

**ABBREVIATED CHART
FOR CRIMINAL DEFENSE PRACTITIONERS
OF THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS
UNDER MARYLAND STATE LAW¹**

11/14/06 Revision

PLEASE NOTE: This chart is provided as a tool for attorneys representing criminal defendants, and is not meant to take the place of advice or representation by an attorney competent in immigration law. The conclusions about collateral consequences and proposals for criminal defense attorney strategies included in the chart reflect the current state of immigration law in the 4th Circuit. The particular perspective presented here is that of a cautious criminal defense attorney and does not include all of the possible arguments regarding immigration consequences that might be made in an immigration or appellate court. Because of the changing nature of the law and our focus on Maryland state law, 4th circuit decisions, and current Bureau of Immigration Appeals decisions, any application of information obtained from this site may be insufficient or inappropriate for your client's particular situation, especially if you are outside the 4th Circuit. The information contained in this chart is intended to be a resource tool only, and is not meant to replace original research. With comments or additions, please contact Fernando Nuñez at fnunez@law.umaryland.edu.

STATUTE	OFFENSE	AGGRAVATED FELONY (AF)?	CRIME INVOLVING MORAL TURPITUDE	OTHER GROUNDS	POSSIBLE SENTENCE (misdemeanor or felony)	SUGGESTIONS OR POSSIBLE ALTERNATE PLEA
CL § 2-201	Murder -- First degree	Yes	Yes			
CL § 2-204	Murder – Second degree	Yes	Yes			
CL § 2-205	Murder – Attempt – First Degree	Yes	Yes			
CL § 2-206	Murder – Attempt – Second Degree	Yes	Yes			

¹ © 2005 Maryland Office of the Public Defender and University of Maryland School of Law Clinical Law Office. This chart has been a cooperative effort between the Maryland Office of the Public Defender, represented by Alan Drew, and the University of Maryland School of Law Clinical Law Office, represented by Maureen A. Sweeney, Fernando Nuñez, and law student researchers Katherine Grubbs and Jennifer Deines. Credit also goes to Catherine Woolley of the Office of the Public Defender for beginning the chart. Our work has been aided by the assistance of the National Legal Aid and Defender Association Defending Immigrants Partnership and the National Immigration Project of the National Lawyers Guild .

CL § 2-207	Manslaughter	Possibly. Voluntary manslaughter would likely be a crime of violence (and thus an aggravated felony if sentence \geq 1 year). ¹ Involuntary manslaughter is not an aggravated felony. ²	Yes ³		F	Where possible, plead specifically to involuntary manslaughter to avoid an aggravated felony.
CL § 2-209	Manslaughter – by vehicle or vessel	No ⁴	Yes ⁵		F	
CL § 3-202	Assault – First degree	Yes, if sentence imposed \geq year (crime of violence) ⁶	Yes ⁷	Possible firearms ground ⁸		Keep record clear of mention of use of firearm. Alternate plea: Second degree assault (Md. CL § 3-203) with a sentence < 1 year.
CL § 3-203	Assault – Second degree	Likely, if sentence imposed is \geq 1 year (crime of violence) ⁹	Simple assault is not a CIMT ¹⁰ .	Possible ground of domestic violence or crime against a child.	M 10Y	Keep sentence < 1 year. Avoid mention of the victim's identity if s/he is a child or family member to avoid deportability for domestic violence or crime against a child.
CL § 3-204	Reckless Endangerment	No ¹¹	Yes			Alternate plea: Second degree assault (Md. CL § 3-203) with a sentence < 1 year.
CL § 3 – 211(c)	Life-threatening injury by motor vehicle or vessel while under the influence of alcohol	No ¹²	No		M 3Y	

CL § 3 – 211(d)	Life-threatening injury by motor vehicle or vessel while impaired by alcohol	No ¹³	No		M 2Y	
CL § 3-211(e)	Life-threatening injury by motor vehicle or vessel while impaired by drugs	No ¹⁴	No	Controlled substances offense	M 2Y	To avoid controlled substances violation, plead generally to § 3-211 without specifying this subsection or mentioning or identifying any drug or drug use.
CL § 3-211(f)	Life-threatening injury by motor vehicle or vessel while impaired by a controlled dangerous substance	No ¹⁵	No	Controlled substances offense	M 2Y	To avoid controlled substances violation, plead generally to § 3-211 without specifying this subsection or mentioning or identifying any drug or drug use.
CL § 3-303	Rape – First degree	Yes	Yes		F	
CL § 3-304	Rape – Second degree	Yes ¹⁶	Yes		F	Alternate plea: Second degree assault (Md. CL § 3-203) with a sentence < 1 year.
CL § 3-305	Sexual Offense – First degree	Yes if sentence ≥ 1 year	Yes		F	Alternate plea: Second degree assault (Md. CL § 3-203) with a sentence < 1 year.
CL § 3-306	Sexual Offense – Second degree – sexual act by force or threat or with disabled person or child under 14	Yes ¹⁷ if victim is a child or if sentence ≥ 1 year N.B. Sexual abuse of a minor is an aggravated felony regardless of length of sentence	Yes	Possible crime against a child or crime of domestic violence	F: 20Y	Alternate plea: Second degree assault (Md. CL § 3-203) with a sentence < 1 year. Keep record of conviction clear of reference to victim’s age or capacity.

CL § 3-307	Sexual Offense – Third degree – sexual contact (1) without consent and with dangerous weapon, injury, threats, assistance, or (2)-(5) disabled or child victim	Yes ¹⁸ if victim is a child or if sentence \geq 1 year. N.B. Sexual abuse of a minor is an aggravated felony regardless of length of sentence.	Yes	Possible firearms, crime against a child or crime of domestic violence	F	Alternate plea: Second degree assault (Md. CL § 3-203) with a sentence < 1 year. Keep sentence < 1 year.
CL § 3-308	Sexual Offense – Fourth degree	Yes if victim is a child. Likely if sentence \geq 1 year. ¹⁹ N.B. Sexual abuse of a minor is an aggravated felony regardless of length of sentence	Yes	Possible crime against a child or crime of domestic violence	M	Keep sentence < 1 year.
CL § 3-309	Rape – Attempt – First degree	Yes ²⁰	Yes		F	
CL § 3-310	Rape – Attempt ²¹ – Second Degree	Yes	Yes		F	Alternate plea: Second degree assault or attempt (Md. CL § 3-203) with a sentence < 1 year. Keep record of conviction clear of reference to victim’s age or capacity.
CL § 3-311	Sexual Offense – Attempt – First Degree	Yes, if sentence \geq 1 year	Yes		F	Alternate plea: Second degree assault (Md. CL § 3-203) with a sentence < 1 year.
CL § 3-312	Sexual Offense – Attempt – Second Degree	Yes, if sentence \geq 1 year	Yes	Possible crime against a child or crime of domestic violence	F	Alternate plea: Second degree assault (Md. CL § 3-203) with a sentence < 1 year. Keep record of conviction clear of reference to victim’s age or capacity.

CL § 3-314	Sexual conduct between correctional or DJJ employee and inmate	Very likely ²² if sentence \geq 1 year	Yes	Possible crime against a child	M 3Y	Alternate plea: Second degree assault (Md. CL § 3-203) with a sentence < 1 year. If possible, keep record of conviction free of reference to victim's age.
CL §3-315	Continuing course of conduct with child	Yes	Yes	Crime against a child	F 30 Y	
CL §3-323	Incest	No	Possibly ²³	Could be crime against a child	F 10Y	Alternate plea: Second degree assault (Md. CL § 3-203) with a sentence < 1 year. Keep record of conviction free of reference to family relationship or age of child victim.
CL §3-402	Robbery	Yes, if sentence \geq 1 year	Yes		F	Keep sentence < 1 year.
CL §3-402	Robbery – Attempt	Yes, if sentence \geq 1 year	Yes		F	Keep sentence < 1 year.
CL §3-403	Robbery with a dangerous weapon	Yes, if sentence \geq 1 year	Yes	No firearms offense ²⁴	F	Keep sentence < 1 year. Keep record free of mention of a firearm, to be certain to avoid firearms offense.
CL §3-403	Robbery with a dangerous weapon – Attempt	Yes, if sentence \geq 1 year	Yes	No firearms offense ²⁵	F	Keep sentence < 1 year. Keep record free of mention of a firearm, to be certain to avoid firearms offense.
CL §3-601	Child Abuse	No	Yes	Crime against a child and possible crime of domestic violence.	F 25Y	Alternate plea: Second degree assault (Md. CL § 3-203) with a sentence < 1 year. Keep record of conviction free of reference to family relationship or age of victim.
CL §3-602	Sexual abuse of a minor	Yes	Yes	Crime against a child; possible crime of domestic violence	F	
CL § 3-802	Stalking	Possibly, if sentence \geq 1 year ²⁶	Likely ²⁷	Stalking	M	Keep sentence < 1 year. Alternate plea: Harassment (Md. CL § 3-803).

CL § 3-803	Harassment	No	No		M 90 days	
Common Law	Resisting Arrest	No	Possibly ²⁸		M	To make sure to avoid aggravated felony, record of conviction should reflect a refusal to submit to arrest rather than active resistance. Keep record of conviction free of mention of any use of a weapon.
CL § 4-101	Carrying a dangerous weapon – concealed or with intent to use ²⁹	No ³⁰	Possibly. Divisible statute. ³¹		M 3Y	Plead to § 4-101 generally or to subsection (c)(1), and keep record of conviction clear of reference to intent to use the weapon.
CL § 4-203	Wearing, carrying or transporting a handgun	No ³²	No	Firearms offense	M 10Y	
CL § 4-204	Use of handgun or antique gun in crime of violence	Yes	Yes	Divisible offense: firearms offense if plea to use of handgun		Not necessarily a firearms offense because antique guns are not included in the analogous federal statute.
CL § 5-601(a)(1)	Controlled dangerous substance – Not marijuana -- Possessing or administering	Not for a first offense of possession, unless substance is > 5g of cocaine base or any amount of flunitrazepam (date rape drug). Unlikely for subsequent offenses; may be divisible. ³³	No ³⁴	Controlled substances offense	M 4Y	Plead to administering or leave the record of conviction unclear as to whether conviction is for possession or administering. Alternate plea: Possession of drug paraphernalia (Md. CL § 5-619)(still a controlled substances offense, but not an aggravated felony).

CL § 5-601(a)(1)	Controlled dangerous substance – Marijuana -- Possessing or administering	No ³⁵	No	Controlled substances offense, unless it is a single offense for personal use involving less than 30 grams ³⁶	M 1Y	Keep amount of marijuana out of the record or specify that it was under 30 grams and for personal use.
CL § 5-601(a)(2)	Controlled dangerous substance -- Obtaining by fraud or deceit	Yes	Yes	Controlled substances offense	M 4Y	
CL § 5-602	Controlled dangerous substance – manufacture, distribute, dispense or possession with intent	Yes	Yes	Controlled substances offense	F up to 20Y	Alternate plea: Accessory after the fact (Md. CL § 1-301) with sentence of < 1 year will avoid aggravated felony and controlled substances offense, but will likely be crime of moral turpitude. ³⁷
CL § 5-604	Counterfeit Substance	Yes ³⁸	Yes ³⁹	Controlled Substances Offense	F up to 5 Y for 1 st offense	
CL § 5-617	Distributing faked controlled dangerous substance	Possibly, if construed as a fraud offense with losses that exceed \$10,000 ⁴⁰	Yes ⁴¹		F 5Y	Alternate plea: Possession or purchase of non-controlled substance (Md. CL § 5-618). Keep the record clear of the value of loss (or potential loss) greater than \$10,000.
CL § 5-618	Possession or purchase of non-controlled substance	No	No			

CL § 5-619	Drug paraphernalia	No ⁴²	No	Controlled substances offense	M 2Y for 2 nd or later conviction	
CL § 5-621	Use or possession of a firearm in a drug trafficking crime	Yes	Yes	Firearms offense	F 20Y	Alternate plea: Possession of handgun (Md. CL § 4-203).
CL § 5-622	Felon in possession of firearm	Yes	Yes	Firearms offense	F 5Y	Alternate plea: Possession of handgun (Md. CL § 4-203).
CL § 6-202	Burglary – First degree – breaking and entering a dwelling with intent to commit theft or a crime of violence.	Yes, if sentence is ≥ 1 year	Possibly. Divisible statute. ⁴³		F 20Y	Keep sentence < 1 year. Avoid identifying the crime the defendant intended to commit or make sure it is not a crime involving moral turpitude. Alternate pleas: Third degree burglary (Md. CL § 6-204) with sentence of < 1 year, or fourth degree burglary (Md. CL § 6-205).
CL § 6-203(a)	Burglary – Second degree – breaking and entering storehouse with intent to commit theft, violence, or arson or to steal a firearm	Likely, if sentence is ≥ 1 year ⁴⁴	Possibly ⁴⁵	Possible firearms offense if convicted under § 6-203(b)	F 15Y	Keep sentence < 1 year. Avoid identifying the crime the defendant intended to commit or make sure it is not a crime involving moral turpitude (will be difficult). Avoid mention of firearm.
CL § 6-204	Burglary – Third degree – breaking and entering a dwelling with intent to commit a crime	Yes, if sentence is ≥ 1 year	Possibly ⁴⁶		F 10 Y	Keep sentence < 1 year. Avoid identifying the crime the defendant intended to commit or make sure it is not a crime involving moral turpitude (such as trespass).

CL § 6-205	Burglary – Fourth degree – breaking and entering (a) a dwelling or (b)storehouse or (c)being in dwelling/storehouse with intent to commit theft or (d)possession of burglar’s tools	Possibly, if sentence \geq 1 year. Divisible statute. ⁴⁷	Possibly – divisible statute. ⁴⁸		M 3Y	Keep record of conviction clear of evidence of intent to commit a specific crime, especially a crime of moral turpitude. Plead to § 6-205 generally, not to subsection (c). Keep sentence < 1 year if plea is to subsection (c).
CL § 6-206	Breaking and entering motor vehicle – rogue and vagabond – (a)possession of burglar’s tools or (b) presence in another’s vehicle with intent to commit theft of vehicle or property	Possibly, if sentence \geq 1 year – divisible statute ⁴⁹	Possibly – divisible statute. Subsection (a) is not a crime of moral turpitude; subsection (b) is.		3Y	Do not plead to subsection (b); rather plead to the section generally or to subsection (a); and keep record of conviction free of indication of intent to commit theft. Keep sentence < 1 year.
CL § 7-104	Theft – (a) Unauthorized control of property, (b) control by deception, (c) possession of stolen property, (d) control of property lost, mislaid, or delivered by mistake; or (e) theft of services	Possibly, if sentence is \geq 1 year – divisible statute ⁵⁰	Possibly – divisible statute. Moral turpitude if record of conviction shows intent to permanently deprive owner of property or deception.		Under \$500 – 18M Over \$500 – 15Y	Keep sentence < 1 year. Keep record free of reference to whether property or services were stolen to avoid aggravated felony. Keep record vague as to intent to permanently deprive victim or use of deception in order to avoid crime of moral turpitude.

CL § 7-105	Theft or unauthorized use of a motor vehicle	Yes ⁵¹	Possibly – divisible statute. Moral turpitude if record of conviction shows intent to permanently deprive owner of property		F 5Y	
CL § 10-201	Disorderly conduct/ disturbing the peace	No	No ⁵²		M: 60D	

¹ Manslaughter is defined in Maryland by the common law and can be either voluntary or involuntary.

Voluntary manslaughter will likely be found to be a crime of violence (and thus an aggravated felony if the sentence imposed is equal to or greater than one year). Immigration lawyers should argue that it is not a crime of violence because it could encompass actions, such as poisoning, which would not involve the use of force. However, many courts would likely find it to be a crime of violence and it is prudent to avoid a conviction if possible.

Involuntary manslaughter is not crime of violence. *Bejarano-Urrutia v. Gonzalez*, 413 F.3d 444 (4th Cir. 2005). See, note 2 below,

Because the general crime of manslaughter could be either an aggravated felony (if voluntary) or not (if involuntary), it is said to be a divisible offense. When a statute is divisible, a court must look to the record of conviction to discover the exact nature of the offense for which the respondent is convicted. *Leocal v. Ashcroft*, 125 S.Ct. 337 (2004); *Matter of Garcia*, I&N Dec. 521 (1966). If it is unclear under which part of the statute a respondent was convicted, the categorical analysis precludes the court from finding that the conviction was for an aggravated felony (or a crime involving moral turpitude, where that is the question). *Id.*

However, even though manslaughter is a divisible offense, the record of conviction is likely to indicate whether the manslaughter was voluntary or involuntary, and it is safest for the criminal defense attorney to consider any voluntary manslaughter as a likely crime of violence.

² The 4th Circuit in *Bejarano-Urrutia v. Gonzalez*, 413 F.3d 444 (4th Cir. 2005), held that a Virginia involuntary manslaughter conviction did not constitute an aggravated felony because it required only a mental state of reckless disregard for human life, which did not rise to the level of intentionality required by the Supreme Court in *Leocal v. Ashcroft*, 125 S.Ct. 337 (2004), to show the “use of force” component of a crime of violence. Maryland’s common law crime of involuntary manslaughter is analogous to Virginia’s for these purposes.

³ Any voluntary homicide is a crime involving moral turpitude, see *Delucia v. Flagg*, 297 F.2d 58 (7th Cir. 1961), and voluntary manslaughter is thus a crime involving moral turpitude.

Involuntary manslaughter in Maryland, given the requisite *mens rea*, will also almost certainly be held to be a crime involving moral turpitude. Involuntary manslaughter in Maryland can be committed in three ways: (1) by doing some unlawful act (*malum in se*) endangering life but which does not amount to a felony, or by exercising gross negligence in either (2) doing some act lawful in itself, or (3) the omission to perform a legal duty. *State v. Pagotto*, 361 Md. 528, 548 (2000). In either the second or third case, the requisite *mens rea* is such that the defendant, “conscious of the risk,” acted with “a wanton or reckless disregard of human life” constituting a “gross departure from what would be the conduct of an ordinary and prudent person so as to amount to a disregard of the consequences and indifference to the rights of others.” *Id.*; *State v. Gibson*, 4 Md. App. 236; 242 A.2d 575 (Md. App. 1968). *aff’d* at 254 Md. 399, 254 A.2d 691 (1969). This is almost precisely the *mens rea* held by the BIA to support a finding of moral turpitude in *Matter of Franklin*, 20 I & N Dec. 867, 867-77 (BIA 1994) (finding manslaughter to be a crime of moral turpitude where the *mens rea* required was recklessness, defined as a “conscious disregard of a substantial and unjustifiable risk” which constituted “a gross deviation from the

standard of care that a reasonable person would exercise in the situation.”). Furthermore, Maryland courts have equated “gross negligence” with “recklessness.” *Albrecht v. State*, 97 Md. App. 630, 632 A.2d 163 (1993), rev’d on other grounds, 336 Md. 475, 649 A.2d 336 (1994).

⁴ *Bejarano-Urrutia v. Gonzalez*, 04-2270, (4th Cir. July 5, 2005); *see*, note 2, above.

⁵ This statute incorporates the “gross negligence” requirement of common law manslaughter in Maryland, *Faulcon v. State*, 211 Md. 249, 126 A.2d 858 (1956); *Connor v. State*, 225 Md. 543, 171 A.2d 699, cert. denied, 368 U.S. 906, 82 S. Ct. 186, 7 L. Ed. 2d 100 (1961), and thus involves moral turpitude. *See*, note 3 above.

⁶ First degree assault involves an assault with a deadly weapon or with specific intent to seriously injure the victim. A crime involving the intentional infliction of bodily harm is a crime of violence. *Matter of Martin*, 23 I. & N. Dec. 491 (BIA 2002).

⁷ An assault with a deadly weapon or with intent to injure is a CIMT. *Matter of Logan*, 17 I&N Dec. 367 (BIA 1980); *Matter of P*, 3 I&N Dec. 5 (BIA 1947).

⁸ The “firearms” included within Md. CL § 3-202 include an antique firearm (defined in turn at Md. CL § 4-201 to include antique guns and replicas). Use of an antique firearm would not violate the federal firearm statutes on which the ground of deportability is based. Thus, for this purpose, § 3-202 is divisible, and, there is an argument that in order for a defendant to be deportable on the basis of a conviction of this section, the record of conviction would have to both specify that a firearm was used and identify the type of firearm. To avoid the firearms ground of deportability, defense attorneys should keep the record inconclusive as to whether a firearm was used and, if so, what type.

⁹ Second degree assault includes the former common law crimes of assault, battery and assault and battery; and includes as an element intentional, harmful or offensive contact (or attempted or threatened contact) with a victim, no matter how slight. Some courts have held that the “contact” contemplated in such a statute does not necessarily involve the use of force and therefore, under the categorical analysis, is not an aggravated felony. *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003). There is also an argument that assault could involve causing harm by means other than contact, such as poisoning, which would not involve the use of force. *Persaud v. McElroy* (SDNY 02). However, many immigration courts will equate “contact” with “force” under 18 USC 16(a) and are likely to hold that second degree assault is a crime of violence. A crime whose elements include the threatened use of force constitutes a crime of violence under 18 USC 16(a). An attempt to commit an aggravated felony constitutes an aggravated felony. 8 USC 1101(a)(43)(U).

¹⁰ *Matter of Short*, 20 I&N Dec. 136 (BIA 1989). Under the categorical approach, it is clear that simple assault does not involve moral turpitude. This categorical approach has, moreover, been established for decades as the proper analysis for determining crimes involving moral turpitude. Though it is unlikely that any Court of Appeals would overturn this long line of precedent, practitioners should at least be aware that the 4th Circuit has expressed dissatisfaction with the categorical approach in this regard. *See, Medina v. US*, 259 F3d 220 (4th Cir. 2001) (involving a conviction for simple assault where the victim was the defendant’s fiancée).

¹¹ *Bejarano-Urrutia v. Gonzalez*, 04-2270, (4th Cir. July 5, 2005); *see*, note 2, above.

¹² *Leocal v. Ashcroft*, 125 S.Ct. 337 (2004); *Bejarano-Urrutia v. Gonzalez*, 04-2270, (4th Cir. July 5, 2005).

¹³ *Leocal v. Ashcroft*, 125 S.Ct. 337 (2004); *Bejarano-Urrutia v. Gonzalez*, 04-2270, (4th Cir. July 5, 2005).

¹⁴ *Leocal v. Ashcroft*, 125 S.Ct. 337 (2004); *Bejarano-Urrutia v. Gonzalez*, 04-2270, (4th Cir. July 5, 2005).

¹⁵ *Leocal v. Ashcroft*, 125 S.Ct. 337 (2004); *Bejarano-Urrutia v. Gonzalez*, 04-2270, (4th Cir. July 5, 2005).

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- ¹⁶ See, *Matter of B-*, 21 I. & N. Dec. 287 (BIA 1996) (finding second degree (statutory) rape under former Maryland Art. 27, §463(a)(3) to be an aggravated felony as a crime likely to result in the use of force). There is an argument for immigration lawyers here that subsection (a)(2) (prohibiting vaginal intercourse with disabled person) does not necessarily involve the use of force and is not therefore a crime of violence aggravated felony (an issue not addressed in *Wireko*.) making the statute divisible. However, given BIA precedent and the likelihood that courts may find it to be a crime of violence or the equivalent of rape, it is advisable for the criminal defense attorney to avoid a conviction under this section.
- ¹⁷ See, *Matter of B-*, 21 I. & N. Dec. 287 (BIA 1996) (finding second degree (statutory) rape under former Maryland Art. 27, §463(a)(3) to be an aggravated felony as a crime likely to result in the use of force); and *Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000) (finding a similar Virginia sexual battery statute to be a crime of violence aggravated felony). There is an argument for immigration lawyers here that subsection 3-306(a)(2) (prohibiting sexual act with disabled person) does not involve the use of force and is not therefore a crime of violence aggravated felony (an issue not addressed in *Wireko*) making the statute divisible. However, given BIA precedent and the likelihood that courts may find it to be a crime of violence or the equivalent of rape, it is advisable for the criminal defense attorney to avoid a conviction under this section.
- ¹⁸ There is an argument for immigration lawyers here that subsections 3-307(a)(1)(ii)(4) (prohibiting sexual contact without consent and aided or abetted by another) and (a)(2) (prohibiting non-consensual sexual contact with a disabled person) do not involve the use of force and are not therefore crimes of violence aggravated felonies (an issue not addressed in *Wireko*) making the statute divisible. However, given the likelihood that courts may nonetheless find a use of force, it is advisable for the criminal defense attorney to avoid any conviction under this section.
- ¹⁹ This section may be found to be divisible. Subsections 3-308(a)(2) and (a)(3) are sexual abuse of a minor, but subsection (a)(1) (non-consensual sexual contact) may not be a crime of violence (and thus not an aggravated felony). However, many courts find sexual offenses to be crimes of violence under 18 U.S.C. § 16(b), as crimes likely to result in the use of force, so it is best to avoid conviction under this section.
- ²⁰ An attempt to commit an aggravated felony constitutes an aggravated felony for immigration purposes. See INA § 101(a)(43)(U).
- ²¹ An attempt to commit an aggravated felony constitutes an aggravated felony for immigration purposes. See INA § 101(a)(43)(U).
- ²² *Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000) (finding Va. misdemeanor sexual battery statute to be an aggravated felony); *Matter of B-*, 21 I. & N. Dec. 287 (BIA 1996) (finding second degree (statutory) rape under former Maryland Art. 27, §463(a)(3) to be an aggravated felony as a crime likely to result in the use of force). There is an argument for immigration lawyers here that subsection (b) (prohibiting correctional employee from having sex with inmate) does not necessarily involve the use of force and is therefore neither a crime of violence aggravated felony (an issue not addressed in *Wireko*) nor rape, making the statute divisible. However, given BIA precedent and the likelihood that courts may find it to be a crime of violence, it is advisable for the criminal defense attorney to avoid a conviction under this section.
- ²³ If victim is a minor or child with the parent, almost certainly a CIMT. See *In re Y.*, 3 I&N Dec. 544 (1949); *In re G.*, 7 I&N Dec. 171 (1956); *Gonzales-Alvarado v. Immigration & Naturalization Svc.*, 39 F. 3d 245 (9th Cir. 1994). If, however, crime arises out of a forbidden marital status between adults, crime does not necessarily involve moral turpitude. *In re B.*, 2 I&N 617 (1946).
- ²⁴ Conviction under this section does not constitute a firearms violation, because the “dangerous weapon” does not have to be a gun, *Couplin v. State*, 37 Md. App. 567, 378 A.2d 197 (1977), cert. denied, 281 Md. 735 (1978), but could be a cord, *Bennett v. State*, 237 Md. 212, 205 A.2d 393 (1964); or a knife, *Hobbs v. Pepersack*, 301 F.2d 875 (4th Cir. 1962); *Bell v. State*, 5 Md. App. 276, 246 A.2d 286 (1968).

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- ²⁶ *Matter of Hernandez-Sandoval*, A90 062 193 (unpublished BIA dec. Nov. 21, 2001)(finding Cal. stalking statute was not a crime of violence and thus not an aggravate felony, despite language of threat to place victim in reasonable fear of safety because there was no element of the use or threat of force). Note, however, that *Hernandez-Sandoval* is a non-published and therefore non-precedent decision, and that courts may find the elements of stalking to constitute a threat of violence and therefore a crime of violence aggravated felony if a sentence of a year or more is imposed.
- ²⁷ *Matter of Ajami*, 22 I. & N. Dec. 949 (BIA 1999) (Mich. aggravated stalking statute was crime involving moral turpitude).
- ²⁸ *Matter of Logan*, 17 I & N Dec. 367 (BIA 1980) (interference with a police officer by use of a deadly weapon).
- ²⁹ This section does not apply to carrying a handgun.
- ³⁰ *US v. Medina-Anicacio*, 325 F.3d 638, (5th Cir. 2003)(carrying a concealed weapon is not a crime of violence and therefore not an aggravated felony).
- ³¹ Subsection 4-101(c)(1) is not a crime involving moral turpitude; subsection (c)(2), prohibiting carrying with intent to use the weapon to inflict harm, would like be a crime of moral turpitude. See, *Matter of S*, 8 I&N Dec. 344 (BIA 1959)(carrying concealed weapon with intent to use on another person held to be crime of moral turpitude).
- ³² *US v. Sandoval-Barajas*, 206 F.3d 853 (9th Cir. 2000)(offense of possession of handgun by alien not an aggravated felony because state offense was broader than enumerated federal statutes). There is no analogous federal statute outlawing simple possession of a handgun.
- ³³ The 4th Circuit has held that possession of cocaine under Md. CL 5-601(a)(1) is not an aggravated felony. *U.S. v. Amaya-Portillo*, 423 F.3d 427 (4th Cir. 2005). The court held that, because the violation is characterized as a misdemeanor under both Maryland and the referenced federal statutes, it cannot be considered a drug trafficking crime for purposes of the definition of aggravated felony. However, the court did not directly address the question of second and subsequent convictions, which may be treated as felonies under the federal law. 21 USC §844(a). However, in order for a subsequent conviction to be considered a felony under federal law (and therefore an aggravated felony for immigration purposes), the state is required to have pleaded and proved the first conviction as an element of the subsequent conviction. 21 USC §851(a)(1). *US v. Weaver*, 905 F.2d 1466, 1481 (11th Cir. 1990).
- Likewise, “administering” a controlled substance to another is also a misdemeanor under Md. CL 5-601(a)(1); it does not appear to be prohibited at all under the federal statutes at issue, and is therefore also not an aggravated felony. Where it is unclear in the record of conviction whether the offense was possession or administering, the conviction should be held not to be for an aggravated felony.
- ³⁴ Possession of CDS is not enough to trigger CIMT unless intent to distribute is present.
- ³⁵ *Matter of Santos-Lopez*, 23 I & N Dec. 419 (BIA 2002).
- ³⁶ Immigration and Nationality Act (INA) § 237(a)(2)(B)(i).
- ³⁷ The BIA has held that the federal accessory after the fact offense (18 USC § 4) is not a drug-related offense, even when the principal offense involved drugs. It is obstruction of justice, but will only be an aggravated felony with a sentence of one year or more. *Matter of Batista-Hernandez*, Int. Dec. 3321 (BIA 1997). It may,

however, be considered a crime involving moral turpitude. *Matter of Sanchez-Marin*, 11 I&N Dec. 264 (BIA 1965)(accessory after the fact was crime of moral turpitude where underlying crime involved moral turpitude).

³⁸ Counterfeit substances are controlled dangerous substances as defined by the Maryland Code and the Controlled Substances Act. *See* Md. Code, Crim. Law, § 5-604(a) and 21 U.S.C. § 802(7). A violation of § 5-604 is a felony under the Maryland Code and punishable under the Controlled Substances Act. *See* 21 U.S.C. §§ 841(a)(2) & 843(a)(5). Therefore, § 5-604 is a drug trafficking crime under INA § 101(a)(43)(B) and an aggravated felony.

³⁹ “Where fraud or forgery is involved, it is clear that a finding of moral turpitude is required.” *In re A--*, 5 I&N Dec. 52, 53 (BIA 1953) (citing *Jordan v. George*, 341 U.S. 223 (1951) (where fraud is a component of the crime, the crime involves moral turpitude)).

⁴⁰ *See* INA § 101(a)(43)(M) (a crime involving fraud and losses greater than \$10,000 is an aggravated felony). Additionally, the relevant language of § 5-617 states that “[a] person may not distribute, attempt to distribute, or possess with intent to distribute a *noncontrolled substance*...” (emphasis added). Therefore, a violation of this section would not be a drug trafficking crime because it does not involve controlled dangerous substances and is not punishable under the relevant federal drug trafficking statutes.

⁴¹ “Where fraud or forgery is involved, it is clear that a finding of moral turpitude is required.” *In re A--*, 5 I&N Dec. 52, 53 (BIA 1953) (citing *Jordan v. George*, 341 U.S. 223 (1951) (where fraud is a component of the crime, the crime involves moral turpitude)).

⁴² The statute punishes possession, use, or intent to use, but not distribution. Since the three federal drug statutes punish only distribution of paraphernalia, this offense would not be classified as a drug trafficking crime. It also wouldn’t come within the common meaning of drug trafficking since possession of paraphernalia has nothing to do with distribution. Since it would neither involve the common meaning of drug trafficking nor be punishable under the 3 relevant federal drug laws, felony possession of paraphernalia would not qualify as an aggravated felony under either test, even if it is a felony.

⁴³ If burglary is committed with the intent to commit a crime involving moral turpitude (including theft), then burglary has been held to be itself a crime involving moral turpitude. However, not all crimes of violence are crimes of moral turpitude. For example, simple assault is not a crime of moral turpitude, but is a crime of violence. If first degree burglary were committed under this section with intent to commit simple assault, it would not be a crime of moral turpitude. A defense attorney can thus assist a client by assuring that the record of conviction contains no reference establishing the crime which the defendant intended to commit upon entry or establishing that the intended crime was not one involving moral turpitude.

⁴⁴ Second degree burglary under Md. CL § 6-203 should not constitute the aggravated felony of burglary because it does not meet the “generic” federal definition of burglary under *Taylor v. U.S.*, 495 U.S. 575 (1990). *Taylor* requires unlawful entry into a building or “structure,” which does not include a vehicle, *Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000). Section 6-203, however, includes entry into a “storehouse,” which in turn includes vessels, railroad cars, trailers and aircraft (Md. CL § 6-201), none of which would qualify as a structure under *Taylor* and *Perez*. Since there is conduct prohibited by § 6-203 that is not encompassed within the federal definition of the aggravated felony of burglary, § 6-203 cannot be the basis for an aggravated felony.

However, it may well be held to be an aggravated felony as an attempted theft or crime of violence. *See, U.S. v. Martinez-Garcia*, 268 F.3d 460 (7th Cir. 2001). It may also be held to be a crime of violence under 18 USC § 16(b) as a crime likely to result in the use of force. *See, Leocal v. Ashcroft*, 125 S.Ct. 337 (2004). Section 6-203 can be distinguished, however, from the crime of burglary referred to by the *Leocal* court, however, because it does not involve unlawful entry into a dwelling and thus does not involve the same degree of risk of encounter with an occupant and, therefore, use of force.

In sum, given the uncertainty of the law in this area and the significant possibility that a violation could be held to be an aggravated felony, defense attorneys should avoid a conviction under this section.

⁴⁵ If burglary is committed with the intent to commit a crime involving moral turpitude (including theft and, specifically, theft of a firearm), then burglary has been held to be itself a crime involving moral turpitude. A defense attorney can thus assist client by assuring that the record of conviction contains no reference establishing the crime which the defendant intended to commit upon entry or ensuring that it is not a crime involving moral turpitude (such as trespass).

⁴⁶ Burglary is a crime involving moral turpitude if the crime the defendant intended to commit after the illegal entry (such as theft) is a crime of moral turpitude. *In re G*, 1 I&N Dec. 403 (1993)(finding entry must be made with the intent to commit a crime involving moral turpitude). Courts may also find that burglary with intent to commit a certain crime constitutes an attempt to commit that crime.

⁴⁷ Subsections (a), (b) and (d) are not aggravated felonies because they do not meet the *Taylor* definition of burglary (495 U.S. 575 (1990)), are not crimes of violence and do not constitute an attempted crime of violence because they include no intent to commit a crime. Subsection (c) could be found to be an aggravated felony as an attempted theft. *But see, Lopez -Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000)(5th Circuit held that mere intent to commit a theft was insufficient to constitute an attempt and therefore an aggravated felony).

⁴⁸ Subsections (a), (b) and (d) are not crimes involving moral turpitude. *Matter of G*, 1 I&N Dec. 403 (BIA 1943); *Matter of M*, 2 I&N Dec. 721 (BIA 1946)(no moral turpitude where there was no evidence in record of conviction of intent to commit a crime of moral turpitude). Possession of burglary tools is not a crime of moral turpitude where intent to commit a crime of moral turpitude is not an element of the offense or evident in the record of conviction. *Matter of S*, 6 I&N Dec. 769 (BIA 1955). However, subsection (c) would likely be because it includes intent to commit theft, a crime involving moral turpitude.

⁴⁹ Subsection (a) is not an aggravated felony, but subsection (b) could be because of intent to commit theft. See above footnotes regarding burglary.

⁵⁰ Some courts have held that where a state statute includes both traditional theft offenses and offenses not in the “generic” definition of theft, the statute is overbroad and divisible for purposes of determining whether it constitutes an aggravated felony. *See, US v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (holding Cal. theft statute divisible as overbroad for including, *inter alia*, provisions outlawing theft of services). Like the California statute in *Corona-Sanchez*, Maryland CL § 7-104(e) criminalizes theft of services available only for compensation. In such cases, the court must then look to the record of conviction to determine whether it can identify the section of the statute under which defendant was convicted and determine whether that section would be an aggravated felony.

There is also an argument for immigration lawyers to make that § 7-104 should not be an aggravated felony because it does not include as an element of the crime an intent to permanently deprive the owner of property. However, current BIA precedent holds that a theft offense can constitute an aggravated felony theft offense even where it does not require permanent deprivation of property. *Matter of VZS*, Int. Dec. 3434 (BIA 2000) (conviction for joyriding constituted aggravated felony offense of theft). Criminal defense attorneys should thus protect their clients by avoiding a conviction under § 7-104 where possible or keeping the sentence to less than one year to avoid an aggravated felony.

⁵¹ There is an argument for immigration lawyers to make that § 7-105 should not be an aggravated felony because it does not include as an element of the crime an intent to permanently deprive the owner of property. However, current BIA precedent holds that a theft offense can constitute an aggravated felony theft offense even where it does not require permanent deprivation of property. *Matter of VZS*, Int. Dec. 3434 (BIA 2000) (conviction for joyriding constituted aggravated felony offense of theft). Criminal defense attorneys should thus protect their clients by avoiding a conviction under § 7-105 where possible or keeping the sentence to less than one year to avoid an aggravated felony.

⁵² Disorderly conduct is generally held to be a regulatory offense and not a crime involving moral turpitude. 9 U.S. Dep’t of State, *Foreign Affairs Manual (FAM)*, § 40.21(a) N.2.3-2(b); *Lewis v. Frick*, 189 F. 146 (D.Mich. 1911), rev’d on other grounds, 195 F. 693 (6th Cir. 1911), aff’d, 233 U.S. 291, 58 L.Ed. 967, 34 S.Ct. 488 (1914) (disorderly conduct not CIMT where non-sexual offense of housebreaking).