

Quick Reference Chart for Determining Immigration Consequences of Common New York Offenses

APPENDIX A

For information on the applicability of these consequences to a specific category of immigrants, see *Chapter 3*.

For detailed information on the following, see applicable sections:

- Aggravated Felony (AF) deportability, see *Appendix G, § 1* (for AF practice aids and sample caselaw determinations, see also *Appendix C*)
- Crime Involving Moral Turpitude (CIMT) deportability, see *Appendix G, § 2*, and inadmissibility, see *Appendix H, § 2* and in both contexts, see *Note on CIMT Offenses*, page A-2 of this Appendix (for CIMT sample caselaw determinations, see also *Appendix D*).
- Controlled Substance Offense (CSO) deportability, see *Appendix G, § 3*, and inadmissibility, see *Appendix H, § 1*
- Crime Against Children (CAC) deportability, see *Appendix G, § 5*
- Crime Of Domestic Violence (CODV) and Stalking and Violation of Protection Order deportability, see *Appendix G, § 5*
- Firearm Offense (FO) deportability, see *Appendix G, § 4*
- Prostitution and commercialized vice inadmissibility, see *Appendix H, § 4*

NOTE! This chart provides an overview of the potential immigration consequences of select New York State offenses. Its main purpose is to warn criminal defense attorneys of risky offenses, so that they may advise on and minimize immigration risks to their clients. The assessments of whether a conviction will or might trigger a particular immigration provision are therefore conservative—they tend to err on the side of stating that an offense would fall within a particular category (for example, aggravated felony). Immigration practitioners are advised to continue challenging designations of many offenses as aggravated felonies, crimes involving moral turpitude, etc., even if the chart lists them as “probably” or even “definitely” falling into those categories.

This chart includes some strategies and tips for criminal defense attorneys to avoid certain grounds of deportability and inadmissibility, but these strategies and tips are by no means exhaustive. For additional strategies, see *Chapter 5*.

This resource was published in January 2011 and has not been updated since that time. Federal court and/or agency decisions may have rendered some portions incorrect or incomplete. This appendix is offered as a starting point for evaluation of the immigration consequences of the listed criminal offenses and not as a substitute for independent legal research in a specific case. Please see the *Resources, News and Events*, and *Litigation* sections of our website (www.immigrantdefenseproject.org) for information on the most recent developments in criminal immigration law, and consult the IDP Hotline at 212-725-6422 for case-specific advice.

NOTE ON CIMT OFFENSES

Noncitizens may be deportable or inadmissible upon conviction of one or more “crimes involving moral turpitude” (“CIMTs”) depending on their individual circumstances. (See generally Chapter 3 of this Manual). In *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008), former Attorney General Mukasey altered the method immigration authorities must use to determine whether a given state offense qualifies as a CIMT. While virtually every court had previously held that the inquiry was “categorical,” focusing only on the minimum conduct required to offend the elements of the statute and ignoring the particular facts underlying the defendant’s conviction, *Silva-Trevino* now permits immigration judges in certain cases to examine evidence outside the record of conviction, including items such as police reports or even the defendant’s own testimony, to assess whether the conduct underlying a conviction involved moral turpitude.

In some cases, *Silva-Trevino* may make it more difficult to predict whether a given criminal offense will later be considered a CIMT, because that analysis may turn on the facts of a particular case, and a plea to a statute the elements of which do not necessarily constitute a CIMT may no longer afford protection against deportability.

As of this writing, the methodology created by *Silva-Trevino* has been rejected by five federal circuit courts of appeals (the Third, Fourth, Fifth, Ninth and Eleventh) and affirmed by two (the Seventh and Eighth). Because its validity remains uncertain, and because it is generally impossible to predict where a non-citizen convicted in New York may eventually be subjected to adverse immigration consequences, **as detailed for particular offenses in this Appendix, defense counsel should conservatively assume that immigration authorities might be allowed to consider evidence outside the record of conviction to determine the facts and circumstances underlying a given conviction and should advise clients accordingly.**

- After *Silva-Trevino*, the inquiry as to some statutes — those which *always* or *never* involve moral turpitude — remains purely categorical. **Where the entry in the “CIMT” column of this Appendix states “Yes” or “No,” it is reasonably safe to assume that immigration authorities may not consider the particular facts underlying the conviction. Where the entry states “Maybe,” “Probably,” or “Probably NOT” but does not refer the reader to this Note, the analysis is likely to be categorical (that is, based only on the elements of the statute), but IDP cannot predict with certainty what the result of the categorical analysis will be.**
- Where existing CIMT caselaw makes clear that a statute punishes some offenses that are CIMTs and others that are not, it is possible that the particular facts underlying the conviction will be considered. For example, it is generally agreed that theft offenses involving an intent to *permanently* deprive the owner of property are CIMTs while those that punish an intent to *temporarily* deprive are not. In the case of a defendant who pleads guilty to a statute that punishes both temporary and permanent takings, authorities might later consult a police report, a gratuitous statement of facts in a plea colloquy, or other evidence to determine which form of intent the defendant was convicted of having. **Where the entry in the “CIMT” column refers to this Note, immigration authorities might consider the particular facts underlying the conviction in jurisdictions that follow *Silva-Trevino*.** For those statutes, the right-hand “Comments, Strategies & Tips” column will suggest some ways that defense counsel can reduce the risk of conviction of a CIMT by controverting or avoiding the creation of potentially harmful evidence.
- *Silva-Trevino* makes it necessary to proceed with caution in the CIMT context. Where an entry in this appendix contains a reference to this Note, **it is strongly recommended that criminal practitioners consult Appendix L, “Recent Developments in the Categorical Approach: Tips for Criminal Defense Lawyers Representing Immigrant Clients.”** The Advisory contains a more detailed explanation of *Silva-Trevino*, steps that defense counsel can take to correctly advise and protect their clients, and tips for protecting clients charged with common categories of offenses that carry a CIMT risk. Practitioners should also check the “Practice Advisories” page and the “Crimes Involving Moral Turpitude” tab of the “Litigation” page of IDP’s website, www.immdefense.org, for more recent updates.

NEW YORK PENAL LAW OFFENSES

(For New York Vehicle and Traffic Law offenses, see the chart beginning on page A-89)

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|-----------------------|---------------|--|--|--|--|
| Criminal solicitation | 100.00-100.13 | Might be AF if underlying offense is AF. | Probably if underlying offense is CIMT. | Probably CSO, etc., if underlying offense is CSO, etc., but there is some case law supporting a contrary argument (see App. E). | Tip for defense lawyers: 1. To reduce risk of CSO, consider alternate plea to criminal facilitation (see PL 115.00-115.08, below). |
| Conspiracy | 105.00-105.17 | A conspiracy to commit AF also is AF. | A conspiracy to commit CIMT probably is CIMT for deportability purposes and triggers CIMT inadmissibility. | Is CSO or FO if underlying offense is CSO or FO. | Tip for defense lawyers: 1. To preserve an argument that the conviction is not CIMT, plead to a conspiracy to commit a crime that requires a mens rea of recklessness or less. <i>Cf. Gill v. INS</i> , 420 F.3d 82 (2d Cir. 2005) (because a person cannot intend to commit a reckless act, an attempted reckless assault could not constitute CIMT even though the completed crime itself is CIMT); <i>Knapiak v. Ashcroft</i> , 384 F.3d 84 (3d Cir. 2004) (same with attempted reckless endangerment, 1st degree). New York courts permit such "hypothetical offense" pleas. See <i>Dale v. Holder</i> , 610 F.3d 294, 302 (5th Cir. 2010) (collecting cases). |
| Attempt | 110.00 | An attempt to commit AF also is AF. | An attempt to commit CIMT probably is CIMT for deportability purposes and triggers CIMT inadmissibility. | Is CSO or FO if underlying offense is CSO or FO. | Tip for defense lawyers: 1. To preserve an argument that the conviction is not CIMT, plead to an attempt to commit a crime that requires a mens rea of recklessness or less. See <i>Gill v. INS</i> , 420 F.3d 82 (2d Cir. 2005) (because a person cannot intend to commit a reckless act, an attempted reckless assault could not constitute CIMT even though the completed crime itself is CIMT); <i>Knapiak v. Ashcroft</i> , 384 F.3d 84 (3d Cir. 2004) (same with attempted reckless endangerment, 1st degree). New York courts permit such "hypothetical offense" pleas. See <i>Dale v. Holder</i> , 610 F.3d 294, 302 (5th Cir. 2010) (collecting cases). |
| Criminal facilitation | 115.00-115.08 | Might be AF if underlying offense is AF. | Probably if underlying offense is CIMT. | Might be CSO, etc., if underlying offense is CSO, etc., but there is some case law supporting a contrary argument (see App. E). | |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|--|---|---|---|
| Assault, 3rd degree Class A misdemeanor | 120.00 | No, unless term of imprisonment imposed is one year, in which case subsections (1) and (2) might be "crime of violence" AF in some jurisdictions outside 2d Circuit. | Subsection (1) is CIMT; subsection (2) is probably NOT CIMT, especially where offense does not involve use of weapon and does not result in serious physical injury; and subsection (3) is probably NOT CIMT. See Note on CIMT Offenses, <i>supra</i> . | Subsection (3) is FO if record of conviction establishes that offense involved a firearm. If the complainant was a current or former spouse or similarly situated individual, subsections (1) and (2) might be CODV in some jurisdictions outside 2d and 5th Circuits. If record of conviction establishes that complainant was a child, conviction might be CAC. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid AF risk, avoid sentence of one year (get 364 days or less). To reduce risk of CIMT, seek alternate plea to attempted reckless assault. New York courts permit such "hypothetical offense" pleas. See <i>Dafe v. Holder</i>, 610 F.3d 294, 302 (5th Cir. 2010) (collecting cases). If this is not possible, have client plead to subsection (2) and specifically negate serious injury or use of weapon. See Note on CIMT Offenses, <i>supra</i>. To avoid FO, have client plead to subsection (2). To reduce CODV or CAC risks, keep age/relationship of complainant out of record of conviction (but note that this may not defeat removability with respect to CODV). <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> Argue not "crime of violence" AF or CODV under any subsection. See <i>Leocal v. Ashcroft</i>, 543 U.S. 1 (2004) (crime of violence AF requires at least reckless mens rea); <i>Chrizanoski v. Ashcroft</i>, 327 F.3d 188 (2d Cir. 2003) (even intentional infliction of injury does not equal the intentional use of force required for crime of violence AF definition under 18 USC 16(a)); <i>U.S. v. Villegas-Hernandez</i>, 468 F.3d 874 (5th Cir. 2006) (same); <i>Tran v. Gonzales</i>, 414 F.3d 464 (3rd Cir. 2005) (recklessness is not sufficient to be crime of violence AF). Preserve argument that subsection (1) is not CIMT because <i>Matter of Solon</i>, 24 I&N Dec. 239 (BIA 2007) was wrongly decided. See, e.g., <i>Matter of Garcia-Hernandez</i>, 23 I&N Dec. 590 (BIA 2003) (simple battery under Cal. Penal Law 242 held not a CIMT). Subsections (2) and (3) are not CIMT. See <i>Matter of Fualaau</i>, 21 I&N Dec. 475 (BIA 1996); <i>Matter of Perez-Contreras</i>, 20 I&N Dec. 615 (BIA 1992). |
| Reckless assault of a child Class D felony | 120.02 | If term of imprisonment imposed is one year or more, probably "crime of violence" AF. | Yes. | Is a CAC. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid AF, avoid sentence of one year or more (get 364 days or less) if possible. To reduce risk of CIMT, consider alternative offense of subsection (2) of Assault, 3rd (see above, PL 120.00(2)) if possible. To avoid CAC, consider plea to alternate offense that does not specify minority of complainant as an element and keep minority of complainant out of record of conviction. |

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|--|--------------|--|--|--|---|
| Assault, 2nd degree Class D felony | 120.05 | If term of imprisonment imposed is one year or more, subsections (1), (2), (3) and (7) probably are “crime of violence” AF and any other subsection might be “crime of violence” AF. | Subsections (1), (2), (3) and (4) are CIMT. Subsections (8), (9) and 10(b) probably are CIMT and any other subsection might be CIMT. | Subsections (2) and (4) are FO if record of conviction establishes that offense involved a firearm. Subsections (8) and (9) are CAC. Subsection (10)(b) might be a CAC and other subsections might be CAC if the record of conviction establishes that the complainant was a child. If the complainant was a current or former spouse or similarly situated individual, subsections (1), (2), (3), (6) and (7) might be CODV (and subsection (4) might be CODV in jurisdictions outside 2d Circuit). | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid AF, avoid sentence of one year or more (get 364 days or less) if possible. 2. To decrease CIMT risk, consider alternative offense of an <i>attempt</i> (PL 110.00) to commit subsection (4) of PL 120.05. See <i>Gill v. INS</i>, 420 F.3d 82 (2d Cir. 2005) (because a person cannot intend to commit a reckless act, an <i>attempted</i> reckless assault could not constitute CIMT even though the completed crime itself is CIMT); <i>Knapik v. Ashcroft</i>, 384 F.3d 84 (3d Cir. 2004) (same with attempted reckless endangerment, 1st degree). New York courts permit such “hypothetical offense” pleas. See <i>Dale v. Holder</i>, 610 F.3d 294, 302 (5th Cir. 2010) (collecting cases). 3. To reduce CODV or CAC risks, keep age/relationship of complainant out of record of conviction (but note that this may not defeat removability with respect to CODV). <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue not “crime of violence” AF or CODV under various subsections. See <i>Leocal v. Ashcroft</i>, 543 U.S. 1 (2004) (crime of violence AF requires at least reckless mens rea); <i>Garcia v. Gonzales</i>, 455 F.3d 465 (4th Cir. 2006) (120.05(4), requiring reckless conduct, is not COV); <i>Chrzanoski v. Ashcroft</i>, 327 F.3d 188 (2d Cir. 2003) (even intentional infliction of injury does not equal the intentional use of force required for crime of violence AF definition under 18 USC 16(a)); <i>Jobson v. Ashcroft</i>, 326 F.3d 367 (2d Cir. 2003) (NY reckless manslaughter is not COV); <i>Jimenez-Gonzalez v. Mukasey</i>, 548 F.3d 557 (7th Cir. 2008) (recklessness is not sufficient to be crime of violence AF) (collecting cases). |
| Assault on a peace officer, police officer, etc. Class C felony | 120.08 | If term of imprisonment imposed is one year or more, probably is “crime of violence” AF. | Probably. | | |

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| Assault, 1st degree Class B felony | 120.10 | If term of imprisonment imposed is one year or more, subsections (1) and (2) probably are “crime of violence” AF and subsections (3) and (4) might be “crime of violence” AF. | Subsections (1) and (3) are CIMT. Subsection (2) is probably CIMT and subsection (4) might be CIMT. | Subsection (1) is FO if record of conviction establishes that offense involved a firearm. If the complainant was a current or former spouse or similarly situated individual, might also be CODV. If the record of conviction establishes that complainant was a child, conviction might be CAC. | Tip for defense lawyers: 1. To preserve argument that conviction under this statute might not be AF, keep the record of conviction clear of mention of which subsection defendant has been charged and convicted under. Tips for immigration lawyers: 1. Argue that subsection (3) is not a “crime of violence” AF because it requires merely reckless conduct. See <i>Jimenez-Gonzalez v. Mukasey</i> , 548 F.3d 557 (7th Cir. 2008) (recklessness is not sufficient to be crime of violence AF) (collecting cases). 2. Argue that subsection (4) lacks a specific intent to cause injury and is therefore not a CIMT. |
| Aggravated assault upon a police officer or peace officer Class B felony | 120.11 | If term of imprisonment imposed is one year or more, probably is “crime of violence” AF. | Yes. | FO if record of conviction establishes that offense involved a firearm. | |
| Aggravated assault upon a person less than eleven years old Class E felony | 120.12 | If term of imprisonment imposed is one year or more and record of conviction shows crime committed is assault as defined under subsection (1) or (2) of PL 120.00, might be “crime of violence” AF in some jurisdictions outside 2d Circuit. | Maybe depending on subsection of 3rd degree assault under which defendant is charged (see above, PL 120.00). See Note on CIMT Offenses, <i>supra</i> . | Is a CAC. Probably FO if record of conviction establishes that underlying offense was 120.00(3) (negligent assault with weapon) and involved a firearm. | Tips for defense lawyers: 1. To avoid AF, avoid sentence of one year or more (get 364 days or less) if possible. 2. To preserve an argument against CIMT, consider alternative offense of an <i>attempt</i> (PL 110.00) to commit PL 120.12 based on an underlying PL 120.00(2) (reckless assault). See <i>Gill v. INS</i> , 420 F.3d 82 (2d Cir. 2005) (because a person cannot intend to commit a reckless act, an <i>attempted</i> reckless assault could not constitute CIMT even though the completed crime itself is CIMT); <i>Knapik v. Ashcroft</i> , 384 F.3d 84 (3d Cir. 2004) (same with attempted reckless endangerment, 1st degree). New York courts permit such “hypothetical offense” pleas. See <i>Dale v. Holder</i> , 610 F.3d 294, 302 (5th Cir. 2010) (collecting cases). 3. To avoid CAC, consider plea to alternate offense that does not specify minority of complainant as an element and keep record of conviction clear of complainant’s minority. |

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|--|----------------|---|---|--|---|
| Menacing, 1st degree Class E felony | 120.13 | If term of imprisonment imposed is one year or more and record of conviction (ROC) shows underlying offense is subsection (1) of PL 120.14, probably is “crime of violence” AF. If ROC shows underlying offense is subsection (2) of PL 120.14, might be “crime of violence” AF. If term of imprisonment imposed is one year or more, might be “crime of violence” AF even if crime comes under subsection (3) of PL 120.14 in some jurisdictions outside 2d Circuit. | Probably. | May be FO if record of conviction (ROC) shows that the crime committed is menacing as defined under subsection (1) of PL 120.14 and that the offense involved a firearm. If the complainant was a current or former spouse or similarly situated individual, might also be CODV. Might also trigger deportability under CODV clause regarding “crime of stalking.” If ROC shows that complainant was a child, conviction might be CAC. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid AF, avoid sentence of one year or more (get 364 days or less) if possible. 2. To minimize CODV or CAC risks, keep age/relationship of complainant out of record of conviction (but note that this may not defeat removability with respect to CODV). |

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| Menacing, 2nd degree Class A misdemeanor | 120.14 | If term of imprisonment imposed is one year, subsection (1) probably is "crime of violence" AF, subsection (2) might be crime of violence AF, and subsection (3) might be "crime of violence" AF in some jurisdictions outside 2d Circuit. | Probably. | Subsection (1) may be FO if record of conviction establishes that offense involved a firearm. If the complainant was a current or former spouse or similarly situated individual, might also be CODV. A conviction might also trigger deportability under CODV clause regarding "crime of stalking," and subsection (3) might trigger deportability under CODV clause regarding "violators of protection orders." If the record of conviction establishes that complainant was a child, conviction might be CAC. | Tips for defense lawyers: 1. To avoid AF, avoid sentence of one year or more (get 364 days or less) if possible. 2. To minimize CODV or CAC risks, keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV). 3. To minimize FO risk, keep record clear of subsection of conviction and/or of mention of type of weapon or dangerous instrument employed under subsection (1). Tip for immigration lawyers: 1. Argue that the statute is not "divisible" as to FO offense because no subsection requires use of firearm as an element. See <i>Lanferman v. BIA</i> , 576 F.3d 84 (2d Cir. 2009). |
| Menacing, 3rd degree Class B misdemeanor | 120.15 | No. | Maybe. | If the complainant was a current or former spouse or similarly situated individual, might be CODV in some jurisdictions outside 2d Circuit. Might also trigger deportability under CODV clause regarding "crime of stalking." If the record of conviction establishes that complainant was a child, conviction might be CAC. | Tip for defense lawyers: 1. To minimize CODV or CAC risks, keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV). Tip for immigration lawyers: 1. Argue that the offense punishes conduct equivalent to a "simple assault" and is therefore not a CIMT. See <i>Matter of Solon</i> , 24 I&N Dec. 239, 244 n.5 (BIA 2007). |
| Menacing a police officer or peace officer Class D felony | 120.18 | If sentence of one year or more is imposed, is probably "crime of violence" AF. | Probably. | May be FO if record of conviction establishes that offense involved a firearm. | |

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| Reckless endangerment, 2nd degree Class A misdemeanor | 120.20 | No, unless term of imprisonment imposed is one year, in which case might be “crime of violence” AF in some jurisdictions outside 2d Circuit. | Maybe. | If the complainant was a current or former spouse or similarly situated individual, might be CODV in some jurisdictions outside 2d Circuit. If the record of conviction establishes that complainant was a child, might be CAC. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid AF, avoid sentence of one year (get 364 days or less). To preserve an argument against CIMT, plead to an <i>attempt</i> (PL 110.00) to commit PL 120.20. See <i>Gill v. INS</i>, 420 F.3d 82 (2d Cir. 2005) (because a person cannot intend to commit a reckless act, an <i>attempted</i> reckless assault could not constitute CIMT even though the completed crime itself is CIMT); <i>Krapik v. Ashcroft</i>, 384 F.3d 84 (3d Cir. 2004) (same with attempted reckless endangerment, first degree). New York courts permit such “hypothetical offense” pleas. See <i>Dale v. Holder</i>, 610 F.3d 294, 302 (5th Cir. 2010) (collecting cases). To minimize CODV or CAC risks, keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV). <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> Argue not “crime of violence” AF or CODV. See <i>Leocal v. Ashcroft</i>, 543 U.S. 1 (2004) (crime of violence AF requires at least reckless mens rea); <i>Chrzanoski v. Ashcroft</i>, 327 F.3d 188 (2d Cir. 2003) (even intentional infliction of injury does not equal the intentional use of force required for crime of violence AF definition under 18 USC 16(a)); <i>Jimenez-Gonzalez v. Mukasey</i>, 548 F.3d 557 (7th Cir. 2008) (recklessness is not sufficient to be crime of violence AF) (collecting cases). |
| Reckless endangerment, 1st degree Class D felony | 120.25 | If term of imprisonment imposed is one year or more, might be “crime of violence” AF but probably not. | Probably. | If the complainant was a current or former spouse or similarly situated individual, might be CODV. If the record of conviction establishes that complainant was a child, conviction might be CAC. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To reduce risk of AF, avoid sentence of one year or more (get 364 days or less) if possible. To preserve an argument against CIMT, plead to an <i>attempt</i> (PL 110.00) to commit PL 120.25. See <i>Gill v. INS</i>, 420 F.3d 82 (2d Cir. 2005) (because a person cannot intend to commit a reckless act, an <i>attempted</i> reckless assault could not constitute CIMT even though the completed crime itself is CIMT); <i>Krapik v. Ashcroft</i>, 384 F.3d 84 (3d Cir. 2004) (same with attempted reckless endangerment, first degree). New York courts permit such “hypothetical offense” pleas. See <i>Dale v. Holder</i>, 610 F.3d 294, 302 (5th Cir. 2010) (collecting cases). To minimize CODV or CAC risks, keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV). <p>(Tip for immigration lawyers on next page)</p> |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
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| (continued) Reckless endangerment, 1st degree Class D felony | 120.25 | (see previous page) | (see previous page) | (see previous page) | (continued) Tip for immigration lawyers: 1. Argue not “crime of violence” AF or CODV. See <i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004) (crime of violence AF requires at least reckless mens rea); <i>Chiranoski v. Ashcroft</i> , 327 F.3d 188 (2d Cir. 2003) (even intentional infliction of injury does not equal the intentional use of force required for crime of violence AF definition under 18 USC 16(a)); <i>Jobson v. Ashcroft</i> , 326 F.3d 367 (2d Cir. 2003) (NY reckless manslaughter is not CIMT); <i>Jimenez-Gonzalez v. Mukasey</i> , 548 F.3d 557 (7th Cir. 2008) (recklessness is not sufficient to be crime of violence AF) (collecting cases). |
| Stalking, 4th degree Class B misdemeanor | 120.45 | No. | Maybe. | Probably triggers deportability as a “crime of stalking.” If the complainant was a current or former spouse or similarly situated individual, might also be CODV in some jurisdictions outside 2d Circuit. If the record of conviction establishes that complainant was a child, conviction might be CAC. | Tip for defense lawyers: 1. To avoid “crime of stalking” CODV or CAC risks, consider alternative offenses such as Disorderly Conduct or Trespass (see below, PL 240.20 & 140.05). To minimize CAC risk if this is not possible, keep minority of complainant out of record of conviction. |
| Stalking, 3rd degree Class A misdemeanor | 120.50 | No, unless term of imprisonment imposed is one year, in which case subsection (3) might be “crime of violence” AF and subsections (1), (2) and (4) might also be “crime of violence” AF in some jurisdictions outside 2 ^d Circuit if ROC shows crime committed comes under subsection (1) of PL 120.45. | Probably. | Probably triggers deportability as a “crime of stalking.” If the complainant was a current or former spouse or similarly situated individual, might also be CODV. If the record of conviction establishes that complainant was a child, conviction might be CAC. | Tips for defense lawyers: 1. To avoid AF, avoid sentence of one year or more (get 364 days or less). 2. To avoid CIMT, consider alternative offenses such as Disorderly Conduct or Trespass (see below, PL 240.20 & 140.05); if that is not possible and if client has no prior CIMTs, consider alternative offense of attempt (PL 110.00) to commit 155.25, which as a B misdemeanor will not trigger deportability as “1 CIMT within 5 years of admission.” 3. To avoid “crime of stalking” CODV or CAC risks, consider alternative offenses such as Disorderly Conduct or Trespass (see below, PL 240.20 & 140.05). To minimize CAC risk if this is not possible, keep minority of complainant out of record of conviction. |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|---|---|---|---|
| Stalking, 2nd degree Class E felony | 120.55 | If term of imprisonment imposed is one year or more, might be "crime of violence" AF. | Probably. | Subsection (1) is FO if record of conviction establishes that offense involved a firearm. Any subsection probably triggers deportability as a "crime of stalking." If the complainant was a current or former spouse or similarly situated individual, might also be CODV. If the record of conviction establishes that complainant was a child, conviction might be CAC. | Tips for defense lawyers: 1. To avoid AF, avoid sentence of one year or more (get 364 days or less) if possible. If this is not possible, to reduce risk of AF, avoid conviction under subsection (1), subparagraph (i) (involving threatened use, as opposed to mere display, of weapon). 2. If a weapon (but not a gun) was involved, to avoid CODV or CAC risks, consider subsection (1). |
| Stalking, 1st degree Class D felony | 120.60 | If term of imprisonment imposed is one year or more, might be "crime of violence" AF. Subsection (2) might also be "rape, or sexual abuse of a minor" AF. | Probably. | Would probably trigger deportability as a "crime of stalking" or, if the complainant was a current or former spouse or similarly situated individual, a CODV. If the record of conviction establishes that complainant was a child, conviction might be CAC. | Tips for defense lawyers: 1. To avoid "crime of violence" AF, avoid sentence of one year or more (get 364 days or less) if possible. 2. To avoid "rape, or sexual abuse of a minor" AF risk, avoid subsection (2) if possible. |
| Criminally negligent homicide Class E felony | 125.10 | No. | Probably NOT. | | |
| Aggravated criminally negligent homicide Class C felony | 125.11 | No. | Probably NOT. | | |
| Vehicular manslaughter, 2nd degree Class D felony | 125.12 | Probably NOT. | Probably NOT. | | |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|---|---|---|--|
| Vehicular manslaughter, 1st degree Class C felony | 125.13 | Probably NOT. | Subsection (2) is probably CIMT and other subsections might be CIMTs. | | <p>Tip for defense lawyers:</p> <ol style="list-style-type: none"> To decrease CIMT risk, consider alternative offenses of Criminally Negligent Homicide or Vehicular Manslaughter, 2nd (see above, PL 125.10 & 125.12). |
| Aggravated vehicular homicide Class B felony | 125.14 | If term of imprisonment imposed is one year or more, might be a "crime of violence." AF in some jurisdictions outside 2d Cir. | Probably. | | <p>Tip for defense lawyers:</p> <ol style="list-style-type: none"> To decrease AF and CIMT risk, consider alternative offenses of Criminally Negligent Homicide or Vehicular Manslaughter, 2nd degree (see above, PL 125.10 & 125.12). <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> Argue not "crime of violence" AF. See <i>Leocal v. Ashcroft</i>, 543 U.S. 1 (2004) (crime of violence AF requires at least reckless mens rea); <i>Chiranoski v. Ashcroft</i>, 327 F.3d 188 (2d Cir. 2003) (even intentional infliction of injury does not equal the intentional use of force required for crime of violence AF definition under 18 USC 16(a)); <i>Jimenez-Gonzalez v. Mukasey</i>, 548 F.3d 557 (7th Cir. 2008) (recklessness is not sufficient to be crime of violence AF) (collecting cases). |
| Manslaughter, 2nd degree Class C felony | 125.15 | Subsection (1) is NOT AF in 2d Circuit, but if term of imprisonment imposed is one year or more, might be "crime of violence" AF in some jurisdictions outside 2d Circuit. If term of imprisonment of one year or more is imposed, subsections (2) and (3) might be "crime of violence" AF. | Subsection (1) is CIMT; subsections (2) and (3) might be CIMT. | If the victim was a current or former spouse or similarly situated individual, might be CODV in some jurisdictions outside 2d Circuit. If the record of conviction establishes that victim was a child, might be CAC. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid AF and CIMT, consider alternative offense of criminally negligent homicide (PL 125.10) if possible. If Tip 1 is not possible and incident involved a car, to avoid AF risk consider alternative offenses such as Vehicular Manslaughter, 2nd or 1st degree (see above, PL 125.12 & 125.13) or Leaving the Scene of an Incident Without Reporting (see below, VTL 600(2)). To preserve an argument against CIMT, plead to an <i>attempt</i> (PL 110.00) to commit 125.15. See <i>Gill v. INS</i>, 420 F.3d 82 (2d Cir. 2005) (because a person cannot intend to commit a reckless act, an <i>attempted</i> reckless assault could not constitute CIMT even though the completed crime itself is CIMT); <i>Knapik v. Ashcroft</i>, 384 F.3d 84 (3d Cir. 2004) (same with attempted reckless endangerment, first degree). New York courts permit such "hypothetical offense" pleas. See <i>Dale v. Holder</i>, 610 F.3d 294, 302 (5th Cir. 2010) (collecting cases). To minimize CODV or CAC risks, keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV). <p>(Tip for immigration lawyers continued on next page)</p> |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYP Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CMT)? [See Note on CMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Domestic Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|-------------|---|---|---|---|
| Manslaughter, 1st degree Class B felony | 125.20 | If term of imprisonment imposed is one year or more, subsections (1) and (2) are "crime of violence" AF in 2d Circuit, and subsections (3) and (4) might be "crime of violence" AF. | Subsections (1), (2) and (4) are CMT; subsection (3) might be CMT. | If the victim was a current or former spouse or similarly situated individual, might be CODV. If the record of conviction establishes that the victim was a child, conviction might be CAC. | <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue not "crime of violence" AF or CODV. See <i>Leocal v. Ashcroft</i>, 543 U.S. 1 (2004) (crime of violence AF requires at least reckless mens rea); <i>Chrzanoski v. Ashcroft</i>, 327 F.3d 188 (2d Cir. 2003) (even intentional infliction of injury does not equal the intentional use of force required for crime of violence AF definition under 18 USC 16(a)); <i>Jobson v. Ashcroft</i>, 326 F.3d 367 (2d Cir. 2003) (NY reckless manslaughter is not COV); <i>Jimenez-Gonzalez v. Mukasey</i>, 548 F.3d 557 (7th Cir. 2008) (recklessness is not sufficient to be crime of violence AF) (collecting cases). <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid AF and CMT, consider alternative offense of criminally negligent homicide (see above, PL 125.10) if possible. 2. If Tip 1 is not possible and incident involved a car, to avoid AF consider alternative offenses such as Vehicular Manslaughter, 2nd or 1st degree (see above, PL 125.12 & 125.13) or Leaving the Scene of an Incident Without Reporting (see below, VTL 600(2)). 3. If Tips 1 and 2 are not possible, to decrease AF risk consider alternative offense of Manslaughter, 2nd (see above, PL 125.15). 4. To preserve an argument against CMT, plead to an <i>attempt</i> (PL 110.00) to commit 125.10(4) if possible. See <i>Gill v. INS</i>, 420 F.3d 82 (2d Cir. 2005) (because a person cannot intend to commit a reckless act, an <i>attempted</i> reckless assault could not constitute CMT even though the completed crime itself is CMT); <i>Knapik v. Ashcroft</i>, 384 F.3d 84 (3d Cir. 2004) (same with attempted reckless endangerment, 1st degree). New York courts permit such "hypothetical offense" pleas. See <i>Date v. Holder</i>, 610 F.3d 294, 302 (5th Cir. 2010) (collecting cases). 5. To minimize CODV or CAC risks, keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV). <p><i>(Tip for immigration lawyers continued on next page)</i></p> |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips |
|---|--------------|---|---|---|---|
| <i>(continued)</i> Manslaughter, 1st degree Class B felony | 125.20 | <i>(see previous page)</i> | <i>(see previous page)</i> | <i>(see previous page)</i> | <p><i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i></p> <p><i>(continued)</i></p> <p>Tip for immigration lawyers:</p> <p>1. Argue subsection (4) is not “crime of violence” AF or CODV. See <i>Leocal v. Ashcroft</i>, 543 U.S. 1 (2004) (crime of violence AF requires at least reckless mens rea); <i>Chrzanoski v. Ashcroft</i>, 327 F.3d 188 (2d Cir. 2003) (even intentional infliction of injury does not equal the intentional use of force required for crime of violence AF definition under 18 USC 16(a)); <i>Jobson v. Ashcroft</i>, 326 F.3d 367 (2d Cir. 2003) (NY reckless manslaughter is not COV); <i>Jimenez-Gonzalez v. Mukasey</i>, 548 F.3d 557 (7th Cir. 2008) (recklessness is not sufficient to be crime of violence AF) (collecting cases)</p> |
| Aggravated manslaughter, 2nd degree Class C felony | 125.21 | If term of imprisonment imposed is one year or more, might be “crime of violence” AF. | Yes. | | <p>Tips for defense lawyers:</p> <p>1. To reduce the risk of AF, consider lesser offense of aggravated criminally negligent homicide (PL 125.11) if possible.</p> <p>2. To preserve an argument against CIMT, plead to an <i>attempt</i> (PL 110.00) to commit 125.21 if possible. See <i>Gill v. INS</i>, 420 F.3d 82 (2d Cir. 2005) (because a person cannot intend to commit a reckless act, an <i>attempted</i> reckless assault could not constitute CIMT even though the completed crime itself is CIMT); <i>Knapik v. Ashcroft</i>, 384 F.3d 84 (3d Cir. 2004) (same with attempted reckless endangerment, 1st degree). New York courts permit such “hypothetical offense” pleas. See <i>Dale v. Holder</i>, 610 F.3d 294, 302 (5th Cir. 2010) (collecting cases).</p> <p>Tip for immigration lawyers:</p> <p>1. Argue not “crime of violence” AF. See <i>Leocal v. Ashcroft</i>, 543 U.S. 1 (2004) (crime of violence AF requires at least reckless mens rea); <i>Chrzanoski v. Ashcroft</i>, 327 F.3d 188 (2d Cir. 2003) (even intentional infliction of injury does not equal the intentional use of force required for crime of violence AF definition under 18 USC 16(a)); <i>Jobson v. Ashcroft</i>, 326 F.3d 367 (2d Cir. 2003) (NY reckless manslaughter is not COV); <i>Jimenez-Gonzalez v. Mukasey</i>, 548 F.3d 557 (7th Cir. 2008) (recklessness is not sufficient to be crime of violence AF) (collecting cases).</p> |
| Aggravated manslaughter, 1st degree Class B felony | 125.22 | If term of imprisonment imposed is one year or more, is “crime of violence” AF | Yes. | | <p>Tip for defense lawyers:</p> <p>1. To reduce the risk of AF, consider lesser offenses of aggravated criminally negligent homicide (PL 125.11) or, failing that, aggravated manslaughter, 2nd degree (PL 125.21).</p> |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|-------------------------|---|--|---|
| Murder, 2nd degree Class A-I felony | 125.25 | Yes. | Yes. | If the victim was a current or former spouse or similarly situated individual, might be CODV. Subsection (5) is CAC and other subsections might be if record of conviction establishes minority of victim. | Tips for defense lawyers: 1. To avoid AF, consider alternative offense of Criminally Negligent Homicide (see above, PL 125.20) if possible, or failing that, Manslaughter, 2nd (see above, PL 125.20) if possible. 2. To preserve an argument against CIMT, plead to an <i>attempt</i> (PL 110.00) to commit 125.25(2) or (4). See <i>Gill v. INS</i> , 420 F.3d 82 (2d Cir. 2005) (because a person cannot intend to commit a reckless act, an <i>attempted</i> reckless assault could not constitute CIMT even though the completed crime itself is CIMT); <i>Knapik v. Ashcroft</i> , 384 F.3d 84 (3d Cir. 2004) (same with attempted reckless endangerment, 1st degree). |
| Aggravated murder Class A-I felony | 125.26 | Yes. | Yes. | Subsection (2) is CAC. If the victim was a current or former spouse or similarly situated individual, might be CODV. | |
| Murder, 1st degree Class A-I felony | 125.27 | Yes. | Yes. | If the victim was a current or former spouse or similarly situated individual, might be CODV. Might be CAC if record of conviction establishes minority of victim. | |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|--|---|---|--|
| Sexual misconduct Class A misdemeanor | 130.20 | Subsections (1) and (2) are “sexual abuse of minor” AF in 2d Cir. where record of conviction establishes that lack of consent results from complainant being under 17 and might otherwise be “rape, or sexual abuse of a minor” AF in 2d Cir. and other jurisdictions. If term of imprisonment imposed is one year, might also be “crime of violence” AF, especially where record of conviction shows that lack of consent arises from forcible compulsion under PL 130.05(2)(a)). | Subsection (3) might be CIMT. Subsections (1) and (2) are CIMT if lack of consent results only from age of complainant and defendant knew or should have known complainant was a minor, and might be CIMT in other cases. See Note on CIMT Offenses, <i>supra</i> . | If the complainant was a current or former spouse or similarly situated individual, might be CODV. If the record of conviction shows that the lack of consent was established on the basis that the complainant was under seventeen years old pursuant to PL 130.05(3)(a), might also be CAC. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. If complainant is minor, to decrease risk of “sexual abuse of a minor” AF under subsections (1) and (2), if at all possible consider alternative offense that does not have sexual conduct as an element of the crime, such as Endangering the Welfare of a Child, Unlawfully Dealing With a Child, 1st degree, or Unlawful Imprisonment, 2nd (see below, PL 260.10, 260.20(2) and 135.05). If that’s not possible, plead to alternative offense that does not have the minor age of the complainant as an element of the crime or as a definition of “without consent”, such as Forcible Touching (see below, 130.52). In any event, try to keep out of the record of conviction any admission or other evidence that the complainant was a minor. 2. Regardless of complainant’s age, to avoid crime of violence” AF risk, avoid sentence of one year (get 364 days or less). 3. To minimize CODV or CAC risks, keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV). 4. To reduce CIMT risk where lack of consent results only from age of complainant, specify in plea allocation that defendant did not know complainant’s age (see PL 15.20(3)). If this is not possible, avoid admission or other evidence of such knowledge. See Note on CIMT Offenses, <i>supra</i>. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Where lack of consent results only from minority of complainant, argue offense is not categorically CIMT because conviction does not require knowledge of complainant’s age. See PL 15.20(3); <i>Matter of Silva-Trevino</i>, 24 I&N Dec. 687, 707 (A.G. 2008). |

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|--|--------------|--|---|---|--|
| Rape, 3rd degree Class E felony | 130.25 | Subsection (2) is “sexual abuse of a minor” AF in 2d Cir. and might be “sexual abuse of a minor” AF in other jurisdictions, particularly if the record of conviction shows that the complainant is under the age of 16. Subsections (1) and (3) might be “rape” AF. If term of imprisonment imposed is one year or more, any subsection is probably “crime of violence” AF in 2d Cir. and might be in other jurisdictions. | Yes, unless lack of consent arises only from complainant’s age, in which case is CIMT if defendant knew or should have known complainant was a minor, and might be CIMT in other cases. See Note on CIMT Offenses, <i>supra</i> . | If the complainant was a current or former spouse or similarly situated individual, probably is CODV. Subsection (2) might be CAC and if record of conviction shows that the complainant is a minor, other subsections might be CAC | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. Regardless of complainant’s age, to avoid “rape” AF risk, avoid this offense altogether. If that’s not possible, to avoid “crime of violence” AF risk, avoid sentence of one year or more (get 364 days or less). 2. If complainant is minor, to decrease “sexual abuse of a minor” AF risk, if at all possible avoid subsection (2) and consider alternative offenses that do not have sexual conduct as an element of the crime, such as Endangering the Welfare of a Child (see below, PL 260.10), Unlawfully Dealing With a Child, 1st degree (see below, PL 260.20(2)), or Unlawful Imprisonment, 2nd or 1st (see below, PL 135.05 & 135.10). If that’s not possible, plead to alternative offense that does not have the minor age of the complainant as an element of the crime or as a definition of “without consent,” such as Forcible Touching (see below PL 130.52). In any event, try to keep out of the record of conviction any admission or other evidence that the complainant was a minor. 3. To minimize CODV or CAC risks, keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV). 4. To reduce CIMT risk where lack of consent results only from age of complainant, specify in plea allocation that defendant did not know complainant was a minor (see PL 15.20(3)). If this is not possible, avoid admission or other evidence of such knowledge. See Note on CIMT Offenses, <i>supra</i>. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Where lack of consent results only from minority of complainant, argue offense is not categorically CIMT because conviction does not require knowledge of complainant’s age. See PL 15.20(3); <i>Matter of Silva-Trevino</i>, 24 I&N Dec. 687, 707 (A.G. 2008) |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|---|---|--|---|
| Rape, 2nd degree Class D felony | 130.30 | Subsection (1) probably is "sexual abuse of a minor" AF and subsection (2) might be "rape, or sexual abuse of a minor" AF. If term of imprisonment imposed is one year or more, either subsection is probably "crime of violence" AF in 2d Cir. and might be elsewhere. | Subsection (2) is CIMT. Subsection (1) is CIMT if defendant knew or should have known complainant was a minor, and might be CIMT in other cases. See Note on CIMT Offenses, <i>supra</i> . | If the complainant was a current or former spouse or similarly situated individual, probably is CODV. Subsection (1) might be CAC and if record of conviction shows that the complainant is a minor, other subsections might be CAC. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. Regardless of complainant's age, to avoid "rape" AF risk, avoid this offense altogether. If that's not possible, to avoid "crime of violence" AF risk, avoid sentence of one year or more (get 364 days or less) if possible. 2. If complainant is minor, to decrease risk of "sexual abuse of a minor" AF, if at all possible avoid subsection (1) and consider alternative offenses that do not have sexual conduct as an element of the crime, such as Endangering the Welfare of a Child (see below, PL 260.10), Unlawfully Dealing With a Child, 1st degree (see below, PL 260.20(2)) or Unlawful Imprisonment, 2nd or 1st (see below, PL 135.05 & 135.10). If that's not possible, plead to alternative offense that does not have the minor age of the complainant as an element of the crime or as a definition of "without consent", such as Forcible Touching (see below, PL 130.52) or even Burglary in the 3rd Degree (see below, PL 140.20). In any event, try to keep out of the record of conviction any admission or other evidence that the complainant was a minor. 3. To minimize CODV or CAC risks, keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV). 4. To reduce CIMT risk under subsection (1), specify in plea allocation that defendant did not know complainant was a minor (see PL 15.20(3)). If this is not possible, avoid admission or other evidence of such knowledge. See Note on CIMT Offenses, <i>supra</i>. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue subsection (1) is not categorically CIMT because conviction does not require knowledge of complainant's age. See PL 15.20(3); <i>Matter of Silva-Trevino</i>, 24 I&N Dec. 687, 707 (A.G. 2008) <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue subsections (3) and (4) are not categorically CIMT because conviction does not require knowledge of complainant's age. See PL 15.20(3); <i>Matter of Silva-Trevino</i>, 24 I&N Dec. 687, 707 (A.G. 2008). |
| Rape, 1st degree Class B felony | 130.35 | Yes, "rape, or sexual abuse of a minor" AF | Subsections (1) and (2) are CIMT. Subsections (3) and (4) are CIMT if defendant knew or should have known complainant was a minor and might be CIMT in other cases. See Note on CIMT Offenses, <i>supra</i> . | If the complainant was a current or former spouse or similarly situated individual, probably is CODV. Subsections (3) and (4) are probably CAC and if record of conviction shows that the complainant is a minor, other subsections might be CAC | <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue subsection (1) is not categorically CIMT because conviction does not require knowledge of complainant's age. See PL 15.20(3); <i>Matter of Silva-Trevino</i>, 24 I&N Dec. 687, 707 (A.G. 2008) <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue subsections (3) and (4) are not categorically CIMT because conviction does not require knowledge of complainant's age. See PL 15.20(3); <i>Matter of Silva-Trevino</i>, 24 I&N Dec. 687, 707 (A.G. 2008). |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYP Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|-------------|--|---|---|--|
| Criminal Sexual Act, 3rd degree Class E felony | 130.40 | Subsection (2) probably is "sexual abuse of a minor" AF, particularly if the record of conviction shows that the complainant is under the age of 16. Subsections (1) and (3) might be "rape" AF. Any subsection might also be "crime of violence" AF if term of imprisonment imposed is one year or more | Subsection (1) is CIMT. Subsections (2) and (3) are CIMT if defendant knew or should have known complainant was a minor and might be CIMT in other cases. See Note on CIMT Offenses, <i>supra</i> . | If the complainant was a current or former spouse or similarly situated individual, probably is CODV. Subsection (2) might be CAC and if record of conviction shows that the complainant is a minor, other subsections might be CAC | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> Regardless of complainant's age, to avoid "rape" AF risk, avoid this offense altogether and consider alternative offenses such as Forcible Touching (see below, PL 130.52). If that's not possible, to avoid "crime of violence" AF risk, avoid sentence of one year or more (get 364 days or less) if possible. Where complainant is less than 21 years of age and where facts permit, to avoid AF consider alternate plea to Unlawfully Dealing With a Child, 1st degree (see below, PL 260.20(2)) (but note that offense may be CSO and/or CAC). If complainant is minor, to decrease "sexual abuse of a minor" AF risk, if at all possible avoid subsection (2) and consider alternative offenses that do not have sexual conduct as an element of the crime, such as Endangering the Welfare of a Child (see below, PL 260.10), Unlawfully Dealing With a Child, 1st degree (see below, PL 260.20(2)) or Unlawful Imprisonment, 2nd or 1st (see below, PL 135.05 & 135.10). If that's not possible, consider alternative offense that does not have the minor age of the complainant as an element of the crime or as a definition of "without consent", such as Forcible Touching (see below, PL 130.52). In any event, try to keep out of the record of conviction any admission or other evidence that the complainant was a minor. To minimize CODV or CAC risks, keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV). To reduce CIMT risk under subsections (2) and (3), specify in plea allocution that defendant did not know complainant was a minor (see PL 15.20(3)). If this is not possible, avoid admission or other evidence of such knowledge. See Note on CIMT Offenses, <i>supra</i>. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> Argue subsection (1) is not categorically CIMT because conviction does not require knowledge of complainant's age. See PL 15.20(3); <i>Matter of Silva-Trevino</i>, 24 I&N Dec. 687, 707 (A.G. 2008) |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|--|---|--|---|
| Criminal Sexual Act, 2nd degree Class D felony | 130.45 | Subsection (1) probably is "sexual abuse of a minor" AF and subsection (2) might be "rape, or sexual abuse of a minor" AF. Either subsection might also be "crime of violence" AF if term of imprisonment imposed is one year or more. | Subsection (2) is CIMT. Subsection (1) is CIMT if defendant knew or should have known complainant was a minor and might be CIMT in other cases. See Note on CIMT offenses, <i>supra</i> . | If the complainant was a current or former spouse or similarly situated individual, probably is CODV. Subsection (1) might also be CAC and if record of conviction shows that the complainant is a minor, other subsections might be CAC | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. Regardless of complainant's age, to avoid "rape" AF risk, avoid this offense altogether and consider alternative offenses such as Forcible Touching (see below, PL 130.52) if possible. Where complainant is less than 21 years of age and where facts permit, to avoid AF consider alternate plea to Unlawfully Dealing With a Child, 1st degree (see PL 260.20(2), below). If alternate plea not possible, to avoid "crime of violence" AF risk, avoid sentence of one year or more (get 364 days or less) if possible. 2. If complainant is minor, to decrease "sexual abuse of a minor" AF risk, if at all possible avoid subsection (1) and consider alternative offenses that do not have sexual conduct as an element of the crime, such as Endangering the Welfare of a Child (see below, PL 260.10) or Unlawful Imprisonment, 2nd or 1st (see below, PL 135.05 & 135.10). If that's not possible, consider alternative offense that does not have the minor age of the complainant as an element of the crime or as a definition of "without consent", such as Forcible Touching (see below, PL 130.52) or even Burglary, 3rd (see below, PL 140.20). In any event, try to keep out of record of conviction admission/ evidence that complainant was a minor. 3. To minimize CODV or CAC risks, keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV). 4. To reduce CIMT risk under subsection (1), specify in plea allocation that defendant did not know complainant was a minor (see PL 15.20(3)). If this is not possible, avoid admission or other evidence of such knowledge. See Note on CIMT Offenses, <i>supra</i>. Note that offense probably remains an aggravated felony in any event. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue subsection (1) is not categorically CIMT because conviction does not require knowledge of complainant's age. See PL 15.20(3); <i>Matter of Silva-Trevino</i>, 24 I&N Dec. 687, 707 (A.G. 2008). |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|--|---|---|--|
| Criminal Sexual Act, 1st degree Class B felony | 130.50 | Subsections (3) & (4) are "sexual abuse of a minor" AF and subsections (1) & (2) probably are "rape" AF. Any subsection probably also is "crime of violence" AF if term of imprisonment of at least one year is imposed. | Subsections (1) and (2) are CIMT. Subsections (3) and (4) are CIMT if defendant knew or should have known complainant was a minor and might be a CIMT in other cases. See Note on CIMT Offenses, <i>supra</i> | If the complainant was a current or former spouse or similarly situated individual, probably is CODV. Subsections (3) and (4) might also be CAC and if record of conviction shows that the complainant is a minor, other subsections might be CAC | <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue subsections (3) and (4) are not categorically CIMT because conviction does not require knowledge of complainant's age. See PL 15.20(3); <i>Matter of Silva-Trevino</i>, 24 I&N Dec. 687, 707 (A.G. 2008). |
| Forcible touching Class A misdemeanor | 130.52 | If record of conviction shows that complainant was a minor, particularly under age 16, might be "sexual abuse of a minor" AF. If term of imprisonment imposed is one year, might also be "crime of violence" AF. | Yes | If the complainant was a current or former spouse or similarly situated individual, might be CODV. If the record of conviction shows that the complainant was a child, might also be CAC | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. Regardless of complainant's age, to avoid "crime of violence" AF risk, avoid sentence of one year (get 364 days or less). 2. If complainant is minor, to minimize "sex abuse of minor" AF risk, consider alternative offenses that do not have sexual conduct as an element of the crime, such as Endangering the Welfare of a Child (see below, PL 260.10) or Unlawful Imprisonment, 2nd or 1st (see below, PL 135.05 & 135.10). In any event, try to keep out of the record of conviction any admission or other evidence that the complainant was a minor. 3. To minimize CODV or CAC risks, keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV). <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue that conviction is categorically NOT "sex abuse of minor" AF, even if the complainant in fact was minor, because the minority of the complainant is not an element of the crime. IJ may not look to the underlying record of conviction to hold to the contrary. See, e.g., <i>Singh v. Ashcroft</i>, 383 F.3d 144 (3rd Cir. 2004); cf. <i>Nijhawan v. Holder</i>, 129 S. Ct. 2294, 2300 (2009) (noting that "sexual abuse of a minor" AF ground requires categorical as opposed to circumstance-specific inquiry) |

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|--|---|--|--|
| Sexual abuse, 3rd degree Class B misdemeanor | 130.55 | If the record of conviction shows that the complainant was a minor, particularly if under age 16, probably is "sexual abuse of a minor" AF. | Is CIMT unless lack of consent results only from age of complainant, in which case is CIMT if defendant knew or should have known complainant was a minor and might be CIMT in other cases. See Note on CIMT Offenses, <i>supra</i> . | If the record of conviction shows that the complainant was a child, probably is CAC. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. If complainant is minor, to minimize "sex abuse of minor" AF risk, consider alternative offenses that do not have sexual conduct as an element of the crime, such as Endangering the Welfare of a Child (see below, PL 260.10) or Unlawful Imprisonment, 2nd (see below, PL 135.05). In any event, to preserve arguments against "sexual abuse of a minor" AF try to keep out of the record of conviction any admission or other evidence that the complainant was a minor and/or that "sexual contact" consisted of acts falling within definition of "sexual contact" at 18 USC 3509(a)(9)(A). 2. To reduce CIMT where lack of consent results only from minority of complainant; specify in plea allocation that defendant did not know complainant was a minor (see PL 15.20(3)). If this is not possible, avoid admission or other evidence of such knowledge. See Note on CIMT Offenses, <i>supra</i>. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue subsection (1) is not categorically CIMT because conviction does not require knowledge of complainant's age. See PL 15.20(3); <i>Matter of Silva-Trevino</i>, 24 I&N Dec. 687, 707 (A.G. 2008) |
| Sexual abuse, 2nd degree Class A misdemeanor | 130.60 | Subsection (2) probably is "sexual abuse of a minor" AF, and, if term of imprisonment imposed is one year, either subsection might be "crime of violence". | Subsection (1) is CIMT; subsection (2) is CIMT if defendant knew or should have known complainant was a minor and might be CIMT in other cases. See Note on CIMT Offenses, <i>supra</i> . | Subsection (2) probably is CAC and if record of conviction shows that the complainant is a minor, subsection (1) might be CAC. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. Regardless of complainant's age, to avoid "crime of violence" AF, avoid sentence of one year (get 364 days or less). 2. If complainant is minor, to decrease "sexual abuse of a minor" AF risk, if at all possible avoid subsection (2) and consider alternative offenses that do not have sexual conduct as an element of the crime, such as Endangering the Welfare of a Child (see below, 260.10) or Unlawful Imprisonment in the 2d Degree (PL 135.05) (see below, 135.05). If that's not possible, consider alternative offense that does not have the minor age of the complainant as an element of the crime or as a definition of "without consent," such as PL 130.52. If plea to this offense cannot be avoided, to preserve arguments against "sexual abuse of a minor" AF try to keep out of the record of conviction any admission or other evidence that "sexual contact" consisted of acts falling within definition of "sexual contact" at 18 USC 3509(a)(9)(A). 3. To minimize CODV or CAC risks, keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV). <p><i>(Tips for defense lawyers and Tip for immigration lawyers continued on next page)</i></p> |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|---|--|--|--|
| Sexual abuse, 1st degree Class D felony | 130.65 | Subsection (3) is probably “sexual abuse of a minor” AF. Any subsection might also be “crime of violence” AF if term of imprisonment imposed is one year or more. | Subsections (1) and (2) are CIMT. Subsection (3) is CIMT if defendant knew or should have known that complainant was a minor and might be CIMT in other cases. See Note on CIMT Offenses, <i>supra</i> . | If the complainant was a current or former spouse or similarly situated individual, (3) probably is CAC and if record of conviction shows that the complainant is a minor, other subsections might be CAC. | <p>Tips for defense lawyers (continued):</p> <p>4. To reduce CIMT risk where lack of consent results only from minority of complainant, specify in plea allocation that defendant did not know complainant was a minor (see PL 15.20(3)). If this is not possible, avoid admission or other evidence of such knowledge. See Note on CIMT Offenses, <i>supra</i>.</p> <p>Tip for immigration lawyers:</p> <p>1. Argue subsection (1) is not categorically CIMT because conviction does not require knowledge of complainant’s age. See PL 15.20(3); <i>Matter of Silva-Trevino</i>, 24 I&N Dec. 687, 707 (A.G. 2008).</p> <p>Tips for defense lawyers:</p> <p>1. Regardless of complainant’s age, to avoid “crime of violence” AF risk, avoid sentence of one year or more (get 364 days or less) if possible.</p> <p>2. If complainant is minor, to minimize “sex abuse of minor” AF risk, if at all possible avoid subsection (3) and consider alternative offenses that do not have sexual conduct as an element of the crime, such as Endangering the Welfare of a Child (see below, PL 260.10) or Unlawful Imprisonment, 2nd or 1st (see below, PL 135.05 & 135.10). If that’s not possible, consider alternative offense that does not have the minor age of the complainant as an element of the crime or as a definition of “without consent,” such as Forcible Touching (see below, PL 130.52) or even Burglary, 3rd (see below, PL 140.20). In any event, to preserve arguments against “sexual abuse of a minor” AF try to keep out of the record of conviction any admission or other evidence that complainant was a minor under subsections (1) and (2) and, under any subsection, that “sexual contact” consisted of acts falling within definition of “sexual contact” at 18 USC 3509(a)(9)(A).</p> <p>3. To minimize CODV or CAC risks, keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV).</p> <p>4. To reduce CIMT risk under subsection (3), specify in plea allocation that defendant did not know complainant was a minor (see PL 15.20(3)). If this is not possible, avoid admission or other evidence of such knowledge. See Note on CIMT Offenses, <i>supra</i>. Note that offense may still be “sexual abuse of a minor” AF.</p> <p>Tip for immigration lawyers:</p> <p>1. Argue subsection (1) is not categorically CIMT because conviction does not require knowledge of complainant’s age. See PL 15.20(3); <i>Matter of Silva-Trevino</i>, 24 I&N Dec. 687, 707 (A.G. 2008).</p> |

| Offense | NYP Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Domestic Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|-------------|---|--|---|---|
| Aggravated sexual abuse, 4th degree Class E felony | 130.65-a | If the record of conviction shows that the complainant was a minor, might be "sexual abuse of a minor" AF. In other cases, might be "rape" AF. If term of imprisonment imposed is one year or more, might also be "crime of violence" AF. | Yes. | If the complainant was a current or former spouse or similarly situated individual, might be CODV. If the record of conviction shows that the complainant was a child, probably is CAC. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> Regardless of complainant's age, to avoid "crime of violence" AF risk, avoid sentence of one year or more (get 364 days or less) if possible. If complainant is minor, to minimize "sex abuse of minor" AF risk, consider alternative offenses that do not have sexual conduct as an element of the crime, such as Endangering the Welfare of a Child (see below, PL 260.10) or Unlawful Imprisonment, 2nd or 1st (see below, PL 135.05 & 135.10). In any event, try to keep out of the record of conviction any admission or other evidence that complainant was a minor. To minimize CODV or CAC risks, keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV). <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> Argue that conviction is categorically NOT "sex abuse of minor" AF, even if the complainant in fact was minor, because the minority of the complainant is not an element of the crime. IJ may not look to the underlying record of conviction to hold to the contrary. See, e.g., <i>Singh v. Ashcroft</i>, 383 F.3d 144 (3rd Cir. 2004); cf. <i>Nijhawan v. Holder</i>, 129 S. Ct. 2294, 2300 (2009) (noting that "sexual abuse of a minor" AF ground requires categorical as opposed to circumstance-specific inquiry). |
| Aggravated sexual abuse, 3rd degree Class D felony | 130.66 | Subsection 1(c) is "sexual abuse of a minor" AF. If the record of conviction shows that the complainant was a minor, any other subsection might be "sexual abuse of a minor" AF. Any subsection might also be "rape" AF, AND if term of imprisonment imposed is one year or more, might also be "crime of violence" AF. | Subsections (1)(a), (1)(b) and (2) are CIMT. Subsection (1)(c) is CIMT if defendant knew or should have known that complainant was minor and might be CIMT in other cases. See Note on CIMT Offenses, <i>supra</i> . | If the complainant was a current or former spouse or similarly situated individual, might be CODV. Subsection (1)(c) is probably CAC and if record of conviction shows that the complainant is a minor, other subsections might be CAC. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> Regardless of complainant's age, to avoid "crime of violence" AF risk, avoid sentence of one year or more (get 364 days or less) if possible. If complainant is minor, to minimize "sex abuse of minor" AF risk, avoid subsection (1)(c) and consider alternative offenses that do not have sexual conduct as an element of the crime, such as Endangering the Welfare of a Child (see below, PL 260.10) or Unlawful Imprisonment, 2nd or 1st (see below, PL 135.05 & 135.10), or Burglary, 3rd (see below, PL 140.20). In any event, try to keep out of the record of conviction any admission or other evidence that the complainant was a minor. To minimize CODV or CAC risks, keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV). To reduce CIMT risk under subsection (1)(c), specify in plea allocation that defendant did not know complainant was a minor (see PL 15.20(3)). If this is not possible, avoid admission or other evidence of such knowledge. See Note on CIMT Offenses, <i>supra</i>. <p><i>(Tips for immigration lawyers continued on next page)</i></p> |

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CMT)? [See Note on CMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | <p style="text-align: center;">Comments, Strategies & Tips</p> <p><i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i></p> |
|---|--------------|---|--|---|---|
| Aggravated sexual abuse, 2nd degree Class C felony | 130.67 | Subsection 1(c) is "sexual abuse of a minor" AF. If the record of conviction shows that the complainant was a minor, any other subsection might be "sexual abuse of a minor" AF. Any subsection might also be "rape" AF, AND if term of imprisonment imposed is one year or more, might also be "crime of violence" AF. | Subsections (1) (a) and (b) are CMT. Subsection (1)(c) is CMT if defendant knew or should have known that complainant was minor and might be CMT in other cases. See Note <i>supra</i> . | If the complainant was a current or former spouse or similarly situated individual, might be CODV. Subsection (1)(c) probably is CAC and if record of conviction shows that the complainant is a minor, other subsections might be CAC. | <p style="text-align: center;">Tips for immigration lawyers:</p> <p>1. For convictions under subsections other than (1)(c), argue that conviction is categorically NOT "sex abuse of minor" AF, even if the complainant in fact was minor, because the minority of the complainant is not an element of the crime. IJ may not look to the underlying record of conviction to hold to the contrary. See, e.g., <i>Singh v. Ashcroft</i>, 383 F.3d 144 (3rd Cir. 2004); cf. <i>Nijhawan v. Holder</i>, 129 S. Ct. 2294, 2300 (2009) (noting that "sexual abuse of a minor" AF ground requires categorical as opposed to circumstance-specific inquiry).</p> <p>2. Argue subsection (1)(c) is not categorically CIMT because conviction does not require knowledge of complainant's age. See PL 15.20(3); <i>Matter of Silva-Trevino</i>, 24 I&N Dec. 687, 707 (A.G. 2008).</p> <p style="text-align: center;">Tips for defense lawyers:</p> <p>1. If complainant is minor, to minimize "sex abuse of minor" AF risk, avoid subsection (1)(c) and consider alternative offenses that do not have sexual conduct as an element of the crime, such as Endangering the Welfare of a Child (see below, PL 260.10) or Unlawful Imprisonment, 2nd or 1st (see below, PL 135.05 & 135.10), or Burglary, 3rd (see below, PL 140.20). In any event, try to keep out of the record of conviction any admission or other evidence that the complainant was a minor.</p> <p>2. To minimize CODV or CAC risks, avoid subsection (1)(c) and keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV).</p> <p style="text-align: center;">Tip for immigration lawyers:</p> <p>1. For convictions under subsections other than (1)(c), argue that conviction is categorically NOT "sex abuse of minor" AF, even if the complainant in fact was minor, because the minority of the complainant is not an element of the crime. IJ may not look to the underlying record of conviction to hold to the contrary. See, e.g., <i>Singh v. Ashcroft</i>, 383 F.3d 144 (3rd Cir. 2004); cf. <i>Nijhawan v. Holder</i>, 129 S. Ct. 2294, 2300 (2009) (noting that "sexual abuse of a minor" AF ground requires categorical as opposed to circumstance-specific inquiry).</p> |

| Offense | NYP Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|-------------|---|---|---|--|
| Aggravated sexual abuse, 1st degree Class B felony | 130.70 | Subsection 1(c) is "sexual abuse of a minor" AF. If the record of conviction shows that the complainant was a minor, any other subsection might be "sexual abuse of a minor" AF. Any subsection might also be "rape" AF, AND if term of imprisonment imposed is one year or more, might also be "crime of violence" AF. | Subsections (1) (a) and (b) are CIMT. Subsection (1)(c) is CIMT if defendant knew or should have known that complainant was minor and might be CIMT in other cases. See Note on CIMT Offenses, <i>supra</i> . | If the complainant was a current or former spouse or similarly situated individual, might be CODV. Subsection (1)(c) probably is CAC and if record of conviction shows that the complainant is a minor, other subsections might be CAC. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. If complainant is minor, to minimize "sex abuse of minor" AF risk, avoid subsection (1)(c) and consider alternative offenses that do not have sexual conduct as an element of the crime, such as Endangering the Welfare of a Child (see below, PL 260.10) or Unlawful Imprisonment, 2nd or 1st (see below, PL 135.05 & 135.10), or Burglary, 3rd (see below, PL 140.20). In any event, to minimize risk of "sex abuse of minor" AF and CAC, try to keep out of the record of conviction any admission or other evidence that the complainant was a minor. 2. To minimize CODV risk, keep relationship of complainant to defendant out of record of conviction. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. For convictions under subsections other than (1)(c), argue that conviction is categorically NOT "sex abuse of minor" AF, even if the complainant in fact was minor, because the minority of the complainant is not an element of the crime. IJ may not look to the underlying record of conviction to hold to the contrary. See, e.g., <i>Singh v. Ashcroft</i>, 383 F.3d 144 (3rd Cir. 2004); cf. <i>Nijhawan v. Holder</i>, 129 S. Ct. 2294, 2300 (2009) (noting that "sexual abuse of a minor" AF ground requires categorical as opposed to circumstance-specific inquiry). |
| Unlawful imprisonment, 2nd degree Class A misdemeanor | 135.05 | If term of imprisonment imposed is one year, would probably be "crime of violence" AF, where record of conviction shows restraint by "physical force" or "intimidation" as opposed to "deception" or "acquiescence" of complainant. | Maybe. | If the complainant was a current or former spouse or similarly situated individual, might be CODV. If the record of conviction shows that the complainant was a child, might also be CAC. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid "crime of violence" AF, avoid sentence of one year (get 364 days or less). If maximum one-year sentence cannot be avoided but the complainant is less than 16 years old, try to establish in plea colloquy that the unlawful "restraint" was effected through complainant's acquiescence to fall within the definition of "restraint" at PL 135.00(1)(b) [as opposed to 135.00(1)(a)], or keep the record ambiguous as to which definition of restraint was applied. In all cases, to reduce risk of "crime of violence" AF, try to establish in plea colloquy that "restraint" was not accomplished by "physical force" or "intimidation," or keep the record ambiguous as to which definition of restraint was applied. 2. To minimize CODV or CAC risks, keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV). <p><i>(Tips for immigration lawyers continued on next page)</i></p> |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CMT)? [See Note on CMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|--|---|---|---|
| Unlawful imprisonment, 1st degree Class E felony | 135.10 | If term of imprisonment imposed is one year, would probably be “crime of violence” AF, especially where record of conviction shows restraint by “physical force” or “intimidation” as opposed to “deception” or “acquiescence” of complainant. | Maybe. | | <p>Tip for immigration lawyers:</p> <p>1. Argue not “crime of violence” AF if government fails to prove that “restraint” was effected on a competent adult. See <i>Dickson v. Ashcroft</i>, 346 F.3d 44 (2d Cir. 2003). Argue not “crime of violence” AF if government fails to prove that “restraint” element was not satisfied by “deception” or “acquiescence” involving no violent force. Cf. <i>Johnson v. US</i>, 130 S. Ct. 1265 (2010) (holding that “physical force” for purposes of ACCA “violent felony” definition similar to 18 USC 16 “crime of violence” definition means “violent force”); <i>Matter of Velasquez</i>, 25 I&N Dec. 278, 283 (BIA 2010) (definition of “force” in <i>Johnson</i> controls “crime of violence” analysis).</p> <p>Tips for defense lawyers:</p> <p>1. To avoid “crime of violence” AF, avoid sentence of one year or more (get 364 days or less) if possible. If one-year sentence cannot be avoided but the complainant is less than 16 years old, try to establish in plea colloquy that the unlawful “restraint” was effected through complainant’s acquiescence to fall within the definition of “restraint” at PL 135.00(1)(b) [as opposed to 135.00(1)(a)], or keep the record ambiguous as to which definition of restraint was applied.</p> <p>2. To minimize CODV or CAC risks, keep age/relationship of complainant to defendant out of record of conviction (but note that this may not defeat removability with respect to CODV).</p> <p>Tip for immigration lawyers:</p> <p>1. Argue not crime of violence AF if government fails to prove that “restraint” was effected on a competent adult. See <i>Dickson v. Ashcroft</i>, 346 F.3d 44 (2d Cir. 2003).</p> |
| Kidnapping, 2nd Degree Class B felony | 135.20 | If term of imprisonment imposed is one year, probably is “crime of violence” AF. | Probably. | If the complainant was a current or former spouse or similarly situated individual, might be CODV. If the record of conviction shows that the complainant was a child, might also be CAC. | |
| Trespass Violation | 140.05 | No. | No. | | |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|---|---|---|---|
| Criminal trespass, 3rd degree Class B misdemeanor | 140.10 | No. | No. | | |
| Criminal trespass, 2nd degree Class A misdemeanor | 140.15 | No. | No. | | |
| Criminal trespass, 1st degree Class D felony | 140.17 | If term of imprisonment imposed is one year or more, probably is “crime of violence” AF | Maybe. See Note on CIMT offenses, <i>supra</i> . | Subsections (2) and (3) are FO and, if record of conviction establishes that offense involved a firearm, subsection (1) also is FO. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid “crime of violence” AF, avoid sentence of one year or more (get 364 days or less) if possible. To minimize FO risk, avoid this offense altogether and consider alternative offenses that do not have firearms as an element of the crime, such as Burglary, 3rd (see below, PL 140.20). If that’s not possible, avoid subsections (2) and (3) [subsection (1) might be better] and try to keep out of record of conviction that the weapon was a firearm. To reduce risk of CIMT, avoid/controvert evidence that defendant intended to or knew that other participant intended to use weapon unlawfully against person or property of another. See Note on CIMT offenses, <i>supra</i>. |
| Burglary, 3rd degree Class D felony | 140.20 | If term of imprisonment imposed is one year or more, probably is “burglary” AF and might be “crime of violence” AF. | Yes if crime intended to be committed was CIMT or, regardless of intended offense, if burgled “building” was occupied dwelling. See Note on CIMT offenses, <i>supra</i> | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid “burglary” or “crime of violence” AF, avoid sentence of one year or more (get 364 days or less) if possible. If burgled “building” is a vehicle and sentence of one year or more cannot be avoided, minimize risk of “burglary” AF by establishing fact of vehicle (as opposed to structure). To minimize CIMT risk, consider alternative offense of Criminal Trespass, 2nd (see above, PL 140.15), even if sentence imposed for that offense is the maximum one year. If that is not possible, specify in allocation an underlying offense that is NOT a CIMT and that “building” was not occupied dwelling, or if that is not possible avoid/controvert evidence of occupied dwelling and/or intended offense that is CIMT. See Note on CIMT offenses, <i>supra</i>. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> Where ROC does not foreclose that defendant entered a vehicle/watercraft, argue not a “burglary” AF because such conduct falls outside generic definition of “burglary.” Cf. <i>Taylor v. United States</i>, 495 U.S. 575 (1990); <i>Matter of Perez</i>, 22 I&N Dec. 1325 (BIA 2000). |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|--|---|--|---|
| Burglary, 2nd degree Class C felony | 140.25 | If term of imprisonment imposed is one year or more, subsection (1) probably is “burglary” or “crime of violence” AF, and subsection (2) is “burglary” or “crime of violence” AF | Subsection (2) is probably CIMT. Subsection (1) is CIMT if crime intended to be committed was CIMT and subsections (b), (c) and (d) may be CIMT regardless of intended crime. See Note on CIMT offenses, <i>supra</i> . | If record of conviction establishes that offense involved a firearm, subsections (1)(a), (c) and (d) are probably FO. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid “burglary” or “crime of violence” AF, avoid this offense altogether and consider alternative offense of Burglary, 3rd with a sentence of 364 days or less, if possible (see above, PL 140.20). To minimize FO risk, avoid this offense altogether and consider alternative offenses that do not have firearms as an element of the crime, such as Burglary, 3rd (see above, PL 140.20). If that’s not possible, avoid subsection (1)(d) and try to keep out of record of conviction that the weapon was a firearm. To minimize CIMT risk, specify in allocution an underlying offense that is NOT a CIMT and that “building” was not occupied dwelling, or if that is not possible avoid/controvert evidence of occupied dwelling and/or intended offense that is CIMT |
| Burglary, 1st degree Class B felony | 140.30 | If term of imprisonment imposed is one year or more, is “burglary” or “crime of violence” AF. | Yes if crime intended to be committed was CIMT or, regardless of intended offense, if burgled “building” was occupied dwelling. Any subsection is probably CIMT. See Note on CIMT offenses, <i>supra</i> . | Subsection (4) is FO and, if record of conviction establishes that offense involved a firearm, subsections (1) and (3) probably also are FO. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid “burglary” or “crime of violence” AF, avoid this offense altogether and consider alternative offense of Burglary, 3rd with a sentence of 364 days or less, if possible (see above, PL 140.20). To minimize FO risk, avoid this offense altogether and consider alternative offenses that do not have firearms as an element of the crime, such as Burglary, 3rd (see above, PL 140.20). If that’s not possible, avoid subsection (4) and try to keep out of record of conviction that the weapon was a firearm. To minimize CIMT risk, specify in allocution an underlying offense that is NOT a CIMT and that “building” was not occupied dwelling, or if that is not possible avoid/controvert evidence of occupied dwelling and/or intended offense that is CIMT. Note that this may not be sufficient to defeat CIMT finding |
| Possession of burglar’s tools Class A misdemeanor | 140.35 | No, unless term of imprisonment imposed is one year, in which case might be attempted “burglary” or “theft” AF. | Maybe if the offense intended to be committed was CIMT. See Note on CIMT offenses, <i>supra</i> . | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid attempted “burglary” or “theft” AF, avoid sentence of one year or more (get 364 days or less). To minimize CIMT risk, consider alternative offense of Criminal Trespass, 2nd, if possible (see below, PL 140.15). If that is not possible, specify in the record an underlying offense that is NOT a CIMT. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> Argue not CIMT if government fails to show that underlying crime intended with the burglary tools is not CIMT. See <i>Guarino v. Uhl</i>, 107 F.2d 399 (2d Cir. 1939); <i>Matter of S</i>, 6 I&N Dec. 769 (BIA 1955). |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|--|--|---|--|
| Criminal mischief, 4th degree Class A misdemeanor | 145.00 | No for subsections (1)-(3) (particularly if record of conviction shows subsection (3)), unless term of imprisonment imposed is one year, in which case might be “crime of violence” AF in some jurisdictions outside 2d Circuit. Subsection (4), if term of imprisonment imposed is one year, might be “crime of violence” AF in any jurisdiction. | Subsections (1), (2) and (4) might be CIMT. Subsection (3) probably is NOT CIMT. See Note on CIMT Offenses, <i>supra</i> . | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid “crime of violence” AF, avoid sentence of one year (get 364 days or less). To minimize CIMT risk, avoid subsections (1), (2) and (4) and consider alternative offenses that are likely NOT to be CIMT, such as Reckless Endangerment of Property (see below, PL 145.25). Where this is not possible, deny “malicious intent” at plea allocation. See Note on CIMT Offenses, <i>supra</i>. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> Argue not a “crime of violence” AF because offense does not have use, attempted use, or threatened use of force as an element. Cf. <i>Chrzanoski v. Ashcroft</i>, 327 F.3d 188 (2d Cir. 2003) (offense involving intent to injure resulting in injury does not inherently require the use of force); see also <i>Johnson v. US</i>, 130 S. Ct. 1265 (2010) (holding that “physical force” for purposes of ACCA “violent felony” definition similar to 18 USC 16 “crime of violence” definition means “violent force,” not simply de minimis touching). Note that the statute reaches damage to the value of property, which can be created without “violent force.” See, e.g., <i>People v. David</i>, 133 A.D.2d 277, 519 N.Y.S.2d 67 (App. Div. 2d Dept’t 1987) (holding that complainant’s home was damaged within the meaning of 145.00(1) when defendant, a contractor, removed a water heater; damage consisted of cost of re-installation but not cost of heater). |
| Criminal mischief, 3rd degree Class E felony | 145.05 | If term of imprisonment imposed is one year or more, might be “crime of violence” AF. | Probably. | | <p>Tip for defense lawyers:</p> <ol style="list-style-type: none"> To avoid “crime of violence” AF, avoid sentence of one year or more (get 364 days or less) if possible. |
| Criminal mischief, 2nd degree Class D felony | 145.10 | If term of imprisonment imposed is one year or more, might be “crime of violence” AF. | Probably. | | <p>Tip for defense lawyers:</p> <ol style="list-style-type: none"> To avoid “crime of violence” AF, avoid sentence of one year or more (get 364 days or less) if possible. |
| Criminal mischief, 1st degree Class B felony | 145.12 | If term of imprisonment imposed is one year or more, probably is “crime of violence” AF. | Probably. | FO (or destructive device offense) if record of conviction establishes that offense involved “destructive device” (as defined in 18 USC 921(a)). | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid “crime of violence” AF, avoid this offense altogether and consider alternative offense of Criminal Mischief, 3rd or 4th, with a sentence of 364 days or less, if possible (see above, PL 145.05 & 145.00). To minimize FO risk, avoid this offense altogether and consider alternative offense of Criminal Mischief, 3rd or 4th, with a sentence of 364 days or less, if possible (see above, PL 145.05 & 145.00). |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|--|---|---|--|
| Reckless endangerment of property Class B misdemeanor | 145.25 | No | Probably NOT | | See <i>Matter of M</i> , 3 I&N Dec. 272 (BIA 1948) (found that property damage offense was CIMT because was not one “where the act was merely accompanied by negligence or carelessness, but one which was perpetrated maliciously and wantonly”); <i>Matter of M</i> , 2 I&N Dec. 686 (BIA 1946) (reckless endangerment of property not a CIMT). |
| Making graffiti Class A misdemeanor | 145.60 | No, unless term of imprisonment imposed is one year, in which case might be “crime of violence” AF in some jurisdictions outside 2d Circuit. | Probably NOT. | | Tip for defense lawyers: 1. To avoid “crime of violence” AF, avoid sentence imposed of one year (get 364 days or less). Tip for immigration lawyers: 1. Argue not a “crime of violence” AF because offense does not have use, attempted use, or threatened use of force as an element. Cf. <i>Johnson v. US</i> , 130 S. Ct. 1265 (2010) (holding that “physical force” for purposes of ACCA “violent felony” definition similar to 18 USC 16 “crime of violence” definition means “violent force,” not simply <i>de minimis</i> touching). |
| Possession of graffiti instrument Class B misdemeanor | 145.65 | No. | Probably NOT | | |
| Arson, 5th degree Class A misdemeanor | 150.01 | No, unless term of imprisonment imposed is one year, in which case probably is “crime of violence” AF. | Probably. | FO (or destructive device offense) if record of conviction establishes that offense involved “destructive device” (as defined in 18 USC 921(a)). | Tip for defense lawyers: 1. To avoid “crime of violence” AF, avoid sentence imposed of one year (get 364 days or less). |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|---|---|---|---|
| Arson, 4th degree Class E felony | 150.05 | If term of imprisonment imposed is one year or more, probably is “crime of violence” AF. | Maybe. | FO (or destructive device offense) if record of conviction establishes that offense involved “destructive device” (as defined in 18 USC 921(a)). | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid “crime of violence” AF, avoid sentence imposed of one year or more (get 364 days or less) if possible. To minimize CIMT risk, consider alternative offense of Criminal Mischief, 4th, subsection (3) (see above, PL 145.00(3)), with a sentence of 364 days or less, if possible, OR consider pleading to an <i>attempt</i> (PL 110.00) to commit Arson, 4th (see above, PL 150.05). See <i>Gill v. INS</i>, 420 F.3d 82 (2d Cir. 2005) (because a person cannot intend to commit a reckless act, an <i>attempted</i> reckless assault could not constitute CIMT even though the completed crime itself is CIMT); <i>Knapik v. Ashcroft</i>, 384 F.3d 84 (3d Cir. 2004) (same with attempted reckless endangerment, 1st degree). New York courts permit such “hypothetical offense” pleas. See <i>Dale v. Holder</i>, 610 F.3d 294, 302 (5th Cir. 2010) (collecting cases). To minimize FO risk, avoid this offense altogether if “destructive device” was used, and consider alternative offenses such as Criminal Mischief, 4th Degree, subsection (3), or Arson, 5th Degree (see above, PL 145.00(3) or 150.01), in each case with a sentence of 364 days or less, if possible. |
| Arson, 3rd degree Class C felony | 150.10 | If term of imprisonment imposed is one year or more, probably is “crime of violence” AF. | Yes. | FO (or destructive device offense) if record of conviction establishes that offense involved “destructive device” (as defined in 18 USC 921(a)). | |
| Arson, 2nd degree Class B felony | 150.15 | If term of imprisonment imposed is one year or more, may be “crime of violence” AF, especially where record of conviction shows that defendant knew another person was present in damaged building/vehicle. | Yes. | FO (or destructive device offense) if record of conviction establishes that offense involved “destructive device” (as defined in 18 USC 921(a)). | <p>Tip for defense lawyers:</p> <ol style="list-style-type: none"> To reduce “crime of violence” AF risk, where possible specify at location that subject building/vehicle was property of defendant and that defendant did not know another person was present. If this is not possible, try to keep out of the record of conviction any admission or other evidence that the subject building/vehicle was property of another and that the defendant knew another person was present. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> Argue not categorically a “crime of violence” AF under 18 USC 16(a) because offense does not require use, etc. of force against the property of <i>another</i>. Argue not categorically a “crime of violence” AF under 18 USC 16(b) because offense may be committed without actual knowledge that another person is present, vitiating “substantial risk” of <i>intentional</i> use of force against his/her person. See <i>Leocal v. Ashcroft</i>, 543 U.S. 1 (2004). |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---------------------------------------|--------------|--|---|--|--|
| Arson, 1st degree Class A-I felony | 150.20 | If term of imprisonment imposed is one year or more, probably is “crime of violence” AF, especially where record of conviction shows that defendant knew another person was present in damaged building/vehicle. | Yes. | FO (or destructive device offense) if record of conviction establishes that offense involved “destructive device” (as defined in 18 USC 921(a)). | <p>Tip for defense lawyers:</p> <ol style="list-style-type: none"> To reduce “crime of violence” AF risk, where possible specify at al-location that subject building/vehicle was property of defendant and that defendant did not know another person was present. If this is not possible, try to keep out of the record of conviction any admission or other evidence that the subject building/vehicle was property of another and that the defendant knew another person was present. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> Argue not categorically a “crime of violence” AF under 18 USC 16(a) because offense does not require use, etc. of force against the property of <i>another</i>. Argue not categorically a “crime of violence” AF under 18 USC 16(b) because offense may be committed without actual knowledge that another person is present, vitiating “substantial risk” of <i>intentional</i> use of force against his/her person. See <i>Leocal v. Ashcroft</i>, 543 U.S. 1 (2004). |
| Petit larceny Class A misde-meanor | 155.25 | If term of imprisonment imposed is one year, probably is “theft” AF. If record of conviction (“ROC”) shows that larceny was accomplished by fraud or deceit, and if evidence (whether or not part of ROC) tied to convicted conduct shows loss or intended loss to victim exceeding \$10,000, may be “fraud or deceit” AF regardless of sentence. Otherwise, not AF. | Yes. | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid “theft” AF, avoid sentence imposed of one year (get 364 days or less. If this is not possible, where loss or intended loss to complainant is no more than \$10,000, minimize risk of “theft” AF by affirmatively establishing in plea colloquy that larceny was accomplished by fraud or deceit (e.g., PL 155.05(2)(a), (d)). Where alleged loss to complainant exceeds \$10,000, to avoid “fraud or deceit” AF, affirmatively establish in plea colloquy that theft was not accomplished by fraudulent or deceitful means (e.g., PL 155.05(2)(a), (d)) and/or that loss or intended loss to complainant did not exceed \$10,000 (See Appendix L). To avoid CIMT, consider alternative offenses such as Disorderly Conduct (see below, PL 240.20), Trespass (see above, PL 140.04) or Jostling (see below, PL 165.25). If that is not possible <i>and</i> if lawfully admitted client has no prior CIMT, consider alternative offense of <i>at-tempf</i> (PL 110.00) to commit 155.25, which as a B misdemeanor will not trigger deportability as “1 CIMT within 5 years of admission” <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> Argue not categorically “theft” AF because statute encompasses taking property by consent fraudulently obtained. See <i>Matter of Garcia-Madruga</i>, 24 I&N Dec. 436 (BIA 2008); <i>Bazuaye v. Mukasey</i>, 273 Fed. App’x 77 (2d Cir. 2008) (unpublished). Argue not categorically “fraud or deceit” AF because statute encompasses taking property without consent. See <i>Matter of Garcia-Madruga</i>, 24 I&N Dec. 436 (BIA 2008). |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|--|---|--|---|
| Grand larceny, 4th degree Class E felony | 155.30 | If term of imprisonment imposed is one year or more, probably is "theft" AF. Subsection (11), if the record of conviction ("ROC") shows the property involved to be hydrous ammonia, probably is "drug trafficking" AF regardless of sentence. Any subsection might be "fraud or deceit" AF regardless of sentence if ROC shows that larceny was accomplished by fraud or deceit, and if evidence (whether or not part of ROC) tied to convicted conduct shows loss or intended loss to victim exceeding \$10,000. | Yes. | Subsection (7) probably is FO. Subsection (11) probably is CSO. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid "theft" AF, avoid sentence imposed of one year or more (get 364 days or less). If this is not possible, where loss or intended loss to complainant is no more than \$10,000, minimize risk of "theft" AF by affirmatively establishing in plea colloquy that larceny was accomplished by fraud or deceit (e.g., PL 155.05(2)(a), (d)). 2. To avoid "fraud or deceit" AF, affirmatively establish in plea colloquy that theft was not accomplished by fraudulent or deceitful means (e.g., PL 155.05(2)(a), (d)) and/or that loss or intended loss to complainant did not exceed \$10,000 (See Appendix L). 3. To avoid FO risk, avoid subsection (7). 4. To avoid "drug trafficking" AF or CSO risk, avoid subsection (11). If the allegation is car theft, to avoid CIMT risk consider alternative offense of Unauthorized Use of a Vehicle, 3rd or 2nd (see below, PL 165.05 & 165.06). <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue not categorically "theft" AF because statute encompasses taking property by consent fraudulently obtained. See <i>Matter of Garcia-Madruga</i>, 24 I&N Dec. 436 (BIA 2008); <i>Bazuaye v. Mukasey</i>, 273 Fed. App'x 77 (2d Cir. 2008) (unpublished). 2. Argue not categorically "fraud or deceit" AF because statute encompasses taking property without consent. See <i>Matter of Garcia-Madruga</i>, 24 I&N Dec. 436 (BIA 2008). |
| Grand larceny, 3rd degree Class D felony | 155.35 | If term of imprisonment imposed is one year or more, probably is "theft" AF. Might be "fraud or deceit" AF regardless of sentence if record of conviction ("ROC") shows that larceny was accomplished by fraud or deceit, and if evidence (whether or not part of ROC) tied to convicted conduct shows loss or intended loss to victim exceeding \$10,000. | Yes. | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid "theft" AF, avoid sentence imposed of one year or more (get 364 days or less) if possible. If this is not possible, where loss or intended loss to complainant is no more than \$10,000, minimize risk of "theft" AF by affirmatively establishing in plea colloquy that larceny was accomplished by fraud or deceit (e.g., PL 155.05(2)(a), (d)). 2. If alleged loss or intended loss exceeds \$10,000, to decrease "fraud or deceit AF" risk, consider alternative offenses such as Criminal Possession of Stolen Property, 4th or 3rd (see below, PL 165.45 & 165.50). If pleading to 155.35 cannot be avoided, affirmatively establish in plea colloquy that larceny was not accomplished by fraud or deceit (e.g., PL 155.05(2)(a), (d)) and/or that loss to complainant was no more than \$10,000 (see Appendix L). 3. If the allegation is car theft, to avoid CIMT risk, consider alternative offense of Unauthorized Use of a Vehicle, 3rd or 2nd (see below, PL 165.05 & 165.06). <p>(Tips for immigration lawyers continued on next page)</p> |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|--|---|--|---|
| Grand larceny, 2nd degree Class C felony | 155.40 | If term of imprisonment imposed is one year or more, probably is "theft" AF and subsection (2) might also be "crime of violence" AF. Subsection (1) might be "fraud or deceit" AF regardless of sentence if record shows that larceny was accomplished by fraud or deceit, and if evidence (whether or not part of ROC) tied to convicted conduct shows loss or intended loss to victim exceeding \$10,000 | Yes. | | <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue not categorically "theft" AF because statute encompasses taking property by consent fraudulently obtained. See <i>Matter of Garcia-Madruga</i>, 24 I&N Dec. 436 (BIA 2008); <i>Bazuaye v. Mukasey</i>, 273 Fed. App'x 77 (2d Cir. 2008) (unpublished). 2. Argue not categorically "fraud or deceit" AF because statute encompasses taking property without consent. See <i>Matter of Garcia-Madruga</i>, 24 I&N Dec. 436 (BIA 2008). If government alleges "fraud or deceit" AF, argue not AF where government has failed to prove that loss tied to convicted conduct exceeds \$10,000 (e.g., if plea colloquy admits to loss amount of no more than \$10,000). See <i>Nijhawan v. Holder</i>, 129 S. Ct. 2294 (2009). |
| | | | | | <p>Tip for defense lawyers:</p> <ol style="list-style-type: none"> 1. If alleged loss or intended loss exceeds \$10,000, to decrease "fraud or deceit AF" risk, consider alternative offenses such as Criminal Possession of Stolen Property, 4th or 3rd (see below, PL 165.45 & 165.50). If this is not possible, affirmatively establish in plea colloquy that larceny was not accomplished by fraud or deceit (e.g., PL 155.05(2)(a),(d)) and/or that loss to complainant was no more than \$10,000 (see Appendix L). (But note that offense will still probably be "theft" and/or "crime of violence" AF if sentence of one year or more is imposed). |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMIT)? [See Note on CIMIT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|--|---|---|--|
| Grand larceny, 1st degree Class B felony | 155.42 | If term of imprisonment imposed is one year or more, probably is "theft" AF. Might be "fraud or deceit" AF regardless of sentence if record of conviction ("ROC") shows that larceny was accomplished by fraud or deceit, and if evidence (whether or not part of ROC) tied to convicted conduct shows loss or intended loss to victim exceeding \$10,000. | Yes. | | |
| Robbery, 3rd degree Class D felony | 160.05 | If term of imprisonment imposed is one year or more, is "crime of violence" and "theft" AF. | Yes. | | Tip for defense lawyers: 1. To avoid AF, avoid sentence imposed of one year or more (get 364 days or less) if possible. |
| Robbery, 2nd degree Class C felony | 160.10 | If term of imprisonment imposed is one year or more, is "crime of violence" and "theft" AF. | Yes. | Subsection 2(b) probably is FO if record of conviction establishes that offense involved a firearm. | Tip for defense lawyers: 1. To avoid AF, avoid this offense altogether and consider alternative plea to Robbery, 3rd with a sentence of 364 days or less (see above, PL 160.05) if possible. |
| Robbery, 1st degree Class B felony | 160.15 | If term of imprisonment imposed is one year or more, is "crime of violence" and "theft" AF. | Yes. | Subsections (2), (3) and (4) are FO if record of conviction establishes that offense involved a firearm. | |
| Unauthorized use of vehicle, 3rd degree Class A misdemeanor | 165.05 | No, unless term of imprisonment imposed is one year, in which case might be "theft" AF. | Probably NOT. | | Tip for defense lawyers: 1. To avoid "theft" AF, avoid sentence imposed of one year (get 364 days or less). |
| Unauthorized use of vehicle, 2nd degree Class E felony | 165.06 | If term of imprisonment imposed is one year or more, might be "theft" AF. | Probably NOT. | | Tip for defense lawyers: 1. To avoid AF, avoid sentence imposed of one year or more (get 364 days or less) if possible. |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|---|---|--|--|
| Unauthorized use of vehicle, 1st degree Class D felony | 165.08 | If term of imprisonment imposed is one year or more, might be "theft" AF. | Maybe, particularly if defendant intended to use vehicle in the commission of a CIMT. See Note on CIMT offenses, <i>supra</i> . | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid AF, avoid sentence imposed of one year or more (get 364 days or less) if possible. To decrease CIMT risk, avoid this offense altogether and consider alternative offense of Unauthorized Use of Vehicle, 2nd with a sentence of 364 days or less (see above, PL 165.05) if possible. If pleading to 165.08 cannot be avoided, specify underlying intended offense in plea allocation that is NOT a CIMT; if this is not possible, leave record vague as to underlying crime intended. See "Note on CIMT offenses," <i>supra</i>. |
| Theft of services Violation Class A misdemeanor Class E felony | 165.15 | If term of imprisonment imposed is one year or more, might be "theft" AF. | Probably. See Note on CIMT offenses, <i>supra</i> . | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid AF, avoid sentence imposed of one year (get 364 days or less) if possible. If this is not possible, to minimize risk of "theft" AF, if possible create record at allocation that theft was accomplished by consent of owner fraudulently or deceitfully obtained (e.g., PL 165.15(3) under "deception" prong). To avoid CIMT, consider alternative offenses such as Disorderly Conduct (see below, PL 240.20) or Trespass (see above, PL 140.04). If that is not possible and if client has no prior CIMTs, consider alternative offense of <i>attempt</i> (PL 110.00) to commit PL 165.15, which as a B misdemeanor will not trigger deportability as "1 CIMT within 5 years of admission." <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> Argue not categorically "theft" AF because statute encompasses taking property by consent fraudulently obtained. See <i>Matter of Garcia-Madruga</i>, 24 I&N Dec. 436 (BIA 2008); cf. <i>Bazuaye v. Mukasey</i>, 273 Fed. App'x 77 (2d Cir. 2008) (unpublished). Argue not a CIMT because offense does not require intent to deprive any person or entity of property, but only intent to obtain use of a service. See PL 155.00(1), (8) (providing exclusive definitions of "property" and "service"); <i>People v. Walters</i>, 862 810 (N.Y. Crim. Ct. 2005) (unpublished) ("[A] service is not property, and property is not a service, and the penal law recognizes the difference between the two."); <i>Matter of G</i>, 2 I&N Dec. 235 (BIA 1945) (predecessor NY statute not CIMT); <i>U.S. ex rel. Fontan v. Uhl</i>, 16 F. Supp. 428 (SDNY 1936) (taking ocean passage without payment not CIMT). |
| Jostling Class A misdemeanor | 165.25 | No. | Probably NOT. | | |

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|---|---|--|---|
| Criminal possession of stolen property, 5th degree Class A misdemeanor | 165.40 | No, unless term of imprisonment imposed is one year, in which case probably is "theft" AF. | Probably. See Note on CIMT offenses, <i>supra</i> . | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid AF, avoid sentence imposed of one year (get 364 days or less). 2. To avoid CIMT risk, consider alternative offenses such as Disorderly Conduct (see below, PL 240.20), Trespass (see above, PL 140.04) or Jostling (see below, PL 165.25); if the allegation is car theft, also consider alternative offense of Unauthorized Use of a Vehicle, 3rd (see above, PL 165.05 & 165.06). If this is not possible, to reduce (but not eliminate) CIMT risk avoid specific admission to requisite intent (see PL 165.55(1)). If the strategies in the preceding sentences are not possible and if client has no prior CIMTs, consider alternative offense of <i>attempt</i> (PL 110.00) to commit PL 165.40, which as a B misdemeanor will not trigger deportability as "1 CIMT within 5 years of admission." <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue not CIMT because conviction may be premised on presumption, not actual finding, that person possessed property with intent to benefit himself or another. <i>But see Michel v. INS</i>, 206 F.3d 253 (2d Cir. 2000) (holding that 165.40 is CIMT without considering this argument); see also <i>Brooks v. Holder</i>, 621 F.3d 88 (2d Cir. 2010) (rejecting similar argument with regard to statutory presumption of intent to use weapon unlawfully). |
| Criminal possession of stolen property, 4th degree Class E felony | 165.45 | If term of imprisonment imposed is one year or more, probably is "theft" AF. Subsection (7), if the record of conviction shows the property involved to be anhydrous ammonia, probably is "drug trafficking" AF regardless of sentence. | Probably. See Note on CIMT offenses, <i>supra</i> . | Subsection (7) probably is CSO. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid "theft" AF, avoid sentence imposed of one year or more (get 364 days or less) if possible. 2. To avoid "drug trafficking" AF or CSO risk, avoid subsection (7). 3. To avoid CIMT risk, consider alternative offenses such as Jostling (see above, PL 165.25); if the allegation is possession of stolen vehicle, also consider alternative offense of Unauthorized Use of a Vehicle, 3rd or 2nd (see below, PL 165.05 & 165.06). If this is not possible, to reduce (but not eliminate) CIMT risk avoid specific admission to requisite intent (see PL 165.55(1)). <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue not CIMT because conviction may be premised on presumption, not actual finding, that person possessed property with intent to benefit himself or another. <i>But see Michel v. INS</i>, 206 F.3d 253 (2d Cir. 2000) (holding that 165.40 is CIMT without considering this argument); see also <i>Brooks v. Holder</i>, 621 F.3d 88 (2d Cir. 2010) (rejecting similar argument with regard to statutory presumption of intent to use weapon unlawfully). |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|--|---|--|---|
| Criminal possession of stolen property, 3rd degree Class D felony | 165.50 | If term of imprisonment imposed is one year or more, is "theft" AF in Fifth Circuit and is probably "theft" AF in other jurisdictions. | Probably. See Note on CIMT offenses, <i>supra</i> . | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid "theft" AF, avoid sentence imposed of one year or more (get 364 days or less) if possible. 2. If the allegation is possession of stolen vehicle, to avoid CIMT risk consider alternative offense of Unauthorized Use of a Vehicle, 3rd or 2nd (see above, PL 165.05 & 165.06). If this is not possible, to reduce (but not eliminate) CIMT risk avoid specific admission to requisite intent (see PL 165.55(1)). <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue not CIMT because conviction may be premised on presumption, not actual finding, that person possessed property with intent to benefit himself or another. <i>But see Michel v. INS</i>, 206 F.3d 253 (2d Cir. 2000) (holding that 165.40 is CIMT without considering this argument); see also <i>Brooks v. Holder</i>, 621 F.3d 88 (2d Cir. 2010) (rejecting similar argument with regard to statutory presumption of intent to use weapon unlawfully). |
| Criminal possession of stolen property, 2nd degree Class C felony | 165.52 | If term of imprisonment imposed is one year or more, probably is "theft" AF. | Probably. See Note on CIMT offenses, <i>supra</i> . | | <p>Tip for defense lawyers:</p> <ol style="list-style-type: none"> 1. To reduce (but not eliminate) CIMT risk avoid specific admission to requisite intent (see PL 165.55(1)). <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue not CIMT because conviction may be premised on presumption, not actual finding, that person possessed property with intent to benefit himself or another. <i>But see Michel v. INS</i>, 206 F.3d 253 (2d Cir. 2000) (holding that 165.40 is CIMT without considering this argument); see also <i>Brooks v. Holder</i>, 621 F.3d 88 (2d Cir. 2010) (rejecting similar argument with regard to statutory presumption of intent to use weapon unlawfully). |
| Criminal possession of stolen property, 1st degree Class B felony | 165.54 | If term of imprisonment imposed is one year or more, probably is "theft" AF. | Probably. See Note on CIMT offenses, <i>supra</i> . | | <p>Tip for defense lawyers:</p> <ol style="list-style-type: none"> 1. To reduce (but not eliminate) CIMT risk avoid specific admission to requisite intent (see PL 165.55(1)). <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue not CIMT because conviction may be premised on presumption, not actual finding, that person possessed property with intent to benefit himself or another. <i>But see, e.g., Brooks v. Holder</i>, 621 F.3d 88 (2d Cir. Sept. 27, 2010) (rejecting similar argument with regard to statutory presumption of intent to use weapon unlawfully). |

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|---|--------------|---|---|--|---|
| Trademark counterfeiting, 3rd degree Class A misdemeanor | 165.71 | If term of imprisonment imposed is one year, might be “counterfeiting” AF. | Probably, especially where defendant has intent to defraud or deceive See Note on CIMT offenses, <i>supra</i> . | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid AF, avoid sentence imposed of one year (get 364 days or less). 2. To avoid CIMT, consider alternative offense such as Disorderly Conduct (see below, PL 240.20) or, for offenses committed in NYC, violation of Administrative Code 20-453 (vendor’s license required). Where that is not possible or for offenses outside NYC), to reduce CIMT risk consider alternate plea to Failure to Disclose the Origin of a Recording, 2d degree (see below, PL 275.35). If that is not possible <i>and</i> if client has no prior CIMT, consider alternative offense of <i>attempt</i> (PL 110.00) to commit PL 165.71, which as a B misdemeanor will not trigger deportability as “1 CIMT within 5 years of admission.” To reduce (though not eliminate) CIMT risk when pleading to this offense, if possible specify in plea colloquy that offense was committed with intent to evade a lawful restriction on sale/resale (as opposed to with intent to deceive or defraud) and that no-one was deceived or defrauded by defendant’s conduct. See Note on CIMT offenses, <i>supra</i>. |
| Trademark counterfeiting, 2nd degree Class E felony | 165.72 | If term of imprisonment imposed is one year or more, might be “counterfeiting” AF. If the loss to the victim(s) exceeds \$10,000, might also be “fraud” AF especially if record of conviction shows element of intent to defraud or deceive (as opposed to evade a lawful restriction). | Probably, especially where defendant has intent to defraud or deceive See Note on CIMT offenses, <i>supra</i> . | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid “counterfeiting” AF, avoid sentence imposed of one year or more (get 364 days or less) if possible. 2. To decrease “fraud” AF risk, specify in plea colloquy that offense was committed with intent to evade a lawful restriction on sale/resale (as opposed to with intent to deceive or defraud). See <i>Valansi v. Ashcroft</i>, 278 F.3d 203 (3d Cir. 2002). In addition, if possible specify in the plea colloquy that the loss amount (as opposed to retail value) did not exceed \$10,000 (see Appendix L). 3. To avoid CIMT, for offenses committed in NYC, consider alternate plea to violation of Administrative Code 20-453 (vendor’s license required). Where that is not possible (or for offenses outside NYC), to reduce CIMT risk consider alternate plea to Failure to Disclose the Origin of a Recording, 1st or 2d degree (see below, PL 275.35, 275.40). If that is not possible <i>and</i> if client has no prior CIMT, consider alternate offense of <i>attempt</i> (PL 110.00) to commit PL 165.71, which as a B misdemeanor will not trigger deportability as “1 CIMT within 5 years of admission.” To reduce (though not eliminate) CIMT risk when pleading to this offense, if possible specify in plea colloquy that offense was committed with intent to evade a lawful restriction on sale/resale (as opposed to with intent to deceive or defraud) and that no-one was deceived or defrauded by defendant’s conduct. See Note on CIMT offenses, <i>supra</i>. |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
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| Trademark counterfeiting, 1st degree Class C felony | 165.73 | If term of imprisonment imposed is one year or more, might be “counterfeiting” AF. If the loss to the complainant(s) exceeds \$10,000, might also be “fraud” AF especially if record of conviction shows element of intent to defraud or deceive (as opposed to evade a lawful restriction). | Probably, especially where defendant has intent to defraud or deceive See Note on CIMT offenses, <i>supra</i> . | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid “counterfeiting” AF, consider alternative offense of Trade-mark Counterfeiting, 3rd or 2nd and get sentence of 364 days or less (see above, PL 165.71 & 165.72) if possible. 2. To decrease risk of “fraud” AF, specify in the plea colloquy if possible that the loss amount did not exceed \$10,000 (regardless of retail value) (see Appendix L); and/or specify in plea colloquy that offense was committed with intent to evade a lawful restriction on sale/resale (as opposed to with intent to deceive or defraud). See <i>Valansi v. Ashcroft</i>, 278 F.3d 203 (3d Cir. 2002). 3. To avoid CIMT for offenses committed in NYC, consider alter-nate plea to violation of Administrative Code 20-453 (vendor’s license required). Where that is not possible (or for offenses outside NYC), to reduce CIMT risk consider alternative offense such as Failure to Dis-close the Origin of a Recording, 1st or 2d degree (see below, PL 275.35, 275.40). If that is not possible and if client has no prior CIMT, consider alternative offense of <i>attempt</i> (PL 110.00) to commit PL 165.71, which as a B misdemeanor will not trigger deportability as “1 CIMT within 5 years of admission.” To reduce (though not eliminate) CIMT risk when pleading to this offense, if possible specify in plea colloquy that offense was committed with intent to evade a lawful restriction on sale/resale (as opposed to with intent to deceive or defraud) and that no-one was deceived or defrauded by defendant’s conduct. See Note on CIMT of-fenses, <i>supra</i>. |
| Forgery, 3rd degree Class A misdemeanor | 170.05 | If term of imprisonment imposed is one year, probably is “forgery” AF. If the loss to the complainant(s) exceeds \$10,000, might also be “fraud” AF especially if record of conviction shows element of intent to defraud or deceive (as opposed to injure). | Yes. | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid “forgery” AF, avoid sentence imposed of one year (get 364 days or less). 2. To decrease risk of “fraud” AF, specify in the plea colloquy that the loss amount did not exceed \$10,000 (See Appendix L); and/or specify in plea colloquy that offense was committed with intent to injure (as opposed to with intent to deceive or defraud). See <i>Valansi v. Ashcroft</i>, 278 F.3d 203 (3d Cir. 2002). <p><i>(Tips for defense lawyers and Tips for immigration lawyers continued on next page)</i></p> |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|--|---|---|--|
| (<i>continued</i>) Forgery, 3rd degree Class A misdemeanor | 170.05 | (<i>see previous page</i>) | (<i>see previous page</i>) | (<i>see previous page</i>) | <p>Tips for defense lawyers (<i>continued</i>):</p> <p>3. To decrease CIMT risk, consider alternative offenses such as Disorderly Conduct (see below, PL 240.20) or Trespass (see above, PL, 140.05). If these are not possible, consider alternative offenses that may preserve the potential argument that the conviction is not a CIMT, such as Offering a False Instrument for Filing, 2nd (see below, PL 175.30) or Making a Punishable False Written Statement (see below, PL 210.45). If these are not possible <i>and</i> if client has no prior CIMTs, consider alternative offense of <i>attempt</i> (PL 110.00) to commit PL 170.05, which as a B misdemeanor will not trigger deportability as “1 CIMT within 5 years of admission.”</p> <p>Tip for immigration lawyers:</p> <p>1. Argue not “fraud” AF where government has failed to establish loss of more than \$10,000 specifically tied to convicted conduct (e.g., if plea colloquy admits to loss amount of no more than \$10,000). See <i>Nijhawan v. Holder</i>, 129 S. Ct. 2294 (2009).</p> |
| Forgery, 2nd degree Class D felony | 170.10 | If term of imprisonment imposed is one year or more, probably is “forgery” AF. If the loss to the complainant(s) exceeds \$10,000, might also be “fraud” AF especially if record of conviction shows element of intent to defraud or deceive (as opposed to injure). | Yes. | | <p>Tips for defense lawyers:</p> <p>1. To avoid “forgery” AF, avoid sentence imposed of one year or more (get 364 days or less) if possible.</p> <p>2. To decrease “fraud” AF risk, specify in the plea colloquy that the loss amount did not exceed \$10,000; and/or specify in plea colloquy that offense was committed with intent to injure (as opposed to with intent to deceive or defraud). See <i>Valansi v. Ashcroft</i>, 278 F.3d 203 (3d Cir. 2002).</p> <p>3. To decrease CIMT risk, consider alternative offenses that may preserve the potential argument that the conviction is not a CIMT, such as Offering a False Instrument for Filing, 2nd (see below, PL 175.30) or Making a Punishable False Written Statement (see below, PL 210.45).</p> <p>Tip for immigration lawyers:</p> <p>1. Argue not “fraud” AF where government has failed to establish loss of more than \$10,000 specifically tied to convicted conduct (e.g., if plea colloquy admits to loss amount of no more than \$10,000). See <i>Nijhawan v. Holder</i>, 129 S. Ct. 2294 (2009).</p> |

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|---|--------------|--|---|--|---|
| Forgery, 1st degree Class C felony | 170.15 | If term of imprisonment imposed is one year or more, probably is “forgery” AF. If the loss to the complainant(s) exceeds \$10,000, might also be “fraud” AF especially if record of conviction shows element of intent to defraud or deceive (as opposed to injure). | Yes. | | <p>Tip for immigration lawyers:</p> <p>1. Argue not “fraud” AF where government has failed to establish loss of more than \$10,000 specifically tied to convicted conduct (e.g., if plea colloquy admits to loss amount of no more than \$10,000). See <i>Nijhawan v. Holder</i>, 129 S. Ct. 2294 (2009).</p> |
| Criminal possession of a forged instrument, 3rd degree Class A misdemeanor | 170.20 | If term of imprisonment imposed is one year, is probably “forgery” AF. If the loss to the complainant(s) exceeds \$10,000, might also be “fraud” AF especially if record of conviction shows element of intent to defraud or deceive (as opposed to injure). | Yes. | | <p>Tips for defense lawyers:</p> <p>1. To avoid “forgery” AF, avoid sentence imposed of one year (get 364 days or less).</p> <p>2. To decrease “fraud” AF risk, specify in the plea colloquy that the loss amount did not exceed \$10,000 (see Appendix L); and/or specify in plea colloquy that offense was committed with intent to injure (as opposed to with intent to deceive or defraud). See <i>Valansi v. Ashcroft</i>, 278 F.3d 203 (3d Cir. 2002).</p> <p>3. To decrease CIMT risk, consider alternative offenses such as Disorderly Conduct (see below, PL 240.20) or Trespass (see above, PL 140.05). If these are not possible, consider alternative offenses that may preserve the potential argument that the conviction is not a CIMT, such as Offering a False Instrument for Filing, 2nd Degree (see below, PL 175.30) or Making a Punishable False Written Statement (see below, PL 210.45); if these are not possible <i>and</i> if client has no prior CIMTs, consider alternative offense of <i>attempt</i> (PL 110.00) to commit 170.20, which as a B misdemeanor will not trigger deportability as “1 CIMT within 5 years of admission.”</p> <p>Tip for immigration lawyers:</p> <p>1. If government alleges “fraud or deceit” AF, argue not AF (1) because fraud or deceit is not a necessary element of the offense; (2) where government has failed to establish loss of more than \$10,000 specifically tied to convicted conduct (e.g., if plea colloquy admits to loss amount of no more than \$10,000). See <i>Nijhawan v. Holder</i>, 129 S. Ct. 2294 (2009).</p> |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|---|---|--|--|
| Criminal possession of a forged instrument, 2nd degree Class D felony | 170.25 | If term of imprisonment imposed is one year or more, is probably "forgery" AF. If the loss to the complainant(s) exceeds \$10,000, might also be "fraud" AF especially if record of conviction shows element of intent to defraud or deceive (as opposed to injure). | Yes. | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid "forgery" AF, avoid sentence imposed of one year or more (get 364 days or less) if possible. To decrease "fraud" AF risk, specify in the plea colloquy that the loss amount did not exceed \$10,000 (see Appendix L); and/or specify in plea colloquy that offense was committed with intent to injure (as opposed to with intent to deceive or defraud). See <i>Valansi v. Ashcroft</i>, 278 F.3d 203 (3d Cir. 2002). Consider alternative offenses that may preserve the potential argument that the conviction is not a CIMT such as Offering a False Instrument for Filing, 2nd (see below, PL 175.30) or Making a Punishable False Written Statement (see below, PL 210.45). <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> If government alleges "fraud or deceit" AF, argue not AF (1) because fraud or deceit is not a necessary element of the offense; (2) where government has failed to establish loss of more than \$10,000 specifically tied to convicted conduct (e.g., if plea colloquy admits to loss amount of no more than \$10,000). See <i>Nijhawan v. Holder</i>, 129 S. Ct. 2294 (2009). |
| Criminal possession of a forged instrument, 1st degree Class C felony | 170.30 | If term of imprisonment imposed is one year or more, is probably "forgery" AF. If the loss to the complainant(s) exceeds \$10,000, might also be "fraud" AF, especially if record of conviction shows element of intent to defraud or deceive (as opposed to injure). | Yes. | | <p>Tip for defense lawyers:</p> <ol style="list-style-type: none"> To decrease "fraud" AF risk, specify in the plea colloquy that the loss amount did not exceed \$10,000 (see Appendix L); and/or specify in plea colloquy that offense was committed with intent to injure (as opposed to with intent to deceive or defraud). See <i>Valansi v. Ashcroft</i>, 278 F.3d 203 (3d Cir. 2002). |
| Tampering with public records, 2nd degree Class A misdemeanor | 175.20 | Probably NOT. | Maybe. | | <p>Tip for defense lawyers:</p> <ol style="list-style-type: none"> To avoid CIMT risk, consider alternative offenses such as Disorderly Conduct (see below, PL 240.20) or Trespass (see above, PL 140.05). If these are not possible <i>and</i> if client has no prior CIMT, consider alternative offense of <i>attempt</i> (PL 110.00) to commit PL 175.20, which as a B misdemeanor will not trigger deportability as "1 CIMT within 5 years of admission." |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|--|--|--|---|
| Tampering with public records, 1st degree Class E felony | 175.25 | If the loss to the victim(s) exceeds \$10,000, might be "fraud" AF. | Yes. | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To decrease "fraud" AF risk, specify in the plea colloquy that the loss amount did not exceed \$10,000 (see Appendix L). 2. Consider alternative offenses that may preserve the potential argument that the conviction is not a CIMT such as Tampering with Public Records, 2d degree (PL 175.20, above), Offering a False Instrument for Filing, 2nd (see below, PL 175.30) or Making a Punishable False Written Statement (see below, PL 210.45). |
| Offering a false instrument for filing, 2nd degree Class A misdemeanor | 175.30 | Probably NOT. | Maybe, especially if defendant intended to defraud or if public office or servant was defrauded or offense conduct otherwise impaired efficiency of government function. See Note on CIMT offenses, <i>supra</i> . | | <p>Tip for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid CIMT risk, consider alternative offenses such as Disorderly Conduct (see below, PL 240.20) or Trespass (see above, PL 140.05). To reduce CIMT risk, specify in plea colloquy that defendant did not intend to defraud, that public office or servant was not defrauded and that offense conduct did not otherwise impair efficiency of any government function. See Note on CIMT offenses, <i>supra</i>. If these suggestions are not possible and if client has no prior CIMT, consider alternative offense of <i>attempt</i> (PL 110.00) to commit PL 175.30, which as a B misdemeanor will not trigger deportability as "1 CIMT within 5 years of admission." |
| Offering a false instrument for filing, 1st degree Class E felony | 175.35 | If the loss to the complainant(s) exceeds \$10,000, might be "fraud" AF. | Yes. | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To decrease "fraud" AF risk, specify in the plea colloquy that the loss amount did not exceed \$10,000 (see Appendix L). 2. To preserve the potential argument that the conviction might not be a CIMT, consider alternative offenses such as Offering a False Instrument for Filing, 2nd (see above, PL 175.30) or Making a Punishable False Written Statement (see below, PL 210.45). |
| Issuing a bad check Class B misdemeanor | 190.05 | No. | Probably NOT. | | |

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|---|---------------|---|---|---|--|
| False person-ation Class B misde-meanor | 190.23 | No. | Maybe. See Note on CIMT offenses, <i>supra</i> . | | <p>Tip for defense lawyers:</p> <ol style="list-style-type: none"> To reduce CIMT risk, keep record clear of indication of whether police or peace officer was engaged in official duty at time of offense. See Note on CIMT Offenses, <i>supra</i>. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> Argue not CIMT because statute does not require that defendant intend to hinder performance of official duties or impair government function. See <i>In re Travis S.</i>, 685 N.Y.S.2d 886, 889 (N.Y. Fam. Ct. 1999) (“[T]he statute itself contains no limiting language in regard to the purpose for which an inquiry about a person’s name, address or date of birth can be made. There is no language in the statute which restricts an officer’s inquiry about a person’s name, address or date of birth to situations affording him or her a lawful right to inquire”); <i>aff’d</i>, 96 N.Y.2d 818 (2001); compare <i>Matter of Jurado</i>, 24 I&N Dec. 29 (BIA 2006). |
| Criminal impersonation, 2nd degree Class A misdemeanor | 190.25 | If the loss to the complainant(s) exceeds \$10,000, might be “fraud or deceit” AF especially if record of conviction shows element of intent to defraud (as opposed to intent to obtain a benefit or to injure) | Probably. | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To decrease “fraud” AF risk, specify in the plea colloquy that the loss amount did not exceed \$10,000 (see Appendix L); and/or specify in plea colloquy that offense was committed with intent to obtain a benefit or to injure (as opposed to with intent to defraud). See <i>Valansi v. Ashcroft</i>, 278 F.3d 203 (3d Cir. 2002). To decrease CIMT risk, consider alternative offenses such as Disorderly Conduct (see below, PL 240.20), Trespass (see above, PL, 140.05). If these are not possible, consider alternative offenses that may preserve the potential argument that the conviction is not a CIMT, such as Offering a False Instrument for Filing, 2nd (see below, PL 175.30) or Making a Punishable False Written Statement (see below, PL 210.45). If these are not possible <i>and</i> if client has no prior CIMT, consider alternative offense of <i>attempt</i> (PL 110.00) to commit PL 190.25, which as a B misdemeanor will not trigger deportability as “1 CIMT within 5 years of admission.” <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> If government alleges “fraud or deceit” AF, argue not AF (1) because fraud or deceit is not a necessary element of the offense; (2) in any event government has failed to prove that loss to complainant exceeds \$10,000 (e.g., if plea colloquy admits to loss amount of no more than \$10,000). |

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|--|--------------|---|--|--|---|
| Criminal impersonation, 1st degree Class E felony | 190.26 | If the loss to the complainant(s) exceeds \$10,000, might be "fraud or deceit" AF. | Probably. | | Tip for defense lawyers: 1. To decrease "fraud" AF risk, specify in the plea colloquy that the loss amount did not exceed \$10,000 (see Appendix L). |
| Resisting arrest Class A misdemeanor | 205.30 | No. | Probably NOT. | | |
| Hindering prosecution, 3rd degree Class A misdemeanor | 205.55 | No, unless term of imprisonment imposed is one year, in which case probably is "obstruction of justice" AF. | Probably (See Appendix E). | Probably is NOT CSO, etc., even if underlying offense was CSO, etc. (See Appendix E). | Tip for defense lawyers: 1. To avoid "obstruction of justice" AF, avoid sentence imposed of one year (get 364 days or less). |
| Hindering prosecution, 2nd degree Class E felony | 205.60 | If term of imprisonment imposed is one year or more, probably is "obstruction of justice" AF. | Probably (See Appendix E). | Probably is NOT CSO, etc., even if underlying offense was CSO, etc. (See Appendix E). | Tip for defense lawyers: 1. To avoid "obstruction of justice" AF, avoid sentence imposed of one year or more (get 364 days or less) if possible. |
| Hindering prosecution, 1st degree Class D felony | 205.65 | If term of imprisonment imposed is one year or more, probably is "obstruction of justice" AF. | Maybe. | Probably is NOT CSO, etc., even if underlying offense was CSO, etc. (See Appendix E). | Tip for defense lawyers: 1. To avoid "obstruction of justice" AF, avoid sentence imposed of one year or more (get 364 days or less) if possible. |
| Perjury, 3rd degree Class A misdemeanor | 210.05 | NO, unless term of imprisonment imposed is one year, in which case might be "perjury" AF. | Maybe, especially where perjured statement is material to proceeding See Note on CIMT offenses, <i>supra</i> . | | Tips for defense lawyers: 1. To avoid "perjury" AF, avoid sentence imposed of one year (get 364 days or less). 2. To decrease CIMT risk, consider alternative offenses such as Disorderly Conduct (see below, PL 240.20) or Trespass (see above, PL 140.05). If this is not possible, to decrease CIMT risk, specify in plea colloquy that perjured statement was not material. See Note on CIMT offenses, <i>supra</i> . If these suggestions are not possible <i>and</i> if client has no prior CIMT, consider alternative offense of <i>attempt</i> (PL 110.00) to commit PL 210.05, which as a B misdemeanor will not trigger deportability as "1 CIMT within 5 years of admission." <i>(Tips for immigration lawyers continued on next page)</i> |

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|--|--------------|--|---|--|--|
| <i>(continued)</i> | 210.05 | <i>(see previous page)</i> | <i>(see previous page)</i> | <i>(see previous page)</i> | <i>(continued)</i> |
| Perjury, 3rd degree Class A misdemeanor | 210.10 | If term of imprisonment imposed is one year or more, might be "perjury" AF. | Yes. | | Tip for immigration lawyers: 1. Argue NOT CIMT because materiality is not a required element for conviction. See, e.g., <i>Matter of R</i> , 2 I&N Dec. 819 (BIA 1947), <i>Matter of H</i> , 1 I&N Dec. 669 (BIA 1943). |
| Perjury, 2nd degree Class E felony | 210.15 | If term of imprisonment imposed is one year or more, is probably "perjury" AF. Probably NOT. | Yes | | Tip for defense lawyers: 1. To avoid "perjury" AF, avoid sentence imposed of one year (get 364 days or less) if possible. 2. To decrease CIMT risk, consider alternative offenses such as Perjury 3rd (see above, PL 210.05). |
| Perjury, 1st degree Class D felony | 210.45 | Probably NOT. | Maybe. | | Tip for defense lawyers: 1. To avoid "perjury" AF, avoid sentence imposed of one year (get 364 days or less) if possible. |
| Making a punishable false written statement Class A misdemeanor | 215.50 | No, unless term of imprisonment imposed is one year, in which case might be "obstruction of justice" AF. | Maybe. | | Tip for defense lawyers: 1. To avoid CIMT risk, consider alternative offenses such as Disorderly Conduct (see below, PL 240.20) or Trespass (see above, PL 140.05). If these are not possible and if client has no prior CIMT, consider alternative offense of <i>attempt</i> (PL 110.00) to commit PL 210.45, which as a B misdemeanor will not trigger deportability as "1 CIMT within 5 years of admission." Tips for defense lawyers: 1. To avoid AF, avoid sentence imposed of one year (get 364 days or less). 2. If allegation involves violation of order of protection ("OOP"), to avoid deportability as a "violation of protection order," avoid subsection (3) and consider alternative offenses such as Disorderly Conduct (see below, PL 240.20), Criminal Nuisance (see below, PL 240.45) or Criminal Trespass (see above, PL 140.15). If a plea to subsection (3) is unavoidable, to reduce risk of deportability for violation of protective order, specify in plea colloquy that defendant did NOT violate any portion of the OOP involving protection against credible threats of violence, repeated harassment, or bodily injury or, at a minimum, keep record vague concerning nature of violation of OOP. 3. To decrease CIMT risk deportability, consider alternative offenses such as Disorderly Conduct (see below, PL 240.20), Resisting Arrest (see above, PL 205.30) or Criminal Trespass (see above, PL 140.15). |

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|---|--------------|--|---|---|---|
| Criminal contempt, 1st degree Class E felony | 215.51 | If term of imprisonment imposed is one year or more, might be "obstruction of justice" AF. If term of imprisonment imposed is one year or more, subsections b(i), b(ii), b(v) and b(vi) probably are "crime of violence." AF, and subsections (b)(iii), (b)(iv), (c), and (d) might be "crime of violence" AF. | Maybe. | If conviction involves violation of an order of protection, subsection (b) probably triggers deportability under CODV clause regarding "violators of protection orders" and subsections (c) and (d) might trigger such deportability. Subsection (b)(i) is FO if record of conviction establishes that offense involved a firearm | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid "obstruction of justice" or "crime of violence" AF, avoid sentence imposed of one year or more (get 364 days or less) if possible. 2. If firearm use is alleged, to minimize FO risk avoid subsection (b)(i) and consider alternative offenses that do not have firearms as an element of the crime, such as subsections (1) or (2) of Attempted Assault, 3rd Degree (see above, PL 110/120.00(1) or (2)). If pleading to subsection (b)(i) cannot be avoided, try to keep out of record of conviction that the weapon was a firearm. 3. If allegation involves violation of protection order, to avoid deportability as a "violator of protection order," avoid subsections (b), (c) and (d) and consider alternative offenses such as Disorderly Conduct (see below, PL 240.20), Criminal Nuisance (see below, PL 240.45), Criminal Trespass (see above, PL 140.15) or subsections (1) or (2) of Attempted Assault, 3rd Degree (see above, PL 110/120.00(1) or (2)). If a plea to subsection (c) or (d) is unavoidable, to reduce risk of deportability for violation of protective order, specify in plea colloquy that defendant did NOT violate any portion of the OOP involving protection against credible threats of violence, repeated harassment, or bodily injury or, at a minimum, keep record vague concerning nature of violation of OOP. |
| Bail jumping, 3rd degree Class A misdemeanor | 215.55 | Might be "bail jumping" AF if record of conviction establishes that defendant failed to appear in connection with any felony charge, OR that defendant failed to appear for <i>service of a sentence</i> if the underlying offense is punishable by imprisonment for a term of 5 years or more. | No. | | |
| Bail jumping, 2nd degree Class E felony | 215.56 | Is "bail jumping" AF. | No. | | |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMIT)? [See Note on CIMIT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|---|---|---|--|
| Bail jumping, 2nd degree Class D felony | 215.57 | Is "bail jumping" AF. | No. | | |
| Failing to respond to an appearance ticket Violation | 215.58 | Probably NOT. | No. | | |
| CPCS, 7th degree Class A misdemeanor | 220.03 | NO if this is a first drug offense, unless record of conviction (ROC) shows possession any amount of flunitrazepam, in which case is "drug trafficking" AF. If offense conduct predates 8/3/2010 and involves more than 5g of crack, might be "drug trafficking crime" AF. If this is a second or subsequent drug offense, might be "drug trafficking" AF if ROC establishes a controlled substance as defined in 21 USC 802 and contains explicit finding of prior drug conviction that was final at time of commission of instant offense. (see App. G, § 1.b). | Probably NOT. | Is CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid risk of "drug trafficking" AF or CSO, if possible negotiate diversion without a guilty plea. See CPL 216.05(11). To avoid risk of CSO, if possible consider alternative offenses such as Disorderly Conduct (see below, PL 240.20), Criminal Nuisance (see below, PL 240.45), or Hindering Prosecution, 3rd Degree (see above, PL 205.55); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). If pleading to this offense cannot be avoided, if possible, keep out of record of conviction identification of the controlled substance involved. <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> Argue NOT CSO if government failed to prove that the controlled substance involved is one defined in 21 USC 802. Argue that second or subsequent offense is NOT "drug trafficking crime" AF because prosecution did not meaningfully correspond to federal recidivist prosecution under 21 USC 844(a), 851. See <i>Carachuri-Rosendo v. Holder</i>, 130 S. Ct. 2577 (2010). |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|--|---|--|--|
| CPCS, 5th degree Class D felony | 220.06 | Conviction under “intent to sell” subsection (1) probably is “drug trafficking” AF if record of conviction (ROC) establishes a controlled substance as defined in 21 USC 802. If this is a first drug offense, any other subsection is NOT a “drug trafficking” AF, unless ROC shows possession of any amount of flunitrazepam, in which case is “drug trafficking” AF, except that if offense conduct predates 8/3/2010 and involves more than 5g of crack, might be “drug trafficking crime” AF. If this is a second or subsequent drug offense, any subsection might be “drug trafficking” AF if ROC establishes a controlled substance as defined in 21 USC 802 and contains explicit finding of prior drug conviction that was final at time of commission of instant offense (see App. G, § 1. b). | Subsection (1) requiring “intent to sell” might be CIMT. Subsections (2) through (8) probably are NOT CIMT. | Is CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid risk of “drug trafficking” AF or CSO, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). To decrease risk of “drug trafficking” AF, avoid subsection (1) in particular. To avoid risk of CSO, if possible consider alternative offenses such as Hindering Prosecution (see above, PL 205.55-205.65); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). If pleading to this offense cannot be avoided, if possible avoid subsection (1) and keep out of record of conviction identification of the controlled substance involved. If pleading to subsection (1) is unavoidable, keep record of conviction consistent with intent to <i>offer</i> to sell. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App’x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> Argue subsection (1) is NOT “drug trafficking” AF because it encompasses intent to <i>offer</i> to sell. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App’x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). 2. Argue NOT CSO if government failed to prove that the controlled substance involved is one defined in 21 USC 802. Argue that second or subsequent offense is NOT “drug trafficking crime” AF because prosecution did not meaningfully correspond to federal recidivist prosecution under 21 USC 844(a), 851. Argue that subsection (1) requiring “intent to sell” is NOT “drug trafficking crime” AF because definition of “sell” under PL 220.00(1) includes offers to give drugs to another, which is not a felony under the federal Controlled Substances Act. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App’x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|---|---|--|---|
| CPCS, 4th degree Class C felony | 220.09 | Conviction under “intent to sell” subsection (13) probably is “drug trafficking” AF. If this is a first drug offense, any other subsection is NOT a “drug trafficking” AF, unless ROC shows possession any amount of flunitrazepam, in which case probably is “drug trafficking” AF, except that if offense conduct predates 8/3/2010 and involves more than 5g of crack, might be “drug trafficking” AF. If this is a second or subsequent drug offense, any subsection might be “drug trafficking” AF if ROC establishes a controlled substance as defined in 21 USC 802 and contains explicit finding of prior drug conviction that was final at time of commission of instant offense (see App. G, § 1. b). | Subsection (13) requiring “intent to sell” might be CIMT. All other subsections probably are NOT CIMT because they do not require “intent to sell”. | Is CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid risk of “drug trafficking” AF or CSO, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). To decrease risk of “drug trafficking” AF, avoid subsection (13) in particular. To avoid risk of CSO, if possible consider alternative offenses such as Hindering Prosecution (see above, PL 205.55-205.65); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). If pleading to this offense cannot be avoided, if possible avoid subsection (13) and keep out of record of conviction identification of the controlled substance involved. If pleading to subsection (13) is unavoidable, keep record of conviction consistent with intent to <i>offer</i> to sell. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App’x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> Argue NOT CSO if government failed to prove that the controlled substance involved is one defined in 21 USC 802. Argue that second or subsequent offense is NOT “drug trafficking crime” AF because prosecution did not meaningfully correspond to federal recidivist prosecution under 21 USC 844(a), 851. See <i>Carachuri-Rosendo v. Holder</i>, 130 S. Ct. 2577 (2010). Argue that subsection (13) requiring intent to sell is NOT “drug trafficking crime” AF because definition of “sell” under PL 220.00(1) includes offers to give drugs to another, which is not a felony under the federal Controlled Substances Act. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App’x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). |

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|--|--|--|--|
| CPCS, 3rd degree Class B felony | 220.16 | Conviction under “intent to sell” subsections (1) through (7) probably is “drug trafficking” AF if record of conviction (ROC) establishes a controlled substance as defined in 21 USC 802. If this is a first drug offense, any other subsection is NOT a “drug trafficking” AF unless ROC shows possession of any amount of flunitrazepam, in which case probably is “drug trafficking” AF, except that if offense conduct predates 8/3/2010 and involves more than 5g of crack, might be “drug trafficking crime” AF. If this is a second or subsequent drug offense, if ROC establishes a controlled substance as defined in 21 USC 802 and contains explicit finding of prior drug conviction that was final at time of commission of instant offense, any such other subsection might be “drug trafficking” AF (see App. G, § 1.b). | Subsections (1) through (7) requiring “intent to sell” might be CIMT. Subsections (8) through (13) probably are NOT CIMT because they do not require “intent to sell.” | Is CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid risk of “drug trafficking” AF or CSO, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). To decrease risk of “drug trafficking” AF, avoid subsections (1) through (7) in particular. To avoid risk of CSO, if possible consider alternative offenses such as Hindering Prosecution (see above, PL 205.55-205.65); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). If pleading to this offense cannot be avoided, if possible avoid subsections (1) through (7) and keep out of record of conviction identification of the controlled substance involved. If pleading to subsections (1) through (7) is unavoidable, keep record of conviction consistent with intent to offer to sell. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App’x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> Argue NOT CSO if government failed to prove that the controlled substance involved is one defined in 21 USC 802. Argue that subsections requiring intent to sell are NOT “drug trafficking crime” AF because definition of “sell” under PL 220.00(1) includes offers to give drugs to another, which is not a felony under the federal Controlled Substances Act. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App’x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). Argue that second or subsequent offense is NOT “drug trafficking crime” AF because prosecution did not meaningfully correspond to federal recidivist prosecution under 21 USC 844(a), 851. See <i>Carachuri-Rosendo v. Holder</i>, 130 S. Ct. 2577 (2010). |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|--|---|--|---|
| CPCS, 2nd degree Class A-II felony | 220.18 | If this is a first drug offense, it is NOT a “drug trafficking” AF, unless record of conviction (ROC) establishes possession of any amount of flunitrazepam, in which case probably is “drug trafficking” AF, or unless offense conduct predates 8/3/2010 and involves more than 5g of crack, in which case might be “drug trafficking crime” AF. If this is a subsequent drug offense, if ROC establishes a controlled substance as defined in 21 USC 802 and contains explicit finding of prior drug conviction that was final at time of commission of instant offense, might be “drug trafficking” AF (see App. G, § 1.b). | Probably NOT. | Is CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid risk of “drug trafficking” AF or CSO, if possible negotiate diversion without a guilty plea. See CPL 216.05(11). 2. To avoid risk of CSO, if possible consider alternative offenses such as Hindering Prosecution (see above, PL 205.55-205.65); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). 3. If pleading to this offense cannot be avoided, if possible keep out of record of conviction identification of the controlled substance involved. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue that second or subsequent offense is NOT “drug trafficking crime” AF because prosecution did not meaningfully correspond to federal recidivist prosecution under 21 USC 844(a), 851. See <i>Carachuri-Rosendo v. Holder</i>, 130 S. Ct. 2577 (2010). |

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|--|--------------|---|---|--|---|
| CPCS, 1st degree Class A-I felony | 220.21 | If this is a first drug offense, it is NOT a "drug trafficking" AF, unless record of conviction (ROC) establishes possession of any amount of flunitrazepam, in which case probably is "drug trafficking" AF, or unless offense conduct predates 8/3/2010 and involves more than 5g of crack, in which case might be "drug trafficking crime" AF. If this is a second or subsequent drug offense, if ROC establishes a controlled substance as defined in 21 USC 802 and contains explicit finding of prior drug conviction that was final at time of commission of instant offense, might be "drug trafficking" AF (see App. G, § 1.b) | Probably NOT. | Would be CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid risk of "drug trafficking" AF or CSO, if possible negotiate diversion without a guilty plea. See CPL 216.05(11). 2. To avoid risk of CSO, if possible consider alternative offenses such as Hindering Prosecution (see above, PL 205.55-205.65); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). 3. If pleading to this offense cannot be avoided, if possible keep out of record of conviction identification of the controlled substance involved. <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue NOT CSO if government failed to prove that the controlled substance involved is one defined in 21 USC 802. 2. Argue that second or subsequent offense is NOT "drug trafficking crime" AF because prosecution did not meaningfully correspond to federal recidivist prosecution under 21 USC 844(a), 851. See <i>Carachuri-Rosendo v. Holder</i>, 130 S. Ct. 2577 (2010). |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|---|---|--|--|
| Use of a Child to Commit a Controlled Substance Offense E Felony | 220.28 | Probably is “drug trafficking” AF if record of conviction establishes a controlled substance as defined in 21 USC 802 | Probably. | Is CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. Probably CAC | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid risk of “drug trafficking” AF and CSO, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). 2. To decrease risk of “drug trafficking” AF and CIMT, if at all possible avoid this drug offense altogether and consider alternative offense of CPCS, 7th degree, or subsections (2) – (8) of CPCS, 5th degree (see above, PL 220.03 & 220.06) or offenses described in Tip 3 below. 3. To avoid risk of CSO, if possible consider alternative offenses such as Hindering Prosecution (see above, PL 205.55-205.65); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). 4. If pleading to this offense cannot be avoided, if possible keep out of record of conviction identification of the controlled substance involved. If possible, also keep record of conviction consistent with <i>offer</i> to sell. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App’x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue NOT CSO or AF if government failed to prove that the controlled substance involved is one defined in 21 USC 802. 2. Argue NOT “drug trafficking crime” AF because definition of “sell” under PL 220.00(1) includes offers to give drugs to another, which is not a felony under the federal Controlled Substances Act. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App’x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007) |

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|--|--------------|--|---|--|---|
| CSCS, 5th degree Class D felony | 220.31 | Is probably “drug trafficking” AF if record of conviction establishes a controlled substance as defined in 21 USC 802. | Probably. | Is CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid risk of “drug trafficking” AF and CSO, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). To decrease risk of “drug trafficking” AF and CMT, if at all possible avoid this drug offense altogether and consider alternative offense of CPCS, 7th degree, or subsections (2) – (8) of CPCS, 5th degree (see above, PL 220.03 & 220.06) or offenses described in Tip 3 below. To avoid risk of CSO, if possible consider alternative offenses such as Hindering Prosecution (see above, PL 205.55-205.65); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). If pleading to this offense cannot be avoided, if possible keep out of record of conviction identification of the controlled substance involved. If possible, also keep record of conviction consistent with <i>offer</i> to sell. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App’x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> Argue NOT CSO or AF if government failed to prove that the controlled substance involved is one defined in 21 USC 802. Argue NOT “drug trafficking crime” AF because definition of “sell” under PL 220.00(1) includes offers to give drugs to another, which is not a felony under the federal Controlled Substances Act. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App’x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007) |

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|--|---|--|---|
| CSCS, 4th degree Class C felony | 220.34 | Is probably "drug trafficking" AF if record of conviction establishes a controlled substance as defined in 21 USC 802. | Probably. | Is CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid risk of "drug trafficking" AF or CSO, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). 2. To decrease risk of "drug trafficking" AF, if at all possible avoid this drug offense altogether and consider alternative offenses described in Tip 3 below. 3. To avoid risk of CSO, if possible consider alternative offenses such as Hindering Prosecution (see above, PL 205.55-205.65); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). 4. If pleading to a felony controlled substance offense cannot be avoided, to preserve possible argument against AF or CIMT, if at all possible plead instead to subsection (2) through (8) of CPCS, 5th degree (see above, PL 220.06) or to subsections (1) through (12) or (14) to (15) of CPCS 4th degree (see above, PL 220.09). 5. If pleading to this offense cannot be avoided, if possible keep out of record of conviction identification of the controlled substance involved. If possible, also keep record of conviction consistent with <i>offer to sell</i>. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App'x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue NOT CSO or AF if government failed to prove that the controlled substance involved is one defined in 21 USC 802. 2. Argue NOT "drug trafficking crime" AF because definition of "sell" under PL 220.00(1) includes offers to give drugs to another, which is not a felony under the federal Controlled Substances Act. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App'x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007) |

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMIT)? [See Note on CIMIT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|--|---|--|---|
| CSCS, 3rd degree Class B felony | 220.39 | Is probably "drug trafficking" AF if record of conviction establishes a controlled substance as defined in 21 USC 802. | Probably. | Is CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid risk of "drug trafficking" AF or CSO, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). 2. To decrease risk of "drug trafficking" AF, if at all possible avoid this drug offense altogether and consider alternative offenses described in Tip 3 below. 3. To avoid risk of CSO, if possible consider alternative offenses such as Hindering Prosecution (see above, PL 205.55-205.65); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). 4. If pleading to a felony controlled substance offense cannot be avoided, to preserve possible argument against AF or CIMIT, if at all possible plead instead to subsection (2) through (8) of CPCS, 5th degree (see above, PL 220.06), to subsections (1) through (12) or (14) to (15) of CPCS 4th degree (see above, PL 220.09), or to subsections (8) through (13) of CPCS, 3rd degree (see above, PL 220.16). 5. If pleading to this offense cannot be avoided, if possible keep out of record of conviction identification of the controlled substance involved. If possible, also keep record of conviction consistent with offer to sell. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App'x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue NOT CSO or AF if government failed to prove that the controlled substance involved is one defined in 21 USC 802. 2. Argue NOT "drug trafficking crime" AF because definition of "sell" under PL 220.00(1) includes offers to give drugs to another, which is not a felony under the federal Controlled Substances Act. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App'x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMIT)? [See Note on CIMIT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
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| CSCS, 2nd degree Class A-II felony | 220.41 | Is probably "drug trafficking" AF if record of conviction establishes a controlled substance as defined in 21 USC 802. | Probably. | Is CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid risk of "drug trafficking" AF or CSO, if possible negotiate diversion without a guilty plea. See CPL 216.05(11). To decrease risk of "drug trafficking" AF, if at all possible avoid this drug offense altogether and consider alternative offenses described in Tip 3 below. To avoid risk of CSO, if possible consider alternative offenses such as Hindering Prosecution (see above, PL 205.55-205.65); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). If pleading to a felony controlled substance offense cannot be avoided, to preserve possible argument against AF or CIMIT, if at all possible plead instead to subsection (2) through (8) of CPCS, 5th degree (see above, PL 220.06), to subsections (1) through (12) or (14) to (15) of CPCS 4th degree (see above, PL 220.09), to subsections (8) through (13) of CPCS, 3rd degree (see above, PL 220.16), or to any subsection of CPCS, 2nd degree (see above, PL 220.18). If pleading to this offense cannot be avoided, if possible keep out of record of conviction identification of the controlled substance involved. If possible, also keep record of conviction consistent with <i>offer</i> to sell. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App'x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> Argue NOT CSO or AF if government failed to prove that the controlled substance involved is one defined in 21 USC 802. Argue NOT "drug trafficking crime" AF because definition of "sell" under PL 220.00(1) includes offers to give drugs to another, which is not a felony under the federal Controlled Substances Act. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App'x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--------------------------------------|--------------|--|---|--|--|
| CSCS, 1st degree Class A-I felony | 220.43 | Is probably "drug trafficking" AF if record of conviction establishes a controlled substance as defined in 21 USC 802. | Probably. | Is CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid risk of "drug trafficking" AF or CSO, if possible negotiate diversion without a guilty plea. See CPL 216.05(11). 2. To decrease risk of "drug trafficking" AF, if at all possible avoid this drug offense altogether and consider alternative offenses described in Tip 3 below. 3. To avoid risk of CSO, if possible consider alternative offenses such as Hindering Prosecution (see above, PL 205.55-205.65); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). 4. If pleading to a felony controlled substance offense cannot be avoided, to preserve possible argument against AF or CIMT, if at all possible plead instead to subsection (2) through (8) of CPCS, 5th degree (see above, PL 220.06), to subsections (1) through (12) or (14) to (15) of CPCS 4th degree (see above, PL 220.09), to subsections (8) through (13) of CPCS, 3rd degree (see above, PL 220.16), to any subsection of CPCS, 2nd or 1st degree (see above, PL 220.18 & 220.21). 5. If pleading to this offense cannot be avoided, if possible keep out of record of conviction identification of the controlled substance involved. If possible, also keep record of conviction consistent with offer to sell. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App'x 413 (5th Cir. 2010), and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue NOT CSO or AF if government failed to prove that the controlled substance involved is one defined in 21 USC 802. 2. Argue NOT "drug trafficking crime" AF because definition of "sell" under PL 220.00(1) includes offers to give drugs to another, which is not a felony under the federal Controlled Substances Act. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App'x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|--|---|--|--|
| CSCS in or near school grounds Class B felony | 220.44 | Is probably "drug trafficking" AF if record of conviction establishes a controlled substance as defined in 21 USC 802. | Probably. | Is CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid risk of "drug trafficking" AF or CSO, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). 2. To decrease risk of "drug trafficking" AF, if at all possible avoid this drug offense altogether and consider alternative offenses described in Tip 3 below. 3. To avoid risk of CSO, if possible consider alternative offenses such as Hindering Prosecution (see above, PL 205.55-205.65); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). 4. If pleading to a felony controlled substance offense cannot be avoided, to preserve possible argument against AF or CIMT, if at all possible plead instead to subsection (2) through (8) of CPCS, 5th degree (see above, PL 220.06). 5. If pleading to this offense cannot be avoided, if possible keep out of record of conviction identification of the controlled substance involved. If possible, also keep record of conviction consistent with offer to sell. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App'x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue NOT CSO or AF if government failed to prove that the controlled substance involved is one defined in 21 USC 802. 2. Argue NOT "drug trafficking crime" AF because definition of "sell" under PL 220.00(1) includes offers to give drugs to another, which is not a felony under the federal Controlled Substances Act. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App'x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|-------------------------|---|--|--|
| Criminally possessing a hypodermic instrument Class A misdemeanor | 220.45 | No. | Probably NOT. | Is probably CSO. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. If defendant is also charged with Criminal Injection of a Narcotic Drug (PL 220.46, below) or another eligible felony, to avoid CSO if possible negotiate diversion without guilty plea pursuant to CPL 216.05(4). If that is not possible, try to negotiate diversion without guilty plea under residual provision, 216.05(11). 2. To decrease risk of CSO, if possible consider alternative offenses such as Disorderly Conduct (see below, PL 240.20), Criminal Nuisance (see below, PL 240.45), or Hindering Prosecution, 3rd Degree (see above, PL 205.55); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue not a CSO because conviction does not require that possession of hypodermic relate to use of federally scheduled controlled substance as defined in 21 USC 802 and/or that government has not shown that possession related to such a substance. <i>But see Matter of Espinoza</i>, 25 I&N Dec. 118 (BIA 2009) (rejecting this argument in context of inadmissibility finding). |

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMIT)? [See Note on CIMIT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|---|---|--|---|
| Criminal injection of a narcotic drug Class E felony | 220.46 | If this is a first offense, it is probably NOT a “drug trafficking” AF, unless record of conviction (ROC) establishes possession of any amount of flunitrazepam, in which case probably is “drug trafficking” AF, or unless offense conduct predates 8/3/2010 and involves more than 5g of crack, in which case might be “drug trafficking crime” AF. If this is a second or subsequent offense, if ROC establishes a controlled substance as defined in 21 USC 802 contains explicit finding of prior drug conviction that was final at time of commission of instant offense, might be “drug trafficking” AF (see App. G, § 1.b). | Maybe. | Is CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid risk of “drug trafficking” AF or CSO, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). 2. To avoid risk of CSO, if possible consider alternative offenses such as Hindering Prosecution (see above, PL 205.55-205.65); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). 3. If pleading to this offense cannot be avoided, if possible keep out of record of conviction identification of the controlled substance involved. <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue NOT CSO if government failed to prove that the controlled substance involved is one defined in 21 USC 802. 2. Argue that second or subsequent offense is NOT “drug trafficking crime” AF because prosecution did not meaningfully correspond to federal recidivist prosecution under 21 USC 844(a), 851. See <i>Carachuri-Rosendo v. Holder</i>, 130 S. Ct. 2577 (2010). |

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| Offense | NYP Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|----------------|--|--|--|--|
| Criminal sale of a controlled substance to a child Class B felony | 220.48 | Is probably “drug trafficking” AF if record of conviction establishes a controlled substance as defined in 21 USC 802. | Probably. | Is CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. Probably CAC. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid risk of “drug trafficking” AF or CSO, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). To decrease risk of “drug trafficking” AF, if at all possible avoid this drug offense altogether and consider alternative offenses described in Tip 3 below. To avoid risk of CSO, if possible consider alternative offenses such as Hindering Prosecution (see above, PL 205.55-205.65); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). If pleading to a felony controlled substance offense cannot be avoided, to preserve possible argument against AF or CIMT, if at all possible plead instead to subsection (2) through (8) of CPCS, 5th degree (see above, PL 220.06), to subsections (1) through (12) or (14) to (15) of CPCS 4th degree (see above, PL 220.09), or to subsections (8) through (13) of CPCS, 3rd degree (see above, PL 220.16). If pleading to this offense cannot be avoided, if possible keep out of record of conviction identification of the controlled substance involved. If possible, also keep record of conviction consistent with <i>offer</i> to sell. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App’x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> Argue NOT CSO or AF if government failed to prove that the controlled substance involved is one defined in 21 USC 802. Argue NOT “drug trafficking crime” AF because definition of “sell” under PL 220.00(1) includes offers to give drugs to another, which is not a felony under the federal Controlled Substances Act. See, e.g., <i>Davila v. Holder</i>, 381 Fed. App’x 413 (5th Cir. 2010) and cases cited therein; cf. <i>Sandoval-Lua v. Gonzales</i>, 499 F.3d 1121 (9th Cir. 2007). |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|------------------------------------|---|--|--|
| Criminally using drug paraphernalia, 2nd degree Class A misdemeanor | 220.50 | Might be “drug trafficking” AF. | Maybe. | Probably is CSO. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid risk of CSO, if possible consider alternative offenses such as Disorderly Conduct (see below, PL 240.20), Criminal Nuisance (see below, PL 240.45), or Hindering Prosecution, 3rd Degree (see above, PL 205.55); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08) or if this is not possible, Criminally Possessing a Hypodermic Instrument (see above, PL 220.45). If none of the strategies in Tip 1 above is possible, to decrease risk of “drug trafficking” AF consider alternative offense of CPCS, 7th degree (see above, PL 220.03). |
| Criminally using drug paraphernalia, 1st degree Class D felony | 220.55 | Probably is “drug trafficking” AF. | Maybe. | Probably is CSO. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid risk of “drug trafficking” AF and CIMT, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). To decrease risk of “drug trafficking” AF, if at all possible, avoid this felony drug offense altogether and consider alternative offense of CPCS, 7th degree, or subsections (2) – (8) of CPCS, 5th degree (see above, PL 220.03 & 220.06) or offenses described in Tip 3 below. To avoid risk of CSO, if possible consider alternative offenses such as Hindering Prosecution (see above, PL 205.55-205.65); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). |
| Criminal possession of precursors of CS Class E felony | 220.60 | Probably is “drug trafficking” AF. | Maybe. | Probably is CSO. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid risk of “drug trafficking” AF or CSO, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). To decrease risk of “drug trafficking” AF, if at all possible, avoid this drug offense altogether and consider alternative offense of CPCS, 7th degree, or subsections (2) – (8) of CPCS, 5th degree (see above, PL 220.03 & 220.06) or offenses described in Tip 3 below. To avoid risk of CSO, if possible consider alternative offenses such as Hindering Prosecution (see above, PL 205.55-205.65); or possibly to decrease risk of CSO consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|---|---|--|---|
| Criminal possession of methamphetamine manufacturing material, 2nd degree Class A misdemeanor | 220.70 | If ROC shows possession of any "precursor," or if ROC shows that particular "chemical reagent" or "solvent" possessed is a "listed chemical" as defined at 21 USC 802(35) and 21 CFR 1310.2(b), is "drug trafficking" AF. Possession of other substances might be "drug trafficking" AF. | Maybe. | Probably is CSO. | <p>Tip for defense lawyers:</p> <ol style="list-style-type: none"> To avoid CSO or AF risks, if possible consider alternative offenses such as Disorderly Conduct (see below, PL 240.20), Criminal Nuisance (see below, PL 240.45), or Hindering Prosecution, 3rd Degree (see above, PL 205.55). |
| Criminal possession of methamphetamine manufacturing material, 1st degree Class E felony | 220.71 | If ROC shows possession of any "precursor," or if ROC shows that particular "chemical reagent" or "solvent" possessed is a "listed chemical" as defined at 21 USC 802(35) and 21 CFR 1310.2(b), is "drug trafficking" AF. Possession of other substances is probably "drug trafficking" AF. | Maybe. | Probably is CSO. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid CSO or AF risks, if possible consider alternative offenses such as Criminal Nuisance (see below, PL 240.45), or Hindering Prosecution, 3rd Degree (see above, PL 205.55). If Tip 1 is not possible, to avoid CSO or AF risks, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). If Tips 1 and 2 are not possible, to decrease risk of "drug trafficking" AF, avoid this drug offense altogether and consider alternative offense of CPCS, 7th (see above, PL 220.03) if possible. |
| Criminal possession of precursors of methamphetamine, 1st degree Class E felony | 220.72 | Is "drug trafficking" AF. | Maybe. | Probably is CSO. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid CSO or AF risks, if possible consider alternative offenses such as Criminal Nuisance (see below, PL 240.45), or Hindering Prosecution, 3rd Degree (see above, PL 205.55). If Tip 1 is not possible, to avoid CSO or AF risks, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). If Tips 1 and 2 are not possible, to decrease risk of "drug trafficking" AF, avoid this drug offense altogether and consider alternative offense of CPCS, 7th (see above, PL 220.03) if possible. |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|---|---|---|---|
| Unlawful manufacture of methamphetamine, 3rd degree Class D felony | 220.73 | Subsection (3) is "drug trafficking" AF. Subsections (1) and (2) are "drug trafficking" AF if ROC shows possession of "precursor" or if ROC shows that any reagent(s) and/or solvent(s) possessed are "listed chemical" as defined at 21 USC 802(35) and 21 CFR 1310.2(b); possession of any other proscribed substance under subsections (1) and (2) might be "drug trafficking" AF. | Maybe. | Is CSO. | Tips for defense lawyers: 1. To avoid CSO or AF risks, if possible negotiate diversion without a guilty pursuant to CPL 216.05(4). 2. If Tip 1 is not possible, to decrease risk of "drug trafficking" AF, avoid this felony drug offense altogether and consider alternative offense of CPCS, 7th degree, or subsections (2) – (8) of CPCS, 5th degree (see above, PL 220.03 & 220.06) if possible. |
| Unlawful manufacture of methamphetamine, 2nd degree Class C felony | 220.74 | Is "drug trafficking" AF if offense conduct qualifies as "drug trafficking" AF (see Unlawful manufacture of methamphetamine, 3d degree (PL 220.73), above). | Maybe. | Is CSO. | Tips for defense lawyers: 1. To avoid CSO or AF risks, if possible negotiate diversion without a guilty pursuant to CPL 216.05(4). 2. If Tip 1 is not possible, to decrease risk of "drug trafficking" AF, avoid this felony drug offense altogether and consider alternative offense of CPCS, 7th degree, or subsections (2) – (8) of CPCS, 5th degree (see above, PL 220.03 & 220.06) if possible. |
| Unlawful manufacture of methamphetamine, 1st degree Class B felony | 220.75 | Is "drug trafficking" AF if offense conduct qualifies as "drug trafficking" AF (see Unlawful manufacture of methamphetamine, 3d degree (PL 220.73), above). | Maybe. | Is CSO. | |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|--|---|--|---|
| Unlawful disposal of methamphetamine laboratory material | 220.76 | Probably NOT | Maybe. | Is CSO. | |
| Class E felony Operating as a major trafficker | 220.77 | Is "drug trafficking" AF. | Probably. | Is CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | |
| Unlawful possession of marijuana Violation | 221.05 | NO if this is a first drug offense. If this is a second or subsequent drug offense and the record of conviction ("ROC") contains explicit finding of prior drug conviction that was final at time of commission of instant offense, might be "drug trafficking" AF (see App. G, § 1. b). | Probably NOT. | Is CSO for inadmissibility purposes; however, for deportability purposes, is CSO only if record of conviction establishes possession of more than 30 grams of marijuana, or if defendant already stands convicted of or will be convicted of additional offense involving possession of 30 grams or less of marijuana. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid risk of CSO altogether, if possible consider obtaining an adjournment in contemplation of dismissal (ACD) or an alternative offense such as Disorderly Conduct (see below, PL 240.20) or Trespass (See above, PL 140.05). 2. If pleading to this offense cannot be avoided, establish in plea colloquy that amount of marijuana involved is less than 30 grams. 3. If pleading to this offense cannot be avoided and defendant has a prior conviction for possession of a controlled substance, to avoid risk of "drug trafficking" AF keep record clear of finding of prior conviction. |
| Criminal possession of marijuana (CPM), 5th degree Class B misdemeanor | 221.10 | NO if this is a first drug offense. If this is a second or subsequent drug offense and the record of conviction ("ROC") contains explicit finding of prior drug conviction that was final at time of commission of instant offense, might be "drug trafficking" AF (see App. G, § 1. b). | Probably NOT. | Is CSO for inadmissibility purposes; however, for deportability purposes, is CSO only if record of conviction establishes possession of more than 30 grams of marijuana, or if defendant already stands convicted of or will be convicted of additional offense involving possession of 30 grams or less of marijuana. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid risk of CSO altogether, if possible consider obtaining an adjournment in contemplation of dismissal (ACD) or an alternative offense such as Disorderly Conduct (see below, PL 240.20), Trespass (see above, PL 140.05), or Criminal Nuisance (see below, PL 240.45). 2. If pleading to a marijuana offense cannot be avoided, to decrease risk of CSO deportability consider alternative plea to UPM (see above, PL 221.05) and establish in plea colloquy that amount of marijuana involved is less than 30 grams. 3. If pleading to this offense cannot be avoided, to decrease risk of CSO deportability establish in plea colloquy that amount of marijuana involved is less than 30 grams. |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|---|---|---|---|
| CPM, 4th degree Class A misdemeanor | 221.15 | NO if this is a first drug offense. If this is a second or subsequent drug offense and the record of conviction ("ROC") contains explicit finding of prior drug conviction that was final at time of commission of instant offense, might be "drug trafficking" AF (see App. G, § 1.b). | Probably NOT. | Is CSO. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid risk of CSO altogether, if possible consider obtaining an adjournment in contemplation of dismissal (ACD) or an alternative offense such as Disorderly Conduct (see below, PL 240.20), Trespass (see above, PL 140.05), or Criminal Nuisance (see below, PL 240.45). If pleading to a marijuana offense cannot be avoided, to decrease risk of CSO deportability consider alternative plea to UPM or to CPM, 5th degree (see above, PL 221.05 & 221.10), and in either case establish in plea colloquy that amount of marijuana involved is less than 30 grams. |
| CPM, 3rd degree Class E felony | 221.20 | NO if this is a first drug offense. If this is a second or subsequent drug offense and the record of conviction ("ROC") contains explicit finding of prior drug conviction that was final at time of commission of instant offense, might be "drug trafficking" AF (see App. G, § 1.b). | Probably NOT. | Is CSO. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid risk of "drug trafficking" AF or CSO, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). To decrease risk of "drug trafficking" AF or CSO, avoid this drug offense altogether and consider alternative offense such as Hindering Prosecution (see above, PL 205.55-205.65); Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). |
| CPM, 2nd degree Class D felony | 221.25 | NO if this is a first drug offense. If this is a second or subsequent drug offense and the record of conviction ("ROC") contains explicit finding of prior drug conviction that was final at time of commission of instant offense, might be "drug trafficking" AF (see App. G, § 1.b). | Probably NOT. | Is CSO. | <p>Tip for defense lawyers:</p> <ol style="list-style-type: none"> To avoid risk of "drug trafficking" AF or CSO, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). To decrease risk of "drug trafficking" AF or CSO, avoid this drug offense altogether and consider alternative offenses such as Hindering Prosecution (see above, PL 205.55-205.65); Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|---|---|--|---|
| CPM, 1st degree Class C felony | 221.30 | NO if this is a first drug offense. If this is a subsequent drug offense and the government establishes a prior drug conviction, might be “drug trafficking” AF (see App. G, § 1.b). | Probably NOT. | Is CSO. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid risk of “drug trafficking” AF or CSO, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). 2. To decrease risk of “drug trafficking” AF, avoid this drug offense altogether and consider alternative offenses such as Hindering Prosecution (see above, PL 205.55-205.65); Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). |
| CSM, 5th degree Class B misdemeanor | 221.35 | If this is a first drug offense, NOT a “drug trafficking” AF in Second or Third circuits and probably NOT in other jurisdictions. If this is a second or subsequent drug offense the record of conviction (“ROC”) contains explicit finding of prior drug conviction that was final at time of commission of instant offense, might be “drug trafficking” AF (see App. G, § 1.b). | Maybe. | Is CSO. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid risk of CSO altogether, if possible consider obtaining an adjournment in contemplation of dismissal (ACD) or an alternative offense such as Disorderly Conduct (see below, PL 240.20), Trespass (see above, PL 140.05), or Criminal Nuisance (see below, PL 240.45). 2. If pleading to a marijuana offense cannot be avoided, to decrease risk of CSO deportability consider alternative offense of UPM or to CPM, 5th degree (see above, PL 221.05 & 221.10), and in either case establish in plea colloquy that amount of marijuana involved is less than 30 grams. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue NOT “drug trafficking” AF based on <i>Martinez v. Mukasey</i>, 551 F.3d 113 (2d Cir. 2008); <i>Thomas v. Att’y Gen.</i>, 625F.3d 134 (3d Cir. 2010); <i>Steele v. Blackman</i>, 236 F.3d 130 (3d Cir. 2001). |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CMT)? [See Note on CMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|---|---|--|--|
| CSM, 4th degree Class A misdemeanor | 221.40 | If record of conviction (ROC) establishes transfer for remuneration, probably is "drug trafficking" AF. In Second and Third Circuits if this is a first drug offense and government cannot establish transfer for remuneration, is NOT a "drug trafficking crime" AF; in other jurisdictions, if this is a first drug offense, is probably NOT a "drug trafficking" crime if immigrant can meet burden of establishing that offense did not involve transfer for remuneration but is probably a "drug trafficking" AF if immigrant cannot meet this burden. In any jurisdiction, if this is a subsequent drug offense and the ROC includes an explicit finding of a prior drug conviction that was final at time of commission of instant offense, might be "drug trafficking" AF even if ROC does not establish transfer for remuneration (see App. G, § 1.b). | Probably. | Is CSO. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid risk of CSO altogether, if possible consider obtaining an adjournment in contemplation of dismissal (ACD) or an alternative offense such as Disorderly Conduct (see below, PL 240.20), Trespass (see above, PL 140.05), or Criminal Nuisance (see below, PL 240.45). If pleading to a marijuana offense cannot be avoided, to decrease risk of CSO deportability consider alternative offense of UPM or to CPM, 5th degree (see above, PL 221.05 & 221.10), and in either case establish in plea colloquy that amount of marijuana involved is less than 30 grams. If Tips 1 and 2 are not possible, to decrease risk of "drug trafficking" AF consider alternative offense of CPM, 5th or 4th degrees (see above, PL 221.10 & 221.15), or CSM, 5th degree (see above, PL 221.35). If pleading to this offense cannot be avoided, leave out of record of conviction any evidence that the transfer of marijuana was effected for remuneration. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> Argue NOT "drug trafficking" AF based on <i>Martinez v. Mukasey</i>, 551 F.3d 113 (2d Cir. 2008); <i>Thomas v. Atty Gen.</i>, 625 F.3d 134 (3d Cir. 2010); <i>Steele v. Blackman</i>, 236 F.3d 130 (3d Cir. 2001). |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|-----------------------------------|--------------|--|---|--|---|
| CSM, 3rd degree Class E felony | 221.45 | Probably is "drug trafficking" AF. | Probably. | IS CSO. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid risk of "drug trafficking" AF or CSO, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). 2. To avoid risk of CSO altogether, if possible consider alternative offenses such as Criminal Nuisance (see below, PL 240.45). 3. If pleading to a marijuana offense cannot be avoided, to decrease risk of CSO deportability consider alternative offense of CPM, 5th degree (see above, PL 221.10), and in either case establish in plea colloquy that amount of marijuana involved is less than 30 grams. 4. If Tips 1 and 2 are not possible, to decrease risk of "drug trafficking" AF avoid this offense altogether and consider alternative offense of CSM, 5th degree (see above, PL 221.35). 5. If Tip 3 is not possible, to decrease risk of "drug trafficking" AF avoid this offense altogether and consider alternative offense of CPM, 4th (see above, PL 221.15), or CSM, 4th degree (see above, PL 221.40) and leave out of record of conviction any evidence that the transfer of marijuana was effected for remuneration. 6. If pleading to a felony marijuana offense cannot be avoided, to pre-serve possible argument against AF or CIMT, plead instead to CPM, 3rd degree (see above, PL 221.20). |
| CSM, 2nd degree Class D felony | 221.50 | If record of conviction (ROC) establishes sale to minor, is "drug trafficking" AF; otherwise is probably is "drug trafficking" AF. | Probably. | Is CSO. Where ROC establishes sale to minor, might be CAC. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid risk of "drug trafficking" AF or CSO, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). 2. To decrease risk of CSO if possible consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). 3. To decrease risk of "drug trafficking" AF avoid this offense altogether and consider alternative offense of CPM, 4th (see above, PL 221.15), or CSM, 4th degree (see above, PL 221.40) and leave out of record of conviction any evidence that the transfer of marijuana was effected for remuneration. 4. If pleading to a felony marijuana offense cannot be avoided, to pre-serve argument against AF or CIMT, plead instead to CPM, 3rd or 2nd degrees (see above, PL 221.20 & 221.25). |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMIT)? [See Note on CIMIT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|--|---|--|---|
| CSM, 1st degree Class C felony | 221.55 | Probably is "drug trafficking" AF. | Probably. | CSO. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid risk of "drug trafficking" AF or CSO, if possible negotiate diversion without a guilty plea pursuant to CPL 216.05(4). To decrease risk of CSO if possible consider alternative offenses such as Criminal Solicitation (see above, PL 100.00-100.13) or Criminal Facilitation (see above, PL 115.00-115.08). To decrease risk of "drug trafficking" AF avoid this offense altogether and, if at all possible, consider alternative offense of CSM, 4th degree (see above, PL 221.40) and leave out of record of conviction any evidence that the transfer of marijuana was effected for remuneration. If pleading to a felony marijuana offense cannot be avoided, to preserve possible argument against AF or CIMIT, plead instead to CPM, 3rd, 2nd or 1st degrees (see above, PL 221.20, 221.25 & 221.30). |
| Promoting gambling, 2nd degree Class A misdemeanor | 225.05 | Might be "gambling" AF if record of conviction shows that offense is one "described in" 18 USC 1955. | No. | Might trigger "commercialized vice" inadmissibility. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> If pleading to gambling offense cannot be avoided, to avoid AF risk, plead to attempt (B misd.). If pleading to gambling offense cannot be avoided, to reduce AF risk, keep record clear of facts satisfying elements of 18 USC 1955. This offense might trigger bar to good moral character (GMC) requirement for citizenship for "one whose income is derived principally from illegal gambling activities." Second or subsequent Art. 225 offense would probably trigger the separate GMC bar for persons convicted of two or more gambling offenses if both offenses were committed during the relevant GMC period. To avoid GMC and admissibility bars, (a) make a record that client's income not principally derived from gambling and that client did not come to U.S. for purpose of engaging in commercialized vice; and (b) keep record clear of indication whether client "profit[ed] from" or "advanc[ed]" activity. <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> Argue that offense is not "described in" 18 USC 1955 and is therefore not AF because NY statute lacks substantive (non-jurisdictional) elements contained in federal statute. Where record of conviction does not specify whether offense involved "profit" or "advanc[ing]", argue that offense is not "gambling offense" for purposes of GMC and does not show income derived from gambling because it punishes merely "advanc[ing]" gambling activity (see PL 225.00(4)). |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CMT)? [See Note on CMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|--------------|---|---|--|---|
| Promoting gambling, 1st degree Class E felony | 225.10 | Might be "gambling" AF if record of conviction shows that offense is one "described in" 18 USC 1955. | No. | Might trigger "commercialized vice" inadmissibility. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. If pleading to gambling offense cannot be avoided, to avoid AF risk, plead to <i>attempted</i> Promoting Gambling, 2nd degree) (see above, PL 225.05). 2. If pleading to felony gambling offense cannot be avoided, to avoid risk of AF, keep record clear of facts satisfying elements of 18 USC 1955. 3. This offense might trigger bar to good moral character (GMC) requirement for citizenship for "one whose income is derived principally from illegal gambling activities." Second or subsequent Art. 225 offense would probably trigger the separate GMC bar for persons convicted of two or more gambling offenses if both offenses were committed during the relevant GMC period. To avoid GMC and admissibility bars, make a record that client's income not principally derived from gambling and that client did not come to U.S. for purpose of engaging in commercialized vice. <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue that offense is not "described in" 18 USC 1955 and is therefore not AF because NY statute lacks substantive (non-jurisdictional) elements contained in federal statute. 2. Argue that offense is not GMC bar under "income derived" provision b/c it does not require profit for conviction. |
| Possession of gambling records, 2nd degree Class A misdemeanor | 225.15 | Probably NOT, unless Might be "gambling" AF if record of conviction shows that offense is one "described in" 18 USC 1955. | No. | Might trigger "commercialized vice" inadmissibility. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. If pleading to gambling offense cannot be avoided, to avoid risk of AF, plead to attempt (B misd.). 2. If pleading to gambling offense cannot be avoided, to reduce risk of AF, keep record clear of facts satisfying elements of 18 USC 1955. 3. This offense might trigger bar to good moral character (GMC) requirement for citizenship for "one whose income is derived principally from illegal gambling activities." Second or subsequent Art. 225 offense would probably trigger the separate GMC bar for persons convicted of two or more gambling offenses if both offenses were committed during the relevant GMC period. To avoid GMC and admissibility bars, make a record that client's income not principally derived from gambling and that client did not come to U.S. for purpose of engaging in commercialized vice. <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue that offense is not "described in" 18 USC 1955 and is therefore not AF because NY statute lacks substantive (non-jurisdictional) elements contained in federal statute. 2. Argue that offense is not GMC bar under "income derived" provision b/c it does not require profit for conviction |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|--|---|--|--|
| Possession of gambling records, 1st degree Class E felony | 225.20 | Might be "gambling" AF if record of conviction shows that offense is one "described in" 18 USC 1955. | No. | Might trigger "commercialized vice" inadmissibility. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> If pleading to gambling offense cannot be avoided, to avoid risk of AF, plead to attempted Possession of gambling records, 2nd degree (see above, PL 225.15). If pleading to felony gambling offense cannot be avoided, to reduce risk of AF, keep record clear of facts satisfying elements of 18 USC 1955(b). This offense might trigger bar to good moral character (GMC) requirement for citizenship for "one whose income is derived principally from illegal gambling activities." Second or subsequent Art. 225 offense would probably trigger the separate GMC bar for persons convicted of two or more gambling offenses if both offenses were committed during the relevant GMC period. To avoid GMC and admissibility bars, make a record that client's income not principally derived from gambling and that client did not come to U.S. for purpose of engaging in commercialized vice <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> Argue that offense is not "described in" 18 USC 1955 and is therefore not AF because NY statute lacks substantive (non-jurisdictional) elements contained in federal statute. Argue that offense is not GMC bar under "income derived" provision b/c it does not require profit for conviction. |
| Prostitution Class B misdemeanor | 230.00 | No. | Yes. | Probably triggers "prostitution" Inadmissibility. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid "prostitution" inadmissibility risk (and, if client has prior CIMT, to avoid CIMT deportability or inadmissibility), if possible consider obtaining an adjournment in contemplation of dismissal (ACD) or an alternative offense such as Disorderly Conduct (see below, PL 240.20) or Trespass (see above, PL 140.05). If Tip 1 is not possible, to avoid "prostitution" inadmissibility risk, consider alternative offense such as Criminal Nuisance (see below, PL 240.45). <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> The BIA has held that to "engage in" prostitution, one must have engaged in a regular pattern of behavior or conduct. See <i>Matter of T</i>, 6 I&N Dec.474 (BIA 1955) (holding that the noncitizen who was twice convicted for committing acts of prostitution was not excludable); <i>Matter of R</i>, 2 I&N Dec. 50 (BIA 1944) (single act for gain under circumstances showing prostitution). |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
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| [Patronizing a prostitute, 4th degree] [repealed eff. 11/1/2007] [Class B misdemeanor] | 230.03 | Probably NOT, but if record of conviction establishes that person patronized was a minor might be "sexual abuse of a minor" AF. | Probably. | If record of conviction shows that person patronized was minor, might be CAC. | <p>Tip for immigration lawyers:</p> <p>1. Argue that conviction is categorically NOT "sex abuse of minor" AF, even if the person patronized in fact was minor, because the minority of the person patronized is not an element of the crime. IJ may not look to the underlying record of conviction to hold to the contrary. See, e.g., <i>Singh v. Ashcroft</i>, 383 F.3d 144 (3rd Cir. 2004); cf. <i>Nijhawan v. Holder</i>, 129 S. Ct. 2294, 2300 (2009) (noting that "sexual abuse of a minor" AF ground requires categorical as opposed to circumstance-specific inquiry).</p> |
| Patronizing a prostitute, 3rd degree Class A misdemeanor | 230.04 | Probably NOT, but if record of conviction establishes that person patronized was a minor might be "sexual abuse of a minor" AF. | Probably. | If record of conviction establishes that person patronized was minor, might be CAC. | <p>Tips for defense lawyers:</p> <p>1. To avoid CIMT deportability or inadmissibility risk if client has prior or future CIMT, consider obtaining an adjournment in contemplation of dismissal (ACD) or an alternative offense such as Disorderly Conduct (see below, PL 240.20) or Trespass (See above, PL 140.05) if possible.</p> <p>2. If Tip 1 above is not possible and prostitute might be minor, to decrease "sex abuse of minor" AF and CAC risks consider alternative offense such as Criminal Nuisance (see below, PL 240.45) and keep out of record of conviction reference to the age of victim.</p> <p>3. If pleading to this offense cannot be avoided and prostitute might be minor, to decrease risk of "sex abuse of minor" AF and CAC, try to keep out of record of conviction reference to the age of the prostitute.</p> <p>Tip for immigration lawyers:</p> <p>1. Argue that conviction is categorically NOT "sex abuse of minor" AF, even if the person patronized in fact was minor, because the minority of the person patronized is not an element of the crime. IJ may not look to the underlying record of conviction to hold to the contrary. See, e.g., <i>Singh v. Ashcroft</i>, 383 F.3d 144 (3rd Cir. 2004); cf. <i>Nijhawan v. Holder</i>, 129 S. Ct. 2294, 2300 (2009) (noting that "sexual abuse of a minor" AF ground requires categorical as opposed to circumstance-specific inquiry).</p> |
| Patronizing a prostitute, 2nd degree Class E felony | 230.05 | Might be "sexual abuse of a minor" AF. | Probably. | Might be CAC. | <p>Tips for defense lawyers:</p> <p>1. To avoid risk of "sexual abuse of a minor" AF or CIMT, if possible consider an alternative offense such as Disorderly Conduct (see below, PL 240.20) or Trespass (see above, PL 140.05).</p> <p>2. If Tip 1 above is not possible and person patronized might be minor, to decrease risk of "sex abuse of minor" AF and CAC consider alternative offense such as Criminal Nuisance (see below, PL 240.45), or Patronizing a Prostitute, 3d degree (see above, 230.04), and in either case keep out of record of conviction reference to the age of person patronized.</p> |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPEL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMIT)? [See Note on CIMIT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|---------------|---|---|--|--|
| Patronizing a prostitute, 1st degree Class D felony | 230.06 | Might be "sexual abuse of a minor" AF. | Probably. | Might be CAC. | |
| Promoting prostitution, 4th degree Class A misdemeanor | 230.20 | Might be "prostitution business" AF. If record of conviction establishes that prostitution promoted was of a minor, might also be "sexual abuse of a minor" AF. | Probably. | Might trigger "prostitution" inadmissibility. If prostitute is minor, might be CAC. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid "prostitution business" AF or "prostitution" inadmissibility risks, consider obtaining an adjournment in contemplation of dismissal (ACD) or an alternative offense such as Disorderly Conduct (see below, PL 240.20), Trespass (see above, PL 140.05) or Criminal Nuisance (see below, PL 240.45) if possible. If Tip 1 above is not possible, to decrease "prostitution business" AF risk, consider alternative offense of Permitting Prostitution (see below, PL 230.40) or Patronizing a Prostitute, 4th (see above, PL 230.03 and accessory liability under PL 20.00) and, if prostitute might be minor, leave out of record of conviction reference to the age of the prostitute. If pleading to this offense cannot be avoided, if possible specify in plea allocation that defendant did not own, control, manage or supervise prostitution business, or at minimum keep out of record admission or evidence of exact nature of advancement or profit from prostitution (see PL 230.15). In all cases, if possible keep out of record of conviction reference to the age of the prostitute. |
| Promoting prostitution, 3rd degree Class D felony | 230.25 | Subsection (1) is probably "prostitution business" AF. Subsection (2) might be "prostitution business" AF. If record of conviction establishes that prostitution promoted was of a minor, either subsection might also be "sexual abuse of a minor" AF. | Probably. | Might trigger "prostitution" inadmissibility. Subsection (2) might be CAC if record of conviction establishes that prostitution promoted was of a minor. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid "prostitution business" AF or "prostitution" inadmissibility risks, consider alternative offense such as Disorderly Conduct (see below, PL 240.20), Trespass (see above, PL 140.05) or Criminal Nuisance (see below, PL 240.45) if possible. If Tip 1 above is not possible, to decrease "prostitution business" AF risk, consider alternative offense of Permitting Prostitution (see below, PL 230.40) or Patronizing a Prostitute, 3d (see above, PL 230.04 and accessory liability under PL 20.00) and, if prostitute might be minor, leave out of record of conviction reference to the age of the prostitute. |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|--|---|---|--|
| Promoting prostitution, 2nd degree Class C felony | 230.30 | Subsection (1) probably is "prostitution business" AF and subsection (2) might be "prostitution business" AF. If record of conviction establishes that prostitution promoted was of a minor, might also be "sexual abuse of a minor" AF. If term of imprisonment imposed is one year or more, subsection (1) might also be "crime of violence" AF. | Probably. | Might trigger "prostitution" inadmissibility. Subsection (2) might be CAC and if record of conviction establishes that prostitution promoted was of a minor, subsection (1) might be CAC. | Tip for defense lawyers: 1. To preserve argument that offense is not "prostitution business" AF, if possible specify in plea allocation that defendant "profited from" rather than "advanced" prostitution and did not own, control, manage or supervise prostitution business, or at minimum keep out of record admission or evidence of exact nature of advancement or profit from prostitution (see PL 230.15). |
| Promoting prostitution, 1st degree Class B felony | 230.32 | Might be "prostitution business" AF. Might also be "sexual abuse of a minor" AF. | Probably. | Might trigger "prostitution" inadmissibility. Might be CAC. | Tip for defense lawyers: 1. To preserve argument that offense is not "prostitution business" AF, if possible specify in plea allocation that defendant "profited from" rather than "advanced" prostitution and did not own, control, manage or supervise prostitution business, or at minimum keep out of record admission or evidence of exact nature of advancement or profit from prostitution (see PL 230.15). |
| Compelling prostitution Class B felony | 230.33 | Probably is "prostitution business" AF. Probably is also "sexual abuse of a minor" AF. If term of imprisonment imposed is one year or more, subsection (1) might also be "crime of violence" AF. | Probably. | Probably is CAC. Might trigger "prostitution" inadmissibility. | |
| Permitting prostitution Class B misdemeanor | 230.40 | Probably NOT. | Maybe. | Might trigger "prostitution" inadmissibility. | Tip for defense lawyers: 1. To avoid "prostitution" inadmissibility and CIMT risk, consider obtaining an adjournment in contemplation of dismissal (ACD) or an alternative offense such as Disorderly Conduct (see below, PL 240.20) or Trespass (see above, PL 140.05) if possible. |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|-------------------------|---|---|---|
| Disorderly conduct Violation | 240.20 | No. | No. | | |
| Harassment, 1st degree Class B misdemeanor | 240.25 | No. | Maybe. | If the complainant was a current or former spouse or similarly situated individual, might be CODV in some jurisdictions outside 2d Circuit. Might also trigger deportability under CODV clause regarding “crime of stalking.” | Tips for defense lawyers: 1. To avoid CIMT risk, consider obtaining an adjournment in contemplation of dismissal (ACD) or an alternative offense such as Disorderly Conduct or Trespass (see above, PL 240.20 & 140.05). 2. To reduce CODV risk, keep relationship of complainant to defendant out of record of conviction (though this may not be effective to avoid removability). |
| Harassment, 2nd degree Violation | 240.26 | No. | Maybe. | If the complainant was a current or former spouse or similarly situated individual, subsection (1) might be CODV. Subsections (2) and (3) might trigger deportability under CODV clause regarding “crime of stalking.” | Tips for defense lawyers: 1. To avoid CIMT risk, consider obtaining an adjournment in contemplation of dismissal (ACD) or an alternative offense such as Disorderly Conduct or Trespass (see above, PL 240.20 & 140.05). 2. To minimize CODV risk, seek alternate plea to Disorderly Conduct or Trespass (see above, PL 240.20 & 140.05). If this is not possible, to reduce CODV risk keep relationship of complainant to defendant out of record of conviction (though this may not be effective to avoid removability). Tip for immigration lawyers: 1. Argue NOT a CODV because physical force necessary to constitute “crime of violence” under 18 USC 16(a) must categorically be violent force capable of causing pain or injury to another person, see <i>Matter of Velasquez</i> , 25 I&N Dec. 278, 283 (BIA 2010), and 240.26 can be offended by “petty forms of offensive touching and kicking” not rising to the level of an assault, <i>People v. Barkow</i> , 96 N.Y.2d 770, 772 (2001); see, e.g., <i>Lynn v. State</i> , 33 A.D.3d 673, 674 (App. Div. 2 Dept., 2006) (chest-butting); <i>People v. Hare</i> , 66 Misc.2d 207, 319 N.Y.S.2d 890 (App. Term 1 st Dept. 1971) (placing finger on complainant’s chest). |

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| Offense | NYPL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|--|--------------|---|---|---|--|
| Aggravated harassment, 2nd degree Class A misdemeanor | 240.30 | No, unless term of imprisonment imposed is one year, in which case subsections (3) and (4) might be "crime of violence" AF. | Maybe. | If the complainant was a current or former spouse or similarly situated individual, subsections (3) or (4) might be CODV. A conviction might trigger deportability under CODV clauses regarding "crime of stalking" and/or "violations of protective orders." | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid "crime of violence" AF, avoid sentence of one year (get 364 days or less). 2. To avoid CIMT risk or CODV, consider obtaining an adjournment in contemplation of dismissal (ACD) or an alternative offense such as Disorderly Conduct or Trespass (see above, PL 240.20 & 140.05). 3. If Tip 2 is not possible, to reduce CODV risk keep relationship of complainant to defendant out of record of conviction (though this may not be effective to avoid removability) and avoid any court finding that offense was committed in violation of relevant portion of an order of protection (see Tip for defense lawyers accompanying Criminal contempt, 2nd degree, PL 215.50). |
| Aggravated harassment, 1st degree Class E felony | 240.31 | If term of imprisonment imposed is one year or more, might be "crime of violence" AF. | Maybe. | If the complainant was a current or former spouse or similarly situated individual, might be CODV. A conviction might also trigger deportability under CODV clauses regarding "crime of stalking" and/or "violations of protective orders." | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid "crime of violence" AF, avoid sentence of one year or more (get 364 days or less) if possible. 2. To avoid CIMT risk or CODV, if possible consider alternative offense such as Disorderly Conduct, Trespass or subsection (3) of Criminal Mischief, fourth degree (see above, PL 240.20, 140.05, 145.00(3)). 3. If Tip 2 is not possible, consider alternative offense of Harassment, 1st or 2nd (see above, PL 240.25 & 240.26) and, if that also is not possible, Aggravated Harassment, 2nd (see above, PL 240.30). 4. If Tip 3 is not possible, to reduce CODV risk keep relationship of complainant to defendant out of record of conviction (though this may not be effective to avoid removability) and avoid any court finding that offense was committed in violation of relevant portion of an order of protection (see Tip for defense lawyers accompanying Criminal contempt, 2nd degree, PL 215.50). |
| Loitering Violation | 240.35 | No. | Probably NOT. | Conviction under subsection (2) might trigger "commercialized vice" inadmissibility. | <p>Tip for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid risk of CIMT and "commercialized vice" inadmissibility, avoid subsection (2). <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue former subsection (3) is not CIMT because it lacks any requirement that proscribed conduct is unwelcome or offensive to others. See <i>People v. Uplinger</i>, 58 N.Y.2d 936 (1983). Consider post-conviction relief based on unconstitutionality of statute. See <i>id.</i> |

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|--|--------------|-------------------------|---|---|--|
| Loitering, 1st degree Class B misdemeanor | 240.36 | No. | Probably NOT. | Might be CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid CSO or CIMT risks, consider obtaining an adjournment in contemplation of dismissal (ACD) or alternative offenses such as Disorderly Conduct, Trespass or Loitering (see above, PL 240.20, 140.05 & 240.35). If pleading to this offense cannot be avoided, if possible, keep out of record of conviction identification of the controlled substance involved. |
| Loitering for the purpose of engaging in a prostitution offense Violation Class B misdemeanor Class A misdemeanor | 240.37 | No. | Maybe. | Might trigger “prostitution” inadmissibility. | <p>Tip for defense lawyers:</p> <ol style="list-style-type: none"> To avoid risk of “prostitution” inadmissibility (and, if client has prior CIMT, to avoid CIMT deportability or inadmissibility), if possible consider obtaining an adjournment in contemplation of dismissal (ACD) or an alternative offense such as Disorderly Conduct, Trespass or Loitering (see above, PL 240.20, 140.05 & 240.35). <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> Argue that just one or a few loitering convictions cannot trigger “prostitution” inadmissibility. The BIA has held that to “engage in” prostitution, one must have engaged in a regular pattern of behavior or conduct. See <i>Matter of T</i>, 6 I&N Dec. 474 (BIA 1955) (holding that the noncitizen who was twice convicted for committing acts of prostitution was not excludable); <i>Matter of R</i>, 2 I&N Dec. 50 (BIA 1944) (single act for gain under circumstances showing prostitution). |
| Appearance in public under influence of drug other than alcohol Violation | 240.40 | No. | Probably NOT. | Might be CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid CSO risk, consider obtaining an adjournment in contemplation of dismissal (ACD) or alternative offenses such as Disorderly Conduct, Trespass or Loitering (see above, PL 240.20, 140.05 & 240.35). If pleading to this offense cannot be avoided, if possible, keep out of record of conviction identification of the controlled substance involved. |
| Criminal nuisance, 2nd degree Class B misdemeanor | 240.45 | No. | Maybe. (See Note on CIMT offenses, <i>supra</i> .) | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid CIMT risk, if possible consider obtaining an adjournment in contemplation of dismissal (ACD) or alternative offenses such as Disorderly Conduct, Trespass or Loitering (see above, PL 240.20, 140.05 & 240.35). If Tip 1 is not possible, to minimize have client allocate to reckless mens rea under subsection (1). See Note on CIMT offenses, <i>supra</i>. |

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|---|--------------|---|---|--|--|
| Criminal nuisance, 1st degree Class E felony | 240.46 | Might be “drug trafficking” AF. | Maybe. | Might be CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid “drug trafficking” AF or CSO risks, if possible consider alternative offenses such as Disorderly Conduct (see above, PL 240.20), Criminal Trespass (see above, PL 140.15), Loitering (see above, PL 240.35), or Criminal Nuisance, 2nd degree (see above, PL 240.25). If pleading to this offense cannot be avoided, if possible, keep out of record of conviction identification of the controlled substance involved. |
| Falsely reporting an incident, 3d degree Class A misdemeanor | 240.50 | No. | Maybe. (See Note on CIMT offenses, <i>supra</i> .) | | <p>Tip for defense lawyers:</p> <ol style="list-style-type: none"> To reduce risk of CIMT, avoid conviction under subsection (4), and/or avoid allocation to specific subsection and keep record clear of indication that defendant intended to impair lawful government function. See Note on CIMT offenses, <i>supra</i>. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> Argue subsections (1)-(3) are not a CIMT because none requires a specific intent to impair an important function of government by dishonest means; offense requires neither that government be deceived nor objective likelihood that government will act in reliance on false report. Compare, e.g., <i>Matter of Jurado</i>, 24 I&N Dec. 29 (BIA 2006) (PA statute requiring intent to disrupt performance of official duties is CIMT). |
| Falsely reporting an incident, 2d degree Class E felony | 240.55 | Might be “explosive materials offense” AF if record of conviction shows that offense is one “described in” 18 USC 844(e). | Maybe. (See Note on CIMT offenses, <i>supra</i> .) | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To reduce risk of AF, consider plea to Falsely reporting an incident in the 3d degree, PL 240.50, and keep record of conviction clear of reference to offense described in 18 USC 844(e). To reduce risk of CIMT, avoid conviction under subsection (2), and/or avoid allocation to specific subsection and keep record clear of indication that defendant intended to impair lawful government function. See Note on CIMT offenses, <i>supra</i>. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> Argue subsections (1)-(3) are not a CIMT because none requires a specific intent to impair an important function of government by dishonest means; offense requires neither that government be deceived nor objective likelihood that government will act in reliance on false report. Compare, e.g., <i>Matter of Jurado</i>, 24 I&N Dec. 29 (BIA 2006) (PA statute requiring intent to disrupt performance of official duties is CIMT). |

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|--|--------------|--|---|--|--|
| Falsely reporting an incident, 1st degree Class D felony | 240.60 | Might be “explosive materials offense” AF if record of conviction shows that offense is one “described in” 18 USC 844(e). | Maybe. (See Note on CIMT offenses, <i>supra</i> .) | Subsection (5) might be CAC. | Tips for defense lawyers: 1. To reduce risk of AF, consider plea to Falsely reporting an incident in the 3d degree, PL 240.50, and keep record of conviction clear of reference to offense described in 18 USC 844(e). 2. To reduce risk of CIMT, avoid allocation to specific subsection and keep record clear of indication that defendant intended to impair lawful government function. See Note on CIMT offenses, <i>supra</i> . |
| Public lewdness Class B misdemeanor | 245.00 | No. | Probably. | | Tip for defense lawyers: 1. Consider alternate plea to disorderly conduct, PL 240.20. |
| Endangering the welfare of a child Class A misdemeanor | 260.10 | Probably NOT. | Subsection (1) probably is CIMT. Subsection (2) might be CIMT. | Probably CAC. | Tip for defense lawyers: 1. To avoid CAC, consider alternative offenses that do not specify minority of complainant. Tip for immigration lawyers: 1. Argue not a CAC because statute does not require any special duty of care owed to complainant by defendant. See <i>Matter of Soram</i> , 25 I&N Dec. 378, 388-90 (BIA 2010) (Filippu, Member, concurring). |
| Unlawfully dealing with a child, 1st degree Class A misdemeanor | 260.20 | No. | Subsection (2) is probably NOT CIMT. Subsection (1) might be CIMT. | Subsection (1) might be CSO and CAC. Subsection (2) might be CAC if record of conviction shows complainant under 18. | |
| Criminal possession of a weapon, 4th degree Class A misdemeanor | 265.01 | Probably NOT, unless record of conviction establishes subsection (4) predicated on felony conviction, or an offense akin to one described in 18 USC 922(g) (1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r), 18 USC 924 (b) or (h), or 26 USC 5861, in which case might be “firearm offense” AF. | Subsections (2) and (8) probably are CIMT. All other subsections probably are NOT CIMT. (See Note on CIMT Offenses, <i>supra</i> .) | Subsections (1) through (6) are FO if record of conviction establishes that offense involved a firearm or destructive device (as defined in 18 USC 921(a). Subsections (7) and (8) are NOT FO. | Tips for defense lawyers: 1. To avoid FO and CIMT, consider alternative offense such as Criminal Trespass (see above, PL 140.15) or subsection (7) of 265.01, if possible. 2. If Tip 1 is not possible, to avoid FO consider subsection (8) or alternative offenses that do not require as an element the use or possession of a firearm, or, if client pleads to subsection (1) or (2) instead, keep out of record of conviction that weapon was a firearm. 3. To avoid CIMT, avoid subsections (2) and (8), and specify at plea colloquy that defendant did not intend to use the weapon/contraband item unlawfully against another. See Note on CIMT Offenses, <i>supra</i> . (Tips for immigration lawyers continued on next page) |

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|---|--------------|--|--|--|--|
| Criminal possession of a weapon, 3rd degree Class D felony | 265.02 | If term of imprisonment imposed is one year or more, might be "crime of violence" AF (especially if convicted under subsection (1) when referencing CPW, 4th degree, subsection (2)). If record of conviction establishes an offense akin to one described in 18 USC 922(g) (1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r), 18 USC 924 (b) or (h), or 26 USC 5861, might also be "firearm offense" AF. | Probably if convicted under subsection (1) (when referencing CPW, 4th degree, subsection (2)). (See Note on CIMT Offenses, <i>supra</i> .) | FO if record of conviction establishes firearm or destructive device (as defined in 18 USC 921(a)). | <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue subsection (5) categorically is NOT "firearm offense" AF. See <i>U.S. v. Sandoval-Barajas</i>, 206 F.3d 853 (9th Cir. 2000) (conviction under state statute that applies to all non-citizens is not an offense 'described in' the enumerated federal statute, which applies only to those illegally in the U.S.). 2. Argue NOT FO if government fails to prove that client was convicted under one of subsections (1) through (6); if government proves conviction under subsections (1) or (2), argue NOT FO if government fails to prove that record of conviction established that weapon used was a firearm. 3. Argue subsection (2) NOT "crime of violence" AF where sentence of a year is imposed because statute does not have use, attempted use, or threatened use of force as an element. See <i>U.S. v. Gamez</i>, 577 F.3d 394, 398 (2d Cir. 2009) (holding that former 265.03(1), similarly requiring possession of weapon with intent to use unlawfully against another, cannot be equated with actual, attempted or threatened use of force for purposes of Guideline 2L1.2 similar to COV definition at 18 USC 16(a)). <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid "crime of violence" AF, avoid sentence of one year or more (get 364 days or less) if possible and, where that is not possible, to minimize risk avoid conviction under subsection (1) (when referencing CPW, 4th degree, PL 265.01, subsection (2)). 2. To avoid FO, consider alternative offenses that do not require as an element the use or possession of a firearm. 3. To avoid CIMT, keep out of record of conviction reference to subsection (1) (when referencing CPW, 4th degree, subsection (2)), and specify at plea colloquy that defendant did not intend to use the weapon/contraband item unlawfully against another. See Note on CIMT Offenses, <i>supra</i>). |

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|---|--------------|---|---|---|--|
| Criminal possession of a weapon, 2nd degree Class C felony | 265.03 | If term of imprisonment imposed is one year or more, subsection (1)(b) is "crime of violence" AF in 2d and 3d Cir. and is probably "crime of violence" AF in other jurisdictions and subsections (1)(a), (1)(c) and (2) are probably "crime of violence" AF in any jurisdiction . Subsection (3) might be "crime of violence" AF. If record of conviction establishes an offense akin to one described in 18 USC 922(g) (1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r), 18 USC 924 (b) or (h), or 26 USC 5861.any subsection might also be "firearm offense" AF | Probably (especially if convicted under subsection (1)). See Note on CIMT offenses, <i>supra</i> . | Is FO. | Tips for defense lawyers: 1. To avoid "crime of violence" AF risk, avoid this offense altogether, consider CPW, 4th or 3rd (see above, PL 265.01 & 265.02), and get sentence of 364 days or less. 2. To avoid FO, consider alternative offenses that do not require as an element the use or possession of a firearm. 3. To minimize CIMT risk under subsections (2) and (3), specify at plea colloquy that defendant did not intend to use the weapon unlawfully against another. See Note on CIMT offenses, <i>supra</i> . |
| Criminal possession of a dangerous weapon, 1st degree Class B felony | 265.04 | If term of imprisonment imposed is one year or more, subsection (1) probably is "crime of violence" AF and either subsection might be "crime of violence" AF. If record of conviction establishes an offense akin to one described in 18 USC 922(g) (1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r), 18 USC 924 (b) or (h), or 26 USC 5861, might be "firearm offense" AF. | Probably (especially subsection (1)). See Note on CIMT offenses, <i>supra</i> . | FO if record of conviction establishes firearm or destructive device (as defined in 18 USC 921(a)) | Tip for defense lawyers: 1. To minimize CIMT risk for subsection (2), specify at plea colloquy that defendant did not intend to use the weapons unlawfully against another. See Note on CIMT offenses, <i>supra</i> . |

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|---|--------------|---|---|--|--|
| Criminal Sale of a Firearm, 3rd degree Class D felony | 265.11 | Probably "firearm trafficking" AF, especially if record of conviction established for remuneration (as opposed to giving or disposing without remuneration). If record of conviction establishes an offense akin to one described in 18 USC 922(g) (1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r), 18 USC 924 (b) or (h), or 26 USC 5861, might also be "firearm offense" AF. | Maybe | FO if record of conviction establishes firearm or destructive device (as defined in 18 USC 921(a)). | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid "firearm trafficking" AF or FO risk, avoid this offense altogether and consider alternative offenses that do not require as an element the use or possession of a firearm. If Tip 1 is not possible, to avoid "firearm trafficking" AF risk, consider CPW, 4th or 3rd (see above, PL 265.01 & 265.02), and get sentence of 364 days or less. If pleading to this offense cannot be avoided, to preserve argument that it is not a "firearm trafficking" AF, plead to subsection (1) and keep out of record of conviction reference to sale for remuneration (it may be better to establish giving or disposing without remuneration). To avoid FO, consider alternative offenses that do not require as an element the use or possession of a firearm. <p>Tip for immigration lawyers:</p> <ol style="list-style-type: none"> Argue NOT "firearm trafficking" AF if government fails to prove that client was convicted of transfer of firearm for remuneration. See <i>Kuhali v. Reno</i>, 266 F.3d 93 (2d Cir. 2001) |
| Failure to disclose the origin of a recording, 2d degree Class A misdemeanor | 275.35 | No, unless sentence of one year is imposed, in which case might be "counterfeiting" AF | Probably NOT. See Note on CIMT Offenses, <i>supra</i> . | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid risk of AF or CIMT, consider alternate plea to non-CIMT offense such as disorderly conduct (PL 240.20, above) or trespass (PL 140.05, above), or for offenses committed within New York City consider alternate plea to violation of Administrative Code 20-453 (vendor's license required), or local equivalent, if any, outside of New York City. Outside of New York City or if Tip 1 above is not possible, to avoid risk of "counterfeiting" AF, negotiate sentence of less than one year. If plea to this statute is required, to reduce risk of CIMT, specify in plea allocution that defendant did not know that subject recordings failed to disclose required information (see Tip 2 for immigration lawyers, below, and Note on CIMT Offenses, <i>supra</i>). If this is not possible, avoid admission or other evidence in record of such knowledge. To further reduce risk of CIMT deportability, consider alternate plea to attempt (PL 110) to commit 275.35, which as a B misdemeanor will not trigger deportability as "1 CIMT within 5 years of admission." <p>(Tips for immigration lawyers continued on next page)</p> |

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|---|--------------|---|---|---|---|
| Failure to disclose the origin of a recording, 1st degree Class E felony | 275.40 | No, unless sentence of one year is imposed, in which case might be “counterfeiting” AF. | Probably NOT. | | <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue offense is not AF “relating to . . . counterfeiting” because it does not require for conviction that the defendant infringe the rights of any copyright holder. See <i>People v. Burrielo</i>, 588 N.Y.S.2d 991 (N.Y. Sup. Ct. 1992). 2. Argue offense is not categorically CIMT because it does not require knowledge that subject recordings fail to disclose required information, see <i>People v. Colon</i>, 798 N.Y.S.2d 856, 862-64 (N.Y. Sup. Ct. 2005), <i>aff’d on other grounds</i>, 847 N.Y.S.2d 44 (App. Div. 1st Dep’t 2007) and because it does not require for conviction that the defendant infringe the rights of any copyright holder, see <i>People v. Burrielo</i>, 588 N.Y.S.2d 991 (N.Y. Sup. Ct. 1992). |
| | | | | | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> 1. To avoid risk of AF or CIMT, for offenses committed within New York City consider alternate plea to violation of Administrative Code 20-453 (vendor’s license required), or local equivalent, if any, outside of New York City. 2. Outside of New York City or if Tip 1 above is not possible, to avoid risk of “counterfeiting” AF, negotiate sentence of less than one year. 3. If plea to this statute is required, to reduce risk of CIMT, specify in plea allocution that defendant did not know that subject recordings failed to disclose required information (see Tip 2 for immigration lawyers, below, and Note on CIMT Offenses, <i>supra</i>). If this is not possible, avoid admission or other evidence in record of such knowledge. <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> 1. Argue offense is not AF “relating to . . . counterfeiting” because it does not require for conviction that the defendant infringe the rights of any copyright holder. See <i>People v. Burrielo</i>, 588 N.Y.S.2d 991 (N.Y. Sup. Ct. 1992). 2. Argue offense is not categorically CIMT because it does not require knowledge that subject recordings fail to disclose required information, see <i>People v. Colon</i>, 798 N.Y.S.2d 856, 862-64 (N.Y. Sup. Ct. 2005), <i>aff’d on other grounds</i>, 847 N.Y.S.2d 44 (App. Div. 1st Dep’t 2007) and because it does not require for conviction that the defendant infringe the rights of any copyright holder, see <i>People v. Burrielo</i>, 588 N.Y.S.2d 991 (N.Y. Sup. Ct. 1992). |

NEW YORK VEHICLE AND TRAFFIC LAW OFFENSES

| Offense | NYVTL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|---------------|-------------------------|---|--|---|
| Vehicle & Traffic Law Violations | 509 | No. | Subsections (4) and (6) are probably NOT CIMT. Other subsections are NOT CIMTs. | | |
| Traffic infraction | | | | | |
| Aggravated unlicensed operation of a vehicle, 3rd degree | 511(1) | No. | Probably NOT. | | Tip for defense lawyers: 1. To avoid CIMT risk, consider alternate plea to unlicensed driving under VTL 509(1), above. (But see 511(5), requiring prosecutor's assent). |
| Misdemeanor | | | | | |
| Aggravated unlicensed operation of a vehicle, 2nd degree | 511(2) | No. | Maybe. | | |
| Misdemeanor | | | | | |
| Aggravated unlicensed operation of a vehicle, 1st degree | 511(3) | No. | Subsection (a)(i) probably is CIMT. | Might be CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | Tips for defense lawyers: 1. To avoid CSO risk, consider alternative offenses that do not have drugs as an element of the offense. 2. If pleading to this offense cannot be avoided, to reduce CSO risk if possible keep out of record of conviction identification of the controlled substance involved. If both alcohol and drugs were alleged, establish in plea colloquy that only alcohol (and not drugs) was involved. 3. To avoid CIMT risk, avoid conviction under subsection (a)(i). |
| Class E felony | | | | | |
| Facilitating aggravated unlicensed operation of a vehicle, 3rd degree | 511-a(1) | No. | Probably NOT. | | |
| Traffic infraction | | | | | |
| Facilitating aggravated unlicensed operation of a vehicle, 2nd degree | 511-a(3) | No. | Probably NOT. | | |
| Misdemeanor | | | | | |
| Facilitating aggravated unlicensed operation of a vehicle, 1st degree | 511-a(4) | No. | Probably NOT. | | |
| Class E Felony | | | | | |

APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES

| Offense | NYVTL Section | Aggravated Felony (AF)? | Crime Involving Moral Turpitude (CIMT)? [See Note on CIMT Offenses, <i>supra</i>] | Other Grounds?: Controlled Substance (CSO), Crime Against Child (CAC), Dom. Violence (CODV) etc., Firearm Offense (FO), Prostitution, Commercialized Vice | Comments, Strategies & Tips <i>These are by no means an exhaustive list of strategies and tips advocates may pursue. For additional defense lawyer strategies, see Chapter 5. For additional immigration lawyer strategies, see Appendix K.</i> |
|---|---------------|-------------------------|---|--|--|
| Operation while registration or privilege is suspended or revoked. Misdemeanor | 512 | No. | Probably NOT. | | |
| Leaving scene of an incident without reporting Class A and B misdemeanor Class E and D felony | 600 | Probably NOT. | Maybe (especially if injury resulted and if evidence indicates defendant knew (and did not merely have cause to know) of injury/damage; and/or if evidence indicates that defendant left scene and did not merely fail to give required information). See Note on CIMT Offenses, <i>supra</i> . | | <p>Tip for defense lawyers:</p> <p>1. To avoid conviction of CIMT, consider alternate plea such as Reckless Driving, (VTL 1212, below). Where this is not possible, to reduce CIMT risk, specify at allocation that defendant did not leave scene of accident but merely failed to provide required insurance information. If this is not possible, keep record vague as to nature of offense. See Note on CIMT Offenses, <i>supra</i>.</p> <p>Tips for immigration lawyers:</p> <p>1. Where evidence permits, argue that offense of merely failing to give required information is categorically not turpitudinous. See, e.g., <i>Cerezo v. Mukasey</i>, 512 F.3d 1163 (9th Cir. 2008).</p> <p>2. In all cases, argue offense is not a CIMT because it requires only that defendant have “cause to know” of damage/injury and requires no culpable mental state at all as to leaving scene of accident without fulfilling specified requirements. See, e.g., <i>People v. Useo</i>, 549 N.Y.S.2d 490 (App. Div. 2d Dep’t 1989).</p> |
| Driving while ability impaired Traffic infraction Misdemeanor | 1192(1) | No. | Probably NOT. See Note on CIMT Offenses, <i>supra</i> . | | <p>Tip for defense lawyers:</p> <p>1. To further reduce CIMT risk, avoid simultaneous plea to offense that includes element of knowledge that license or privilege to drive is suspended or revoked (e.g., VTL 511, above). See Note on CIMT Offenses, <i>supra</i>.</p> <p>Tip for immigration lawyers:</p> <p>1. If government attempts to argue offense is CIMT because committed when defendant’s license was <i>in fact</i> suspended or revoked, argue that even under <i>Matter of Silva-Trevino</i>, aggravating factor punishable as separate offense cannot be combined with offense of conviction to create CIMT where neither alone is CIMT. See <i>Matter of Torres-Varela</i>, 23 I&N Dec. 78, 90-91 (BIA 2001).</p> |

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|---|---------------|-------------------------|--|--|---|
| Driving while intoxicated; per se Misdemeanor Class E and D felony | 1192(2) | No. | Probably NOT. See Note on CIMT Offenses, <i>supra</i> . | | <p>Tip for defense lawyers:</p> <p>1. To further reduce CIMT risk, avoid simultaneous plea to offense that includes element of knowledge that license or privilege to drive is suspended or revoked (e.g., VTL 511, above). See Note on CIMT Offenses, <i>supra</i>.</p> <p>Tip for immigration lawyers:</p> <p>1. If government attempts to argue offense is CIMT because committed when defendant's license was <i>in fact</i> suspended or revoked, argue that even under <i>Matter of Silva-Trevino</i>, aggravating factor punishable as separate offense cannot be combined with offense of conviction to create CIMT where neither alone is CIMT. See <i>Matter of Torres-Varela</i>, 23 I&N Dec. 78, 90-91 (BIA 2001).</p> |
| Aggravated driving while intoxicated; per se Misdemeanor Class E and D felony | 1192(2-a) | No. | Subsection (a) is probably NOT a CIMT. Subsection (b) might be a CIMT. See Note on CIMT Offenses, <i>supra</i> . | Subsection (b) might be CAC. | <p>Tip for defense lawyers:</p> <p>1. To reduce CIMT risk, consider plea to alternate offense of 1192(2). Note that this may not entirely eliminate CIMT risk if aggravating factors (especially children in car) present. To further reduce CIMT risk, avoid simultaneous plea to offense that includes element of knowledge that license or privilege to drive is suspended or revoked (e.g., VTL 511, above.) See Note on CIMT Offenses, <i>supra</i>.</p> <p>Tip for immigration lawyers:</p> <p>1. If government attempts to argue offense is CIMT because committed when defendant's license was <i>in fact</i> suspended or revoked, argue that even under <i>Matter of Silva-Trevino</i>, aggravating factor punishable as separate offense cannot be combined with offense of conviction to create CIMT where neither alone is CIMT. See <i>Matter of Torres-Varela</i>, 23 I&N Dec. 78, 90-91 (BIA 2001).</p> |
| Driving while intoxicated Misdemeanor Class E and D felony | 1192(3) | No. | Probably NOT. See Note on CIMT Offenses, <i>supra</i> . | | <p>Tip for defense lawyers:</p> <p>1. To further reduce CIMT risk, avoid simultaneous plea to offense that includes element of knowledge that license or privilege to drive is suspended or revoked (e.g., VTL 511, above). See Note on CIMT Offenses, <i>supra</i>.</p> |

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|--|---------------|-------------------------|---|--|---|
| Driving while ability impaired by drugs Misdemeanor Class E and D felony | 1192(4) | No. | Probably NOT. See Note on CIMT Offenses, <i>supra</i> . | Might be CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid CSO risk, consider alternative offenses that do not have drugs as an element of the offense. If pleading to this offense cannot be avoided, if possible keep out of record of conviction identification of the controlled substance involved. To further reduce CIMT risk, avoid simultaneous plea to offense that includes element of knowledge that license or privilege to drive is suspended or revoked (e.g., VTL 511, above). See Note on CIMT Offenses, <i>supra</i>. <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> Argue NOT CSO if government failed to prove that the controlled substance involved is one defined in 21 USC 802. If government attempts to argue offense is CIMT because committed when defendant's license was <i>in fact</i> suspended or revoked, argue that even under <i>Matter of Silva-Trevino</i>, aggravating factor punishable as separate offense cannot be combined with offense of conviction to create CIMT where neither alone is CIMT. See <i>Matter of Torres-Varela</i>, 23 I&N Dec. 78, 90-91 (BIA 2001). |
| Driving while ability impaired by the combined influence of drugs and alcohol Class A and B misdemeanor Class E and D felony | 1192(4-a) | No. | Probably NOT. See Note on CIMT Offenses, <i>supra</i> . | Might be CSO if record of conviction establishes a controlled substance as defined in 21 USC 802. | <p>Tips for defense lawyers:</p> <ol style="list-style-type: none"> To avoid CSO risk, consider alternative offenses that do not have drugs as an element of the offense. If pleading to this offense cannot be avoided, if possible keep out of record of conviction identification of the controlled substance involved. To further reduce CIMT risk, avoid simultaneous plea to offense that includes element of knowledge that license or privilege to drive is suspended or revoked (e.g., VTL 511, above). See Note on CIMT Offenses, <i>supra</i>. <p>Tips for immigration lawyers:</p> <ol style="list-style-type: none"> Argue NOT CSO if government failed to prove that the controlled substance involved is one defined in 21 USC 802. If government attempts to argue offense is CIMT because committed when defendant's license was <i>in fact</i> suspended or revoked, argue that even under <i>Matter of Silva-Trevino</i>, aggravating factor punishable as separate offense cannot be combined with offense of conviction to create CIMT where neither alone is CIMT. See <i>Matter of Torres-Varela</i>, 23 I&N Dec. 78, 90-91 (BIA 2001). |

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|--|---------------|-------------------------|---|--|---|
| Operating a motor vehicle after having consumed alcohol Non-criminal adjudication | 1192-a | No. | No. | | |
| Reckless driving Misdemeanor | 1212 | No. | Probably NOT. See Note on CIMT Offenses, <i>supra</i> . | | Tip for defense lawyers: 1. To minimize risk of CIMT, allocute to violation of “unreasonably interferes” prong of statute (as opposed to “unreasonably endangers”) and controvert or keep record clear of any injury or property damage resulting from offense. See Note on CIMT Offenses, <i>supra</i> . |

