexual Assault | Yes. AF as rape. Also AF as crime of violence if a term of imprisonment of one year or more is imposed. | Yes. | CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with. | |
| <i>18 Pa. C.S. § 3124.2</i> Institutional Sexual Assault | Probably crime of violence AF if a term of imprisonment of one year or more is imposed. | Yes. | Crimes Against Child: Possible | |
| <i>18 Pa. C.S. § 3125(a)(1)</i> Aggravated Indecent Assault without consent | Yes. AF as rape because it involves nonconsensual sexual penetration. Also AF as a crime of violence if a term of imprisonment of one year or more is imposed. | Yes. | CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with. | |
| <i>18 Pa. C.S. § 3125(a)(2) – (3)</i> Aggravated Indecent Assault (a)(2) with force (a)(3) with threat of force | Yes. AF as a crime of violence if a term of imprisonment of one year or more is imposed. | Yes. | CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with. | |
| <i>18 Pa. C.S. § 3125(a)(4) – (6)</i> Aggravated Indecent Assault (a)(4) victim is unconscious (a)(5) victim is impaired (a)(6) victim is disabled | Yes. AF as crime of violence if a term of imprisonment of one year or more is imposed because victim is unable to give consent. | Yes. | CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with. | |

Immigration Consequences of Selected Pennsylvania Offenses: A Quick Reference Chart

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| <i>18 Pa. C.S. § 3125(a)(7) and (8)</i> Aggravated Indecent Assault (a)(7) victim is less than 16 (a)(8) victim is less than 13 | Yes. AF as sexual abuse of a minor regardless of sentence imposed. | Yes. | Crimes Against Child: yes. | |
| <i>18 Pa. C.S. § 3125(b)</i> Aggravated Indecent Assault of a Child | Yes. AF as sexual abuse of a minor regardless of sentence imposed. | Yes. | Crimes Against Child: yes. | |
| <i>18 Pa. C.S. § 3126(a)</i> Indecent Assault (where subsection of statute is not specified in record of conviction). | Possible AF. | Yes. | CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with. CAC: Yes | Tip for criminal attorneys: To possibly avoid AF, keep record clear of subsection of statute and have client plea to 3126(a) generally. Tip for immigration attorneys: If subsection is not specified in record of conviction, this might not be an AF because conviction under subsection (a)(1) might not be an AF. See 18 Pa C.S. § 3126(a)(1) below. |
| <i>18 Pa. C.S. § 3126(a)(1)</i> Indecent Assault without consent | Possible AF as a crime of violence if a term of imprisonment of one year or more is imposed. | Yes, requires at least recklessness. | CODV: possible. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to potentially avoid AF. Tip for immigration attorneys: 3d Circuit has not ruled that crime of violence will be found with simple lack of consent, but other circuits have. |
| <i>18 Pa. C.S. § 3126(a)(2) – (a)(3)</i> Indecent Assault (a)(2) with force (a)(3) with threat of force | Yes, crime of violence AF if term of imprisonment of one year or more is imposed. | Yes. | CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to potentially avoid AF. |

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| <i>18 Pa. C.S. § 3126(a)(4) – (a)(6)</i> Indecent Assault (a)(4) victim is unconscious (a)(5) victim is impaired (a)(6) victim is disabled | Yes, crime of violence AF if term of imprisonment of one year or more is imposed because victim is unable to give consent. | Yes. | CODV: Yes if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to potentially avoid AF. |
| <i>18 Pa. C.S. § 3126(a)(7) and (a)(8)</i> Indecent Assault (a)(7) victim is less than 16 (a)(8) victim is less than 13 | Yes. AF as sexual abuse of a minor regardless of sentence imposed. | Yes. | Crimes Against Child: Yes. | |
| <i>18 Pa. C.S. § 3127</i> Indecent exposure | No. | Yes. | CODV: No, because not a crime of violence. CAC: Yes, under sentence enhancement for victim less than 16 years old. | |
| <i>18 Pa.C.S.4915.1</i> Failure to comply with registration requirements | No. | No. | Probably not. | |
| Property Destruction | | | | |
| <i>18 Pa. C.S. §3301(a)(1)(i)</i> Arson endangering person | No. Not AF as a crime of violence. | Possibly. | CODV: No because not a crime of violence | Tip for criminal attorneys: To reduce the risk of CIMT, explore alternate plea to <i>attempted</i> reckless burning or exploding. Keep record clear of any relationship to the victim. |
| <i>18 Pa. C.S. §3301(a)(1)(ii)</i> Arson endangering person | Probably yes, crime of violence AF if term of imprisonment of one year or is imposed. | Probably yes. | CODV: Yes because a crime of violence. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to potentially avoid AF. Keep record clear of any relationship to the victim. |

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| <i>18 Pa. C.S. §3301(a)(2)</i> Arson endangering person | Probably yes, crime of violence AF if term of imprisonment of one year or is imposed. | Yes. | CODV: Yes because a crime of violence. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to potentially avoid AF. Keep record clear of any relationship to the victim. |
| <i>18 Pa. C.S. §3301(a.1)(1)(i)</i> Arson endangering person | Intentional or knowing: Probably yes, crime of violence AF if term of imprisonment of one year or is imposed. Reckless: No. | Intentional or knowing: yes. Recklessness: Possibly. | CODV: Intentional or Knowing: Yes because a crime of violence. Recklessness: No. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to potentially avoid AF. Try to specify to recklessness on the record. Keep record clear of any relationship to the victim. |
| <i>18 Pa. C.S. §3301(a.1)(2)</i> Arson endangering person | Probably Yes. | Yes. | | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to potentially avoid AF. |
| <i>18 Pa. C.S. §3301(c)(1)</i> Arson endangering property | Yes, crime of violence AF if term of imprisonment of one year or is imposed. | Yes. | CODV: Yes because a crime of violence. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to potentially avoid AF. Keep record clear of any relationship to the victim. |
| <i>18 Pa. C.S. §3301(c)(2)</i> Arson endangering property | No. Not AF as a crime of violence. | Possibly. | CODV: No because not a crime of violence | Tip for criminal attorneys: To reduce the risk of CIMT, explore alternate plea to <i>attempted</i> reckless burning or exploding. |
| <i>18 Pa. C.S. §3301(c)(3)</i> Arson endangering property | Yes, crime of violence AF if term of imprisonment of one year or is imposed. | Yes. | CODV: Yes because a crime of violence. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to potentially avoid AF. Keep record clear of any relationship to the victim. |
| <i>18 Pa. C.S. §3301(d)</i> Reckless Burning or Exploding | No. Not AF as a crime of violence. Probably yes, explosive device AF regardless of sentence imposed. | Possibly. | CODV: No because not a crime of violence. | Tip for criminal attorneys: To reduce the risk of CIMT, explore alternate plea to <i>attempted</i> reckless burning or exploding. Keep record clear of any relationship to the victim. |

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| <i>18 Pa. C.S. § 3301(f)</i> Possession of explosion or incendiary materials and devices | Probably yes, crime of violence AF if term of imprisonment of one year or is imposed and if underlying subsection is intentional or knowing. Probably yes, explosive device AF regardless of sentence imposed. | Probably. | CODV: Yes because a crime of violence. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to potentially avoid AF. |
| <i>18 Pa. C.S. § 3304(a)(1)</i> Criminal Mischief | Possible AF as a crime of violence if a term of imprisonment of one year or more is imposed and plea is to intentional conduct. Probably yes, explosive device AF regardless of sentence imposed | Possibly. | Possibly a “destructive device offense” if record of conviction establishes that offense involved “destructive device” (as defined in 18 U.S.C. 921(a)). | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. For safest outcome, plea specifically to negligent or reckless conduct to avoid AF and CIMT. Tip for immigration attorneys: There is no case law on this statute specifically but there is an argument against AF. |
| <i>18 Pa. C.S. § 3304(a)(2)</i> Criminal Mischief | Possible AF as a crime of violence if a term of imprisonment of one year or more is imposed and plea is to intentional conduct. | Possibly. | No. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. For safest outcome, plea specifically to reckless conduct to avoid AF and CIMT |
| <i>18 Pa. C.S. § 3304(a)(3)</i> Criminal Mischief | May be fraud AF if there is a loss to victim of more than \$10,000. | Possibly. | No. | Tip for criminal attorneys: To avoid AF, keep record clear of any language regarding specific intent or amount of loss if more than \$10,000. If possible, plea specifically to reckless conduct. Plea should specifically be to amount less than \$10,000 to avoid AF. |
| <i>18 Pa. C.S. § 3304(4)(5)(6)</i> Criminal Mischief | Possible crime of violence AF if a term of imprisonment of one year or more is imposed. | Possibly. | No. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. |

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| Burglary and Criminal Intrusion | | | | |
| <p><i>18 Pa. C.S. § 3502(a)(1)</i> Burglary adapted for overnight accommodations and person present</p> | <p>Probably burglary AF if a term of imprisonment of one year or more is imposed. “Occupied structure” definition includes vehicles and other structures which would not qualify as a generic burglary.</p> <p>May also be crime of violence AF if a term of imprisonment of one year or more is imposed.</p> | Probably. | <p>CODV: Possibly. If it’s a crime of violence because location is a dwelling, would be CODV offense if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.</p> | <p>Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Keep record vague with regard to what was entered to possibly avoid generic burglary AF. Because definition of “occupied structure” in Pennsylvania includes vehicles and securely fenced lots, a specific plea to the language of the statute may avoid AF as a burglary offense. Specify vehicle or fenced lot if applicable.</p> <p>Tip for immigration attorneys: If the record of conviction does not specify what the client actually entered and the government bears the burden of proof, argument against AF is that generic burglary does not include vehicles or securely fenced lots, which are included in the PA statute. Possible argument against CIMT is that conviction under this statute is distinguishable from the FL statute in <u>Louissant</u> because PA statute punishes entry of non-dwellings. Other argument against CIMT would include a conviction under that statute where the underlying crime is not a CIMT.</p> |
| <p><i>18 Pa. C.S. § 3502(a)(2)</i> Burglary adapted for overnight accommodations and no person present</p> | <p>Probably burglary AF if a term of imprisonment of one year or more is imposed.</p> <p>May also be crime of violence AF if a term of imprisonment of one year or more is imposed.</p> | Probably. | <p>CODV: Possibly. If it’s a crime of violence because location is a dwelling, would be CODV offense if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with.</p> | See advice above. |

Immigration Consequences of Selected Pennsylvania Offenses: A Quick Reference Chart

| Offense | Aggravated Felony (AF) | Crime Involving Moral Turpitude (CIMT) | Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc. | Alternate Pleas and Practice Tips |
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| <p><i>18 Pa. C.S. § 3502(a)(3)</i> Burglary not adapted for overnight accommodations and person present</p> | <p>Probably burglary AF if a term of imprisonment of one year or more is imposed. “Occupied structure” definition includes vehicles and other structures which would not qualify as a generic burglary.</p> <p>May also be crime of violence AF if a term of imprisonment of one year or more is imposed.</p> | <p>Probably.</p> | <p>CODV: Should not be because statute specifically states that structure is not adapted for overnight accommodation so this should not qualify as a crime of violence</p> | <p>See advice above.</p> |
| <p><i>18 Pa. C.S. § 3502(a)(4)</i> Burglary not adapted for overnight accommodations and no person present</p> | <p>Probably burglary AF if a term of imprisonment of one year or more is imposed. “Occupied structure” definition includes vehicles and other structures which would not qualify as a generic burglary.</p> <p>May also be crime of violence AF if a term of imprisonment of one year or more is imposed.</p> | <p>Probably.</p> | <p>CODV: Should not be because statute specifically states that structure is not adapted for overnight accommodation so this should not qualify as a crime of violence</p> | <p>See advice above.</p> |

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| <p><i>18 Pa. C.S. § 3503(a)</i> Criminal Trespass - Buildings and Occupied Structures</p> <p>(1)(i) F3 (unprivileged entry)</p> | Probably not. | Possibly. | CODV: Probably not. | <p>Tips for criminal attorneys: If possible, plea specifically to entry without force or damage to property and keep record clear of any intention to commit a crime on the property to potentially avoid CIMT. Keep record vague as to what structure was entered or plea specifically to vehicle or fenced lot if applicable.</p> <p>Tip for immigration attorneys: Criminal trespass uses the same vague definition of “occupied structure” as burglary; see advice for §3502 above.</p> |
| <p><i>18 Pa. C.S. § 3503(a)</i> Criminal Trespass Buildings and Occupied Structures</p> <p>(1)(ii) F2 (breaking and entering)</p> | Possible AF as a crime of violence if a term of imprisonment of one year or more is imposed. | Possibly. | CODV: Possibly. If it’s a crime of violence because location is a dwelling, so possible CODV if against current or former spouse, person with whom the defendant is currently co-habiting, co-habited with, or co-parents with. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Keep record clear of damage to property or intention to commit crime inside structure to potentially avoid AF and CIMT. |
| <p><i>18 Pa. C.S. § 3503(b)</i> Defiant Trespass</p> | No. | Probably not. | No. | Tip for immigration attorneys: Statute punishes mere presence, which should not qualify as an AF or CIMT. |
| <p><i>18 Pa. C.S. § 3503(b.1) (i)(ii)(iii)</i> Simple Trespass</p> | No. | Probably. | CODV: Possibly. If it’s a crime of violence because location is a dwelling, so possible CODV offense if against current or former spouse, person with whom the defendant is currently co-habiting or co-parenting with. | <p>Tips for criminal attorneys: Section (b.1)(1)(iii) for attempted defacement of property is a safer option.</p> <p>Tip for immigration attorneys: If conviction is for property defacement or damage, possible argument against CIMT that crime is similar to criminal mischief and should not be CIMT. See criminal mischief analysis under §3304.</p> |

Immigration Consequences of Selected Pennsylvania Offenses: A Quick Reference Chart

| Offense | Aggravated Felony (AF) | Crime Involving Moral Turpitude (CIMT) | Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc. | Alternate Pleas and Practice Tips |
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| <i>18 Pa. C.S. § 3503(b.1)(iv)</i> Simple Trespass | Probably theft aggravated felony if term of imprisonment of one year or more is imposed. | Probably. | No. | This section found to be unconstitutional and void. <u>Commonwealth v. Leach</u> , 141 A.3d 426 (Pa. 2016). Tips for criminal attorneys: Section (b.1)(1)(iii) for attempted defacement of property is a safer option. |
| Robbery | | | | |
| <i>18 Pa.C.S. § 3701</i> Robbery | Yes, theft or attempted theft AF if term of imprisonment of one year or more is imposed. Also a possible AF as a crime of violence if a term of imprisonment of one year or more is imposed. | Yes. | CODV: Possible if against current or former spouse, person with whom the defendant is currently co-habiting co-habited with or co-parent with. Firearms: Probably not because crime by statute does not require firearm. | Tips for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. A plea to 3701(a)(1)(iii) may also avoid the crime of violence category if the underlying felony is not a crime of violence and does not create a risk that substantial harm will be used. |
| <i>18 Pa. C.S. § 3702</i> Robbery of a Motor Vehicle | Probably theft AF if a term of imprisonment of one year or more is imposed. Also probably AF as a crime of violence if a term of imprisonment of one year or more is imposed. | Probably. | Firearms: Probably not because crime by statute does not require firearm. | Tips for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. UUA is safer alternative to avoid AF and CIMT. Tip for immigration attorneys: Possible argument against CIMT is that statute could include a temporary taking. |
| Theft Offenses | | | | |
| <i>18 Pa. C.S. § 3921(a)</i> Theft by unlawful taking Movable Property | Yes, theft AF if a term of imprisonment of one year or more is imposed. | Yes. | No. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. If case involves an auto, unauthorized use of an automobile is a safer option to avoid AF and CIMT. |

Immigration Consequences of Selected Pennsylvania Offenses: A Quick Reference Chart

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| <i>18 Pa. C.S. § 3921(b)</i> Theft by unlawful taking Immovable Property | Probably not. | Probably not. | No. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Tip for immigration attorneys: This conviction should not be a theft AF or CIMT because there is no element of intent to deprive. |
| <i>18 Pa. C.S. § 3922(a)</i> Theft by Deception | AF as fraud offense if the loss to the victim reflected in the record is \$10,000. AF as theft offense if term of imprisonment of one year or more is imposed. | Yes. | No. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Plea should also specifically be to amount less than \$10,000 to avoid AF. Bad checks is a safer alternative to avoid CIMT if amount is less than \$10,000. |
| <i>18 Pa. C.S. § 3925</i> Receiving stolen property | Yes, theft AF if a term of imprisonment of one year or more is imposed. | Yes. | No. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. |
| <i>18 Pa. C.S. § 3926</i> Theft of Services | Yes, theft AF if term of imprisonment of one year or more is imposed. Possible AF as offense involving deceit if convicted for deception and loss to victim is more than \$10,000. | Yes. | No. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Plea should also specifically be to amount less than \$10,000 to avoid AF. |
| <i>18 Pa. C.S. § 3928</i> Unauthorized Use of an Automobile | Possible AF as theft offense if a term of imprisonment of one year or more is imposed. | No. | No. | Tips for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Tips for immigration attorneys: This should not be a crime of violence AF under 16(a) because no force element, and because it is a misdemeanor in PA, cannot be a crime of violence under 16(b). |

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| <i>18 Pa. C. S. § 3929</i> Retail Theft | Probably theft AF if a term of imprisonment of one year or more is imposed. | Yes. | No. | <p>Tips for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Avoid any language regarding a lack of consent of the owner of the property or any exercise of control over the property in the allocation.</p> <p>Tip for immigration attorneys: Possible argument against AF could be that sections (1), (2), and (3) do not require that the offense be committed without consent, so not generic theft offenses. For sections (4) and (5), possible argument that these are not theft offenses because there is no requirement of exercising control over property.</p> |
| <i>18 Pa. C.S. § 3934</i> Theft from a Motor Vehicle | Yes, theft AF if a term of imprisonment of one year or more is imposed. | Yes. | No. | Tips for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. |
| Forgery and Fraudulent Practices | | | | |
| <i>18 Pa.C.S. § 4101</i> Forgery | <p>Yes, forgery AF if a term of imprisonment of one year or more is imposed.</p> <p>Also would be fraud AF if convicted of intent to defraud and documents related to conviction show loss is greater than \$10,000.</p> | Yes. | No. | Tips for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid forgery AF. Plea specifically to amount less than \$10,000 to avoid fraud AF. Avoid pleading to “intent to defraud” or “facilitating a fraud” subsections. |
| <i>18 Pa.C.S. § 4105</i> Bad checks | No. Not fraud AF because no intent to defraud. | No. | No. | Tip for criminal attorneys: This is a good statute to use when negotiating a plea. |

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| <i>18 Pa.C.S. § 4106(a)</i> Access Device Fraud | Probably theft AF if sentence of one year or more imposed. Fraud AF if documents related to conviction show loss is greater than \$10,000. | Yes. | No. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. |
| <i>18 Pa.C.S. 4107</i> Deceptive or fraudulent business practices | Probably theft AF if sentence of one year or more imposed. Fraud AF if documents related to conviction show loss is greater than \$10,000. | Probably. | No. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. |
| <i>18 Pa.C.S. § 4116</i> Copying; recording devices | Possible counterfeiting AF if a term of imprisonment of one year or more is imposed. | Maybe. | No. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. |
| <i>18 Pa.C.S. § 4119</i> Trademark Counterfeiting | Yes, counterfeiting AF if a term of imprisonment of one year or more is imposed. | Probably. | No. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Tip for immigration attorneys: This statute was recently found to be unconstitutionally vague by the PA Supreme Court, which may be an argument against AF or CIMT. |
| <i>18 Pa.C.S. § 4120</i> Identity Theft | Probably not. | Probably. | Yes, possible ground of inadmissibility if non-citizen claims to be USC for any purpose or benefit under the INA or federal or state law. | Tip for Immigration attorneys: Under <u>Nijhawan v. Holder</u> , 557 U. S. 29 (2009), intent to defraud or deceive is a required element of the statute, so this should not be a fraud AF. |

Immigration Consequences of Selected Pennsylvania Offenses: A Quick Reference Chart

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| <i>62 P.S. § 481</i> Welfare Fraud | Probably not AF theft offense if sentence of confinement of a year or more imposed. AF as fraud offense if loss to the victim exceeds \$10,000. | Yes. | No. | Tip for criminal attorneys: DHS can look at outside documents, like pre-sentence investigation reports, to establish amount of loss for fraud offense. Plea should specifically be to amount less than \$10,000 to avoid AF. Tip for immigration attorneys: Possible argument against AF or CIMT that it is possible to commit offense by non-willful impersonation, which would not qualify as fraud offense. |
| Offenses Against the Family | | | | |
| <i>18 Pa.C.S. § 4304 (a)(1)</i> Endangering welfare of children | Probably not. | No. | Crimes Against Child: Probably yes. | Tip for criminal attorneys: Keep record clear of any mention of sexual conduct, or plea specifically to non-sexual conduct to avoid CIMT. Tips for immigration attorneys: The argument against AF is that sexual abuse of a minor is a generic offense that requires sexual conduct as an element of the offense. |
| Falsification | | | | |
| <i>18 Pa.C.S. § 4902</i> Perjury | Yes, perjury AF if a term of imprisonment of one year or more is imposed. | Yes. | No. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. |
| <i>18 Pa.C.S. § 4903</i> False Swearing | Probably not unless the false statement involves fraud or deceit in which loss to the victim exceeds \$10,000. | Probably. | No. | Tip for criminal attorneys: Under <u>Nijhawan v. Holder</u> , 557 U. S. 29 (2009), DHS can look at outside documents, like pre-sentence investigation reports, to establish amount of loss for fraud offense. Plea should specifically be to amount less than \$10,000 to avoid AF. |

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|-----------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------|----------------------------------------|------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>18 Pa.C.S. § 4904</i> Unsworn Falsification | Probably not unless the false statement involves fraud or deceit in which loss to the victim exceeds \$10,000. | Yes. | No. | Tips for criminal attorneys: DHS can look at outside documents, like pre-sentence investigation reports, to establish amount of loss for fraud offense. Plea should specifically be to amount less than \$10,000 to avoid AF. |
| <i>18 Pa. C.S. § 4905</i> False Alarms to Agencies of Public Safety | No. | Probably. | No. | |
| <i>18 Pa.C.S. § 4906</i> False reports to law enforcement | Probably not unless the false statement involves fraud or deceit in which the loss to law enforcement exceeds \$10,000. | Probably. | No. | |
| <i>18 Pa. C.S. § 4914</i> False ID to Law Enforcement Officer | Probably not. | Probably not. | No. | Tip for Criminal Attorneys: To avoid a CIMT, plead generally to the statute. Keep language clear of any intent to mislead, impair, or obstruct the function of the government through dishonest means. |
| Obstruction | | | | |
| <i>18 Pa.C.S. § 4910</i> Tampering with or Fabricating Physical Evidence | Yes. | Yes. | No. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Try for 18 Pa.C.S. 5101 instead to preserve argument against AF and CIMT. |
| <i>18 Pa.C.S. § 5101</i> Obstructing administration of law or other governmental function | May be obstruction of justice AF if a term of imprisonment of one year or more is imposed. | Probably not. | No. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. |
| <i>18 Pa.C.S. § 5104</i> Resisting Arrest | Probably not. | Probably not. | No. | Tip for Criminal defense attorney: keep the record clear of any reference to violent conduct. |

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| <i>18 Pa. C.S. § 5104.1</i> Disarming a Law Enforcement Officer | Probably, if a sentence of one year or more is imposed. | Probably. | Firearms: Probably, if a gun is mentioned on the record. | Tip for Criminal Attorneys: Avoid a sentence of one year or more to avoid AF. Leave record vague as to what the officer was disarmed of to avoid firearms offense. Plead generally to the offense, if possible. Resisting arrest and/or PIC are safer alternatives. Tip for Immigration Attorneys: Argument against AF is that offense includes “depriving,” which does not involve substantial risk of physical force. |
| <i>18 Pa.C.S. § 5105</i> Hindering apprehension or prosecution | Probably obstruction of justice AF if a term of imprisonment of one year or more is imposed. | Possibly. | Firearms: Probably, under (a)(2) if a gun is mentioned on the record. | Tip for criminal attorneys: Keep term of imprisonment to 364 days or less to avoid AF. Criminal contempt for failure to appear in court is a safer alternative. |
| <i>18 Pa.C.S. § 5124</i> Default in required appearance (failure to appear) | Yes, if related to an offense equivalent to a federal felony where sentence on underlying charge of 2 years or more may be imposed. Yes, if related to service of sentence where underlying offense is punishable by 5 years or more. | Possibly. | No. | Tip for criminal attorneys: Criminal contempt for failure to appear in court may be a safer alternative. |
| <i>18 Pa. C.S. § 5503</i> Disorderly Conduct | No. | No. | No. | |
| Prostitution | | | | |
| <i>18 Pa.C.S. § 5902(a)</i> Prostitution | No. | Yes. | Prostitution: Yes. | Tip for criminal attorneys: Alternate safe havens: -Obstruction of Highway -Disorderly Conduct -Loitering -Defiant Trespass |

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| <i>18 Pa.C.S. § 5902(b)(1)</i> Promoting Prostitution | Yes, regardless of sentence imposed. Separate AF category for “supervising, owning,” etc. prostitution business or transportation of prostitute for commercial advantage. | Yes. | Prostitution: Yes. | |
| <i>18 Pa.C.S. § 5902(b)(2)-(5)</i> Promoting Prostitution | Possible AF. | Yes. | Prostitution: Yes. | Tip for criminal attorneys: To potentially avoid AF, keep record clear of any reference to ownership, supervision, or management or to interstate travel. Tip for immigration attorneys: Argument against AF could be that there is no requirement of ownership, supervision or profit, and no requirement of interstate travel. |
| <i>18 Pa.C.S. § 5902(b)(6)</i> Promoting Prostitution | Probably AF if record reflects interstate travel. | Yes. | Prostitution: Yes. | Tip for criminal attorneys: To potentially avoid AF, keep record clear of reference to interstate travel. Tip for immigration attorneys: If record does not specify whether travel was interstate or intrastate, argument against AF is that only interstate travel is included in the federal statute. |
| <i>18 Pa.C.S. § 5902(b)(7)</i> Promoting Prostitution | Probably not. No requirement of supervision, ownership etc. of the actual business. | Probably. | Prostitution: Possibly. | |
| <i>18 Pa.C.S. § 5902(b)(8)</i> Promoting Prostitution | Probably not. No requirement of supervision, ownership etc. of the actual business. | Probably. | Prostitution: Possibly. | |

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| <i>18 Pa. C.S. § 5902(e)</i> Patronizing Prostitutes | No. | Probably. | Prostitution: Not for a single act of soliciting on one's own behalf. | |
| Firearms Offenses | | | | |
| <i>18 Pa.C.S. § 6105(a)(b)</i> Persons not to possess, use, manufacture, control, sell or transfer firearms | Yes. | No. | Firearms: Yes. | Tip for criminal attorneys: Safer option is to plead to offense that penalizes both guns and non-guns, with vague record of conviction (PIC or POW) or see advice for 6105(c). |
| <i>18 Pa.C.S. § 6105(a)(c)</i> Persons not to possess, use, manufacture, control, sell or transfer firearms | Yes under (c)(1)-(5), (9). Probably not under (6)-(8). | No. | Firearms: Yes. | Tip for criminal attorneys: Safer option is to plead to offense that penalizes both guns and non-guns, with vague record of conviction (PIC or POW). Try to stipulate to subsection (c) without reference to the underlying conviction or precondition. Tip for immigration attorneys: There is an argument that the subsections are means rather than elements thus a stipulation to Subsection (c) generally would prevent an opening of the record of conviction, avoiding the aggravated felony conviction. |
| <i>18 Pa.C.S. § 6106</i> Firearms not to be carried without a license | No. | No. | Firearms: Yes. | Tip for criminal attorneys: Safer option is to plead to offense that penalizes both guns and non-guns, with vague record of conviction (PIC or POW). |
| <i>18 Pa.C.S. § 6108</i> Firearms not to be carried on public streets in Philadelphia | No. | No. | Firearms: Yes. | Tip for criminal attorneys: Safer option is to plead to offense that penalizes both guns and non-guns, with vague record of conviction (PIC or POW). |

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| Minors | | | | |
| <i>18 Pa.C.S. § 6301</i> Corruption of minors (a)(1)(i) | Possible AF as sexual abuse of a minor regardless of sentence imposed. | Probably not. | Crimes Against Child: yes. | <p>Tip for criminal attorneys: If possible, to minimize risk of AF and CIMT, make a record of merely negligent conduct. To avoid crimes against child, plead guilty to an offense that does not include the age of the victim as an element, like simple assault. Avoid or if possible controvert any mention of sexual conduct anywhere in the record.</p> <p>Tip for immigration attorneys: The argument against AF is that sexual abuse of a minor is a generic offense that requires sexual conduct as an element of the offense.</p> |
| <i>18 Pa.C.S. § 6301</i> Corruption of minors (a)(1)(ii) | Probably AF as sexual abuse of a minor regardless of sentence imposed. | Probably. | Crimes Against Child: yes. | |
| <i>18 Pa.C.S. § 6301</i> Corruption of minors (2) assisting minor in truancy | No. | Probably not. | Possibly yes. | |
| <i>18 Pa.C.S. § 6310.2</i> Manufacture or sale of false identification card | Possible false documents AF if term of imprisonment of one year or more is imposed and if document could be used as evidence of authorized stay or employment in the United States. | Probably CIMT for knowing and intentional offenses. Possible CIMT for recklessness. | No. | <p>Tip for criminal attorneys: Definition of ID card under § 6310.6 indicates that purpose of statute is to prevent minors from buying alcohol. This statute should not be used to prosecute persons possessing false immigration papers. Keep record clean of any false statements regarding immigration status. To lessen risk of CIMT, plead specifically to reckless violation of statute or, if that is not possible, keep record inconclusive as to mens rea.</p> |

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| <i>18 Pa.C.S. § 6310.3</i> Carrying a false identification card | Possible. See advice above. | Probably under “obtains or attempts to obtain liquor” prong. Probably not under “possesses” prong. | No. | <p>Tip for criminal attorneys: See above regarding AF risk. To lessen risk of CIMT, plead to mere possession prong of statute and negate or keep record clear of intent to utter or use the ID. If that is not possible, keep record inconclusive as to prong of statute violated.</p> <p>Tip for immigration attorneys: For argument against CIMT, see <u>Matter of Serna</u>, 20 I&N Dec. 579 (BIA 1992).</p> |
| <i>18 Pa.C.S. § 6312</i> Sexual abuse of children: Photographing, videotaping, depicting on computer or filming sex acts | <p>Probably AF as sexual abuse of a minor regardless of sentence imposed.</p> <p>Possible child pornography AF, regardless of sentence imposed.</p> | Yes. | Crimes Against Child: Yes. | <p>Tip for criminal attorneys: To preserve possible arguments against AF, plea to subsection (d) and see advice below</p> <p>Tip for immigration attorneys: Argument against child pornography AF is that PA statute is broader than federal statute because PA includes photographs of simple nudity.</p> |
| <i>18 Pa.C.S. § 6312(d)</i> Child Pornography | <p>Possible AF as sexual abuse of a minor regardless of sentence imposed.</p> <p>Not Child Pornography AF.</p> | Yes. | Crimes Against Child: Yes. | <p>Tip for criminal attorneys: To preserve possible arguments against AF, keep record clear of any reference to physical contact or depiction of sexual act. If possible, plead specifically to photographing simple nudity</p> <p>Tip for immigration attorneys: see advice above</p> |

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Domestic Violence, Protection Orders and Child Support

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| <p><i>23 Pa.C.S. § 6114</i> Contempt for violation of protection order</p> | <p>No.</p> | <p>Probably.</p> | <p>Violation of Protective Order: Yes, if Protective order was procured by current or former spouse, person with whom the defendant is currently co-habiting, co-habited with or co-parent with.</p> | <p>Tip for criminal attorneys: To preserve possible argument against CODV offense, keep record of conviction clear of any reference to threats, repeated harassment, or bodily injury and attempt to plead specifically to violating portion of order that does not involve physical abuse of victim, threats of violence, repeated harassment or injury, such as eviction or simple contact. If this is not possible, keep record silent as to portion of order violated. Safer alternative pleas: Harassment, Simple Assault</p> <p>Tip for immigration attorneys: Possible argument against CODV is that this is not a deportable offense unless a portion of the order was violated that involved threats of violence, repeated harassment or bodily injury.</p> |
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Controlled Substances

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| <p><i>35 P.S. § 780-113(16)</i> Knowing or Intentional Possession of a controlled or counterfeit substance</p> | <p>No (see exception below). However, yes if substance is any amount of flunitrazepam.</p> | <p>No.</p> | <p>Controlled substance: Yes, if substance specified is included on list of federal schedule of controlled substances.</p> <p>Exception: A first offense for possession of less than 30 grams of marijuana for personal; second and subsequent offense would.</p> | <p>T Tip for criminal attorneys: Best language to use is “substance under PA Law but not under Federal Law” or avoid specifying the substance involved in the record of conviction where client is a lawful permanent resident. In plea colloquy state guilty of drug or C/S as specified in PA. Do not reference affidavit of probable cause in plea.</p> <p>If client is undocumented you can also use language above or specify a C/S found in the PA statute but not on list of federally controlled substances such as: dextrophan and propylhexadrine.</p> |
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Immigration Consequences of Selected Pennsylvania Offenses: A Quick Reference Chart

| Offense | Aggravated Felony (AF) | Crime Involving Moral Turpitude (CIMT) | Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc. | Alternate Pleas and Practice Tips |
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| <p><i>35 P.S. § 780-113(30)</i> Manufacture, Delivery, or possession w/ intent to deliver a controlled substance ALL DRUGS EXCEPT MARIJUANA (SEE BELOW FOR MARIJUANA)</p> | <p>Yes, as drug trafficking AF if substance specified is included on list of federal schedule of controlled substances.</p> | <p>Yes.</p> | <p>Controlled substance: Yes, if substance specified is included on list of federal schedule of controlled substances.</p> | <p>Tip for criminal attorneys: Avoid specifying the substance involved in the record of conviction. If the client is undocumented, a vague record of conviction will not help. Instead try to specify a drug that does not appear on the federal schedule. Substances found in the PA statute but not on list of federally controlled substances include: dextropropion and propylhexadrine.</p> |
| <p><i>35 Pa.C.S. § 780-113(30)</i> Manufacture, Delivery, or possession w/ intent to deliver a controlled substance MARIJUANA</p> | <p>Yes as drug trafficking AF, regardless of the sentence imposed, with one narrow exception. If record does not establish the amount of the substance or specifies a small amount, and does not reflect actual or intended transfer, delivery, sale or any remuneration, this may not be an AF.</p> <p><u>Very complicated area! See advice!</u></p> | <p>Yes.</p> | <p>Controlled substance: Yes.</p> | <p>Tip for criminal attorneys: Keep record clear of amount of marijuana other than a small amount; any remuneration involved; and manufacturing for other than self, i.e. have the complaint amended to take out these facts, and do not mention in the colloquy. If client transferred drugs without remuneration make sure the record indicates so. Sample vague language for amended complaint: "Client did manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance, to wit: marijuana."</p> |
| <p><i>35 P.S. § 780-113(31)</i> Marijuana Offenses - Possession or distribution, but not sale, of a small amount of marijuana (30 grams or less of marijuana or 8 grams of hashish).</p> | <p>No.</p> | <p>Simple possession: No</p> <p>Delivery but not for sale: Probably.</p> | <p>Controlled substance: Yes.</p> <p>Exception: A first offense for possession of less than 30 grams of marijuana would not qualify under the deportability grounds, but the second and subsequent offenses would.</p> | |

Immigration Consequences of Selected Pennsylvania Offenses: A Quick Reference Chart

| Offense | Aggravated Felony (AF) | Crime Involving Moral Turpitude (CIMT) | Other Grounds: Controlled Substance, Domestic Violence, Firearms, Crime against Children, Etc. | Alternate Pleas and Practice Tips |
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| <p><i>35 P.S. § 780-113(32)</i> Drug Paraphernalia</p> <p>The use of, or possession with intent to use drug paraphernalia for purposes relating to controlled substance</p> | <p>No.</p> <p>Sale or Delivery under §33 may be AF as trafficking offense.</p> | <p>Simple possession: No</p> <p>Delivery but not for sale: Probably.</p> | <p>No unless the government has shown that the conviction related to a substance listed in the federal schedule.</p> | <p>Tip for Defense attorneys: Avoid specifying the substance involved in the record of conviction where client is a lawful permanent resident. In plea colloquy state guilty of drug or C/S as specified in PA. Do not reference affidavit of probable cause in plea. If client is undocumented specify a C/S found in the PA statute but not on list of federally controlled substances such as: dextrophan and propylhexadrine.</p> |
| <p><i>35 P.S. § 780-113(35)</i> Possession with intent to distribute a noncontrolled substance</p> | <p>No.</p> | <p>No.</p> | <p>Controlled substance: No.</p> | <p>Tip for immigration attorneys: It is clear from the language of the statute that this is not “relating to” a controlled substance because <i>all</i> convictions under this statute do not, by definition, involve controlled substances.</p> |
| Traffic Offenses | | | | |
| <p><i>75 Pa. C.S § 1543</i> Driving While Suspended</p> | <p>No.</p> | <p>No. If DUI conviction involves driving on suspended license, however, see DUI below.</p> | <p>No.</p> | |
| <p><i>75 Pa. C.S. § 3732</i> Homicide by Vehicle</p> | <p>No.</p> | <p>Probably not.</p> | <p>No.</p> | <p>Tip for immigration attorneys: statute includes negligent conduct, which should not qualify as an AF or CIMT.</p> |
| <p><i>75 Pa. C.S. § 3733</i> Fleeing and Eluding Police</p> | <p>Probably not.</p> | <p>Maybe.</p> | <p>No.</p> | <p>Tip for Criminal Attorneys: Try to plead generally to the statute. Avoid facts that could be construed to be willful or wanton disregard for lives or property of others.</p> |

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| <i>75 Pa. C.S. § 3735</i> Aggravated Assault by DUI | No. | No. | Controlled substance: Yes, if record specifies controlled substance. | Tip for criminal attorneys: Keep record clean of any substance other than alcohol to avoid controlled substance offense. Tip for immigration attorneys: Argument against CIMT is that negligence is not enough for a CIMT. BEWARE: If license revoked or suspended. |
| <i>75 Pa. C.S. § 3742</i> Accidents Involving Death or Personal Injury | Probably not. | Probably not. | No. | Tip for Criminal attorneys: try to keep the language vague, such as "I failed to fulfill my duties" |
| <i>75 Pa. C.S. § 3743</i> Accidents in Attended Vehicle | Probably not. | Probably not. | No. | Tip for Criminal attorneys: try to keep the language vague, such as "I failed to fulfill my duties." |
| <i>75 Pa. C.S. § 3802</i> Driving While Under the Influence of Alcohol or Controlled Substance | No. | Probably not unless record of conviction establishes circumstances such as knowing license suspended or revoked due to prior DUI. | Controlled substance: Yes if record specifies controlled substance. | Tip for criminal attorneys: Keep record clear of any mention of substances other than alcohol to avoid CS. |
| Misc. | | | | |
| <i>18 Pa. C.S. § 907 (a)</i> Possession of an Instrument of Crime | Probably not. | Probably not. | Firearms: Possibly, if instrument specified is a gun. | Tip or Criminal Attorneys: To avoid CIMT, avoid mention on the record of how the instrument was used. Plead generally to the statute or specify that possession was in furtherance of a non-CIMT. |
| <i>18 Pa. C.S. § 5513</i> Gambling devices, gambling | Possibly with sentence of one year or more. | Probably not. | Commercialized Vice: Possibly. Gambling Offense: Yes. | |

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| <p><i>18 Pa. C.S. § 7512</i> Communication Facility</p> | <p>Yes if in furtherance of an aggravated felony.</p> | <p>Yes if in furtherance of a CIMT.</p> | <p>Controlled Substance: Yes, if convicted under section related to controlled substances. Could also be inadmissible based on reason to believe individual is a drug trafficker.</p> | <p>Tip for Defense attorneys: If underlying offense involves drugs, best language to use is “substance under PA Law but not under Federal Law.” Do not reference affidavit of probable cause in plea.</p> <p>If client is undocumented use language above or specify a C/S found in the PA statute but not on list of federally controlled substances such as: dextropropion and propylhexadrine.</p> |
| <p><i>62 P.S. § 481</i> Welfare Fraud</p> | <p>Probably AF as fraud offense if loss to the victim exceeds \$10,000.</p> | <p>Yes.</p> | <p>No.</p> | <p>Tip for criminal attorneys: DHS can look at outside documents, like presentence investigation reports, to establish amount of loss for fraud offense. Plea should specifically be to amount less than \$10,000 to avoid AF.</p> <p>Tip for immigration attorneys: Possible argument against AF or CIMT that it is possible to commit offense by non-willful impersonation, which would not qualify as fraud offense.</p> |