

## 6.2 Cases Involving Aggravated Felonies

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## 6.2 Cases Involving Aggravated Felonies

A conviction of an aggravated felony carries the most severe immigration consequences, including mandatory deportation in most cases, mandatory detention during removal proceedings, a permanent bar from future immigration to the U.S., and a jail sentence of up to twenty years if the individual illegally reenters the U.S. after deportation.

The following options may not eliminate all the grounds of deportability or inadmissibility, but they may avoid the more severe immigration consequences of an aggravated felony conviction.

### A. Aggravated Felonies Triggered by a One Year Term of Imprisonment

To constitute an aggravated felony, many offenses must be accompanied by a one year sentence of imprisonment (actual or suspended) or more. The principal offenses in this category are:

- Theft offenses
- Burglary and felony breaking and entering
- “Crimes of violence” as defined under immigration law, such as certain intentional violent assault offenses
- Forgery and counterfeiting offenses
- Obstruction of justice offenses

For a complete description of those offenses, see *supra* § 3.4A, Aggravated Felonies Generally.

**Community Punishment.** A judge may impose a fine, without a sentence of imprisonment, for felonies that authorize a community or “C” punishment under structured sentencing. A judge also may enter a prayer for judgment continued or PJC, without a sentence of imprisonment. Even though a sentence of imprisonment of one year or more is authorized, a fine or PJC would be the sentence imposed in those circumstances and therefore would not make the offense an aggravated felony under the one-year rule.

**Consecutive Sentences with Individual Counts of Less Than 12 months.** As long as no individual count results in a maximum sentence of 12 months or longer, a total term of imprisonment (active or suspended) of 12 months or more will not trigger these aggravated felony grounds. This concept does not come into play often in North Carolina because all felony sentences of imprisonment now exceed one year.<sup>1</sup>

## **B. Theft Aggravated Felony**

A theft offense, plus a maximum sentence of imprisonment (active or suspended) of one year or longer, will be considered an aggravated felony offense. The U.S. Supreme Court has defined theft as the “taking of property or an exercise of control over property *without consent* with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent.” *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007) (emphasis added).

A crime that covers theft by trickery or deception is not considered a theft aggravated felony by the Board of Immigration Appeals, and Fourth and Eleventh Circuits. *See Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008); *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005) (holding that Virginia credit care fraud did not come within theft aggravated felony); *Vassell v. U.S. Att’y Gen.*, 839 F.3d 1352 (11th Cir. 2016) (holding that Georgia theft statute does not qualify as theft aggravated felony). Consequently, if your client pleads to a fraud offense, it should not be considered a theft aggravated felony even if the defendant receives a sentence of imprisonment of twelve months or more (though it may come under a different aggravated felony ground if the loss is more than \$10,000). Similarly, there is a good argument that a conviction under the North Carolina larceny statute should not come within the theft aggravated felony ground because it appears to cover larceny by trick. More specifically, the element of trespass—that is, a taking without consent—can be satisfied by a “constructive trespass” where property is fraudulently obtained by trick or artifice. *State v. Jones*, 177 N.C. App. 269 (2006). Because larceny by trick is not a separate crime from common-law larceny, no convictions under the larceny statute may qualify as an aggravated felony. *See supra* § 3.3A, Categorical Approach and Variations.

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1. There may be an argument that a person convicted of multiple felony offenses and sentenced to consecutive terms has not received a sentence of one year or more *for the second and subsequent offense*. For the second and subsequent offense, North Carolina law reduces the maximum sentence to be served by the period of post-release supervision for that offense. *See* G.S. 15A-1354(b). This argument may be helpful only where a non-aggravated felony is the first in the string of consecutive judgments (because the maximum sentence for the first-sentenced offense *will* include post-release supervision), followed by the potential aggravated felony offense (so that the reduction rule of G.S. 15A-1354(b) is applied to the potential aggravated felony). This argument may not succeed, as the maximum sentence “imposed” by the judge on the second and subsequent offense still includes the extra time for post-release supervision even though the defendant will never serve it.

### **C. Sexual Abuse of a Minor Aggravated Felony**

A conviction for an offense considered sexual abuse of a minor is an aggravated felony offense. The Board of Immigration Appeals has not defined sexual abuse of a minor, and the federal circuit court definitions vary. Under the categorical approach, a crime that lacks an element of age of minority of the victim should not qualify as sexual abuse of a minor. For example, a conviction for sexual battery under G.S. 14-27.33 should not qualify as sexual abuse of a minor because the minor age of the victim (under age 18) is not an element of the offense.

In the context of statutory rape-type offenses (where sexual intercourse is abusive solely because of the ages of the participants), the U.S. Supreme Court has held that the statute must require the victim to be less than age 16 for the offense to qualify as a “sexual abuse of a minor” aggravated felony. *See Esquivel-Quintana v. Sessions*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1562 (2017) (holding that conviction under California statutory rape statute criminalizing unlawful sexual intercourse with a minor (defined as under age 18) who is more than three years younger than the offender is not categorically “sexual abuse of a minor”).

### **D. Aggravated Felonies Triggered by More Than a \$10,000 Loss**

The convictions listed below will be considered an aggravated felony if the amount of loss is more than \$10,000:

- Crimes involving fraud or deceit with a loss to the victim of more than \$10,000
- Money laundering involving more than \$10,000
- Tax evasion with a loss to the government of more than \$10,000

The U.S. Supreme Court has held that the amount of loss is generally not an element of the fraud-related offenses listed above and, thus, may be proven by evidence outside the record of conviction. *Nijhawan v. Holder*, 557 U.S. 29, 42 (2009). *See supra* § 3.3A, Categorical Approach and Variations. If defense counsel is able to negotiate a loss of \$10,000 or less, as indicated by the plea agreement, this category of aggravated felony should probably not apply.

There is a good argument that conviction of multiple counts of fraud, each carrying a loss of less than \$10,000 but with an aggregate loss of more than \$10,000, should not qualify as an aggravated felony. At least one conviction must be tethered to more than a \$10,000 loss. *See Nijhawan v. Holder*, 557 U.S. at 42 (indicating that there must be a tether between the evidence of loss and the particular “conviction” and that the amount cannot be based on acquitted or dismissed counts or general conduct).

### **E. Crime of Violence Aggravated Felony**

A crime of violence as defined in 18 U.S.C. § 16, plus a maximum sentence of imprisonment (active or suspended) of one year or longer, will be considered an

aggravated felony offense. For a discussion of the definition of crime of violence, see *supra* § 3.4B, Specific Types of Aggravated Felonies.

A crime that penalizes negligent or accidental conduct is not considered a crime of violence under immigration law and therefore is not an aggravated felony. Consequently, negotiating a plea to an offense such as felony serious injury by vehicle under G.S. 20-141.4(a3) or felony death by vehicle under G.S. 20-141.4(a1) should not be considered a crime of violence aggravated felony even if the defendant receives a sentence of imprisonment of twelve months or more.

The U.S. Supreme Court has not resolved whether a state offense that requires proof of reckless use of force qualifies as a crime of violence, but both the Fourth and Eleventh Circuits have held that such an offense is not a crime of violence. *See, e.g., Garcia v. Gonzales*, 455 F.3d 465 (4th Cir. 2006); *United States v. Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010). For further discussion, see *supra* § 3.4B, Specific Types of Aggravated Felonies.

The second part of the crime of violence definition, which is in 18 U.S.C. § 16(b) and covers a felony offense that involves a substantial risk of use of force against person or property, could be struck down as void for vagueness. The U.S. Supreme Court will decide the issue by July 2018 in *Dimaya v. Lynch*. If that provision is found to be unconstitutionally vague, federal court and BIA cases finding that certain offenses are crimes of violence under § 16(b) will be overruled. For further discussion, see *supra* § 3.4B, Specific Types of Aggravated Felonies.

Also, the Board of Immigration Appeals has held that a crime committed by offensive touching does not require “violent” force and thus is not a crime of violence. *Matter of Velasquez*, 25 I&N Dec. 278, 282-83 (BIA 2010) (treating the rule in *Johnson v. United States*, 559 U.S. 133 (2010), which held that “physical force” in the context of the almost-identically defined Armed Career Criminal Act means violent force, as controlling authority in interpreting whether an offense is a “crime of violence” under § 16(a)). Under this case law, North Carolina common law robbery may not qualify as a crime of violence under § 16(a) because it can be committed using de minimis violence. The Fourth Circuit has made such a finding under a virtually identical crime of violence definition. *See United States of America v. Gardner*, 823 F.3d 793 (4th Cir. 2016) (holding that because the minimum conduct necessary to sustain a conviction for North Carolina common law robbery does not necessarily include the use, attempted use, or threatened use of “force capable of causing physical pain or injury to another person,” as required under *Johnson v. United States*, it is not a violent felony under the force clause of the Armed Career Criminal Act).

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**Practice Note:** A crime of violence aggravated felony does not cover any misdemeanor assault convictions because under North Carolina sentencing law the maximum sentence for a misdemeanor other than impaired driving is 150 days.

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