

# Chapter 6

## Options for Minimizing Adverse Immigration Consequences

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The immigration consequences of conviction can be severe and can extend to a large number of criminal dispositions. In some cases, however, your client may be able to avoid these adverse immigration consequences or at least minimize them so that he or she remains eligible for immigration relief from removal.

This chapter presents options for minimizing adverse immigration consequences in the criminal case. Section 6.1 describes approaches that are generally applicable regardless of the specific type of case. Whether that approach is feasible will depend, of course, on the circumstances of the case. The remaining sections are broken down by specific categories of offenses and discuss potential options applicable to that offense type. Bear in mind that the following options are not case-specific—they are not a substitute for individualized research or consultation with an immigration attorney.

## 6.1 General Rules

### A. Offenses That Do Not Carry Adverse Immigration Consequences

If your client pleads guilty or is found guilty, the most favorable result for the client from an immigration standpoint is a plea and sentence to an offense that does not fall within a crime-based ground of removal (deportability or inadmissibility) or that does not bar immigration relief from removal. For example, if a number of different offenses are charged, it may be possible to identify a charge with less serious immigration consequences. In other cases, it may be possible to negotiate a plea to a lesser included offense, or a related offense, that does not contain an element triggering deportability or inadmissibility.

For example, the offense of indecent liberties with a child is a sexual abuse of a minor aggravated felony. A conviction of sexual battery, however, should not qualify as sexual abuse of a minor because the minor age of the victim is not an element of the offense.

To determine whether an offense and its lesser included and related offenses carry adverse immigration consequences, see *infra* Appendix A, Selected Immigration

Consequences of North Carolina Offenses. You should also contact an immigration attorney if you need assistance in a particular case.

### **B. Deferred Prosecution**

A deferred prosecution may or may not constitute a conviction depending on the structure of the agreement. *See supra* 4.2A, Deferred Prosecution. Certain deferrals may be a favorable option from an immigration standpoint.

### **C. Categorical Approach and Record of Conviction**

To determine whether an individual is removable based on a conviction, the immigration court examines the elements of the statute violated, not the individual's conduct. If the statute is divisible and proscribes both offenses that carry an immigration penalty and offenses that do not, then the immigration court is allowed to examine the record of conviction to determine the offense for which the defendant was convicted. *See supra* § 3.3A, Categorical Approach and Variations. If the record of conviction does not establish all of the elements necessary for a deportable offense, the noncitizen should not be found deportable.

The plea proceedings are considered a part of the record of conviction. In North Carolina, there is generally no transcription of the plea proceedings in district court. The record of conviction in district court is generally composed of the charging document (e.g., warrant), any judgment, and any other documents in the shuck. In superior court, plea proceedings are recorded and, thus, are part of the record of conviction in felony cases and misdemeanors appealed for trial de novo. There is also usually a written transcript of plea in superior court.

There may be steps counsel can take. For example, if your client is pleading guilty under a statute that is divisible, take care to avoid references in the record of conviction—including dismissed counts or during the plea colloquy—to the specific facts listed in the statute of conviction that would establish conviction under the prong of the divisible statute that comes within the removal ground.

Crafting an *Alford* plea where the statute is divisible may be another option. The Fourth Circuit Court of Appeals has held that the State's proffer of a factual basis for an *Alford* plea cannot establish with the requisite certainty that the conviction triggers a federal sentencing enhancement. *See United States v. Alston*, 611 F.3d 219, 227 (4th Cir. 2010). The same rationale may apply to removal consequences based on a conviction. Thus, should your client take an *Alford* plea, he or she may have a solid argument that the government cannot meet its burden of establishing under which prong of a divisible statute your client was convicted (at least in the Fourth Circuit).

Alternatively, where your client is pleading guilty to the non-deportable crime under a divisible statute, and there is no transcription of proceedings, you should try to have the court or prosecutor note this on the shuck or charging document. This will be particularly

important if your client will be applying for relief from removal, where the burden is on the noncitizen.

In limited situations, the immigration court may look beyond the record of conviction to determine certain aspects of the crime that go beyond the elements of the offense. For example, decisions have allowed the immigration court to look beyond the record of conviction at the amount of loss to determine whether the offense was an aggravated felony triggered by a loss exceeding \$10,000 and at the relationship between the parties in assault or other violent offense cases to determine whether the offense was a crime of domestic violence. *See supra* § 3.3A, Categorical Approach and Variations. Where the immigration court can look beyond the record of conviction, if possible defense counsel should try to plead affirmatively to an immigration-safe circumstance. For example, if the defendant is pleading guilty to a fraud offense, counsel could try to craft a plea for a sum certain that is \$10,000 or less if appropriate. In other words, defense counsel should work to create a record of conviction that protects the client and negates the need to consider evidence outside the record of conviction.

#### **D. Pleading Not Guilty**

If the proposed plea carries adverse immigration consequences, your client may decide to plead not guilty. Even if a plea offer appears favorable in terms of the criminal consequences, the client may decide that the immigration consequences are a more important consideration. In those cases, you need to consider litigating possible suppression issues and other pretrial motions as appropriate. The client may want to take the case to trial to seek acquittal of all charges or at least of charges that carry immigration penalties.

#### **E. Post-Conviction Relief**

If a defendant has a final judgment of conviction that carries adverse immigration consequences, he or she may consider filing a motion to vacate the conviction or sentence, if warranted. For example, if trial counsel failed to advise the defendant of the immigration consequences of the conviction and the defendant relied on that information in deciding to plead guilty, the defendant may have grounds to file a post-conviction motion based on ineffective assistance of counsel under *Padilla v. Kentucky*. *See infra* Ch. 8, State Post-Conviction Relief.

## **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>

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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.

## 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 card 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.

## 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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### 6.3 Cases Involving Drugs

Any violation of law relating to a federally controlled substance will subject your noncitizen client to removal based on controlled substance grounds (with the exceptions discussed below). Certain drug offenses may also be considered aggravated felonies and carry additional adverse immigration consequences.

In many cases, the consequences of a drug conviction are worse from a noncitizen client’s perspective than other criminal-based grounds of removal (except for aggravated felonies). Specifically, drug offenses will likely render an LPR client deportable and ineligible for certain forms of relief. Drug offenses will likely render non-LPR clients inadmissible and permanently bar them from acquiring LPR status. If your client is charged with a drug offense, the following options may mitigate these immigration consequences or at least the additional consequences of an aggravated felony drug conviction.

“Controlled substance” is defined by federal law and refers to substances covered by the federal drug schedules. At the time of this revised edition of this manual, it appears that all of the drugs listed in the North Carolina state drug schedules are covered by the



federal drug schedules, with one exception, chorionic gonadotropin in Schedule III, which steroid users employ to avoid testicular atrophy, a side-effect from steroids (which may be significant, as discussed in A., below).

#### **A. Manufacture, Sale, or Delivery of a Schedule III Controlled Substance**

A conviction of manufacture, sale, or delivery, or possession of a *federally* controlled substance with intent to manufacture, sell, or deliver constitutes a drug trafficking aggravated felony and triggers the severe consequences associated with aggravated felonies (with the exception for marijuana discussed in E., below).

It appears that the only North Carolina controlled substance that is not a controlled substance under federal law is chorionic gonadotropin in Schedule III, which steroid users employ to avoid testicular atrophy, a side-effect from steroids. A conviction for such an offense should not qualify as a drug trafficking aggravated felony. Also, if your client pleads guilty to a Schedule III drug and the record of conviction does not reveal the specific drug, there is a strong argument that your client is not deportable for a drug trafficking aggravated felony. *See Harbin v. Sessions*, 860 F.3d 58 (2d Cir. 2017); *see also supra* § 3.4D, Conviction of Any Controlled Substance Offense. However, if the charging document names a controlled substance other than chorionic gonadotropin, the client will be deportable.

#### **B. Simple Possession of a Controlled Substance**

A conviction of possession of a federally controlled substance with intent to manufacture, sell, or deliver constitutes a drug trafficking aggravated felony and triggers the severe consequences associated with aggravated felonies.

If a defendant has no prior drug convictions, a conviction of simple possession of a federally controlled substance (with the exception of possession of more than five grams of crack cocaine and any amount of flunitrazepam, commonly known as the date rape drug) is not considered a drug-trafficking aggravated felony. *See supra* § 3.4B, Specific Types of Aggravated Felonies.

While such a possession conviction will still have adverse immigration consequences as a conviction related to a controlled substance, it will not have the more severe consequences associated with an aggravated felony conviction. The difference in consequences may be particularly significant to an LPR client. *See supra* § 5.1B, Impact on LPR of an Aggravated Felony.

#### **C. Possession of 30 Grams or Less of Marijuana**

A conviction of possession of 30 grams or less of marijuana, although a drug offense, is exempt from many immigration consequences if the defendant has no prior drug convictions. An LPR will avoid deportability (but not inadmissibility after traveling abroad). A non-LPR will be inadmissible, but he or she will not necessarily be barred

from adjusting to LPR status in the future because this ground of inadmissibility can be waived by the immigration court. Regarding this exception, the immigration court is *not* limited to the elements of the offense and to the record of conviction; instead, the 30 grams exception calls for a circumstance-specific inquiry into the noncitizen's actual conduct. Thus, to meet its burden of proof, the government can look to court documents outside of the record of conviction to establish that more than 30 grams of marijuana were in fact involved. *See supra* § 3.3A, Categorical Approach and Variations.

If your client is pleading guilty to a Class 1 misdemeanor possession of marijuana (which covers quantities of more and less than 30 grams), you should document in the record of conviction that the quantity involved is 30 grams or less, if applicable. It is important to do so in case your client is deemed inadmissible and needs to apply for a waiver of the conviction. *See supra* § 3.3C, Burden of Proof on Noncitizen in Applying for Relief and Demonstrating Admissibility.

The 30 grams exception also covers the possession of drug paraphernalia where the paraphernalia was merely an adjunct to the noncitizen's simple possession or use of 30 grams or less of marijuana. Thus, a client who pleads guilty to marijuana paraphernalia related to less than 30 grams of marijuana should not be deportable (assuming she has no other drug convictions). If a defendant is convicted under G.S. 90-113.22A (possession of marijuana drug paraphernalia) in a case involving 30 grams or less of marijuana, defenders should ensure that the record reflects the amount of marijuana. (There is also an argument that other drug paraphernalia convictions may not be controlled substance convictions, discussed in D., below.)

#### **D. Drug Paraphernalia**

A conviction for paraphernalia related to an unnamed Schedule III drug should not be a deportable offense for the same reason that conviction of manufacture, sale, or delivery, or possession with that intent, of an unnamed Schedule III drug possession is not a deportable offense, discussed in A., above. For that reason defenders may want to negotiate such language where appropriate. *See supra* § 3.4D, Conviction of Any Controlled Substance Offense.

Additionally, there is an argument that no North Carolina conviction for possession of drug paraphernalia under G.S. 90-113.22 is a deportable offense. Under *United States v. Mathis*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 2243 (2016), the identity of the controlled substance is arguably not an element of the North Carolina paraphernalia statute (except when the paraphernalia involves marijuana under G.S. 90-113.22A). Because the state schedules are broader than the federal ones (because North Carolina's covers chorionic gonadotropin, discussed in A., above), a state paraphernalia conviction is arguably never a controlled substance offense. *See supra* § 3.4D, Conviction of Any Controlled Substance Offense. That analysis would appear to apply to the manufacture or delivery of paraphernalia under G.S. 90-113.23.

### **E. Delivery of Marijuana**

The U.S. Supreme Court has held that a statute that punishes conduct that includes the transfer of small amounts of marijuana for no remuneration is not a “drug trafficking” aggravated felony. Under this law, there is a good argument that a conviction for delivery of marijuana or possession of marijuana with intent to manufacture, sell, or deliver under G.S. 90-95(a)(1) is not a drug trafficking aggravated felony. The reason is that a defendant can be convicted of delivery or possession with intent to manufacture, sell, or deliver without any evidence of remuneration and without the State establishing the amount of the marijuana. The Board of Immigration Appeals adopted this argument in an unpublished decision. *See infra* Appendix B, Relevant Immigration Decisions. For further discussion, *see supra* § 3.4B, Specific Types of Aggravated Felonies.

### **F. Possession by Trafficking**

There is a strong argument, as evidenced by an unpublished administrative decision, that North Carolina possession by trafficking should not qualify as an aggravated felony. *See infra* Appendix B, Relevant Immigration Decisions. Federal law punishes possession as a misdemeanor, regardless of quantity. Thus, where the state offense, like North Carolina possession by trafficking, proscribes mere possession (even where the quantity is large), the offense would not constitute a felony under federal criminal law and thus should not qualify as drug trafficking aggravated felony. *See Lopez v. Gonzales*, 549 U.S. 47, 60 (2006).

### **G. Accessory after the Fact**

The offense of accessory after the fact to a drug offense (under G.S. 14-7) is not considered a drug offense and thus does not trigger the immigration consequences associated with a drug offense. *See Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997). An accessory after the fact conviction is considered an “obstruction of justice offense,” however. *See id.* Thus, if accompanied by a one-year term of imprisonment (active or suspended) or more, an accessory after the fact conviction will constitute an aggravated felony. An accessory after the fact offense is generally punishable two classes lower than the principal offense under North Carolina’s structured sentencing scheme.

This rule does not apply to the offenses of attempt, conspiracy, and accessory before the fact to a drug offense, which probably *are* drug offenses.

### **H. Non-Drug Charges**

Accompanying non-drug charges may have less serious or no adverse immigration consequences and may be an appropriate basis for a plea agreement. For assistance in determining whether accompanying charges may carry adverse immigration consequences, see Appendix A, Selected Immigration Consequences of North Carolina Offenses, or contact an immigration attorney.

## 6.4 Cases Involving Crimes Involving Moral Turpitude

There is no statutory definition for the immigration term “crime involving moral turpitude” (CMT). CMT determinations have generally been based on case law and are thus subject to the interpretation of an immigration judge.

A conviction for a CMT may render your client deportable or inadmissible. The following options may mitigate the immigration consequences that stem from a CMT offense.

### A. Offense That Is Not a Crime Involving Moral Turpitude

Some of the offenses charged, their lesser included offenses, or related offenses may not be CMT offenses and may not have immigration consequences. For example, the offense of assault with a deadly weapon may be a CMT, but the offense of simple assault is not. Other examples of crimes not involving moral turpitude include misdemeanor breaking and entering, carrying a concealed weapon, trespass, unauthorized use of a vehicle, drunk and disruptive, and disorderly conduct.

An impaired driving conviction under North Carolina law may constitute a CMT offense depending on the presence of aggravating factors. An impaired driving offense with no aggravating factors is not a CMT. An impaired driving conviction with an aggravating factor of driving with a revoked license is possibly a CMT offense. An impaired driving conviction with other aggravating factors is probably not a CMT. For a further discussion, see *supra* § 3.4C, Conviction of a Crime Involving Moral Turpitude.

For assistance in determining whether an offense is considered a CMT, see Appendix A, Selected Immigration Consequences of North Carolina Offenses, or contact an immigration attorney.

### B. One Misdemeanor CMT

If a noncitizen defendant has no prior CMT convictions and is convicted of only one non-DWI misdemeanor CMT, he or she avoids all adverse immigration consequences (including inadmissibility, deportability, and bar to naturalization), as long as the offense does not fall within another ground of removal (such as a domestic violence offense). See *supra* § 3.4C, Conviction of a Crime Involving Moral Turpitude (CMT deportation grounds for noncitizen admitted for less than five years); § 3.5B, Crime Involving Moral Turpitude; § 5.1E, Impact on LPR of a Criminal Disposition Barring Naturalization (petty offense exception for naturalization purposes). This approach is specific to North Carolina because under North Carolina’s structured sentencing law the maximum sentence for a misdemeanor other than a DWI is 150 days. It is not clear whether a DWI, if a CMT, would satisfy the exceptions based on sentence length. See *supra* § 4.3D, Comparison to Potential Sentence.

### **C. One Felony CMT for Noncitizen Admitted to the U.S. for More Than Five Years**

If your client was lawfully admitted to the U.S. more than five years ago and has no prior CMT convictions, he or she is not deportable if convicted of only one felony CMT or multiple CMTs arising out of the same transaction. *See supra* § 3.4C, Conviction of a Crime Involving Moral Turpitude (discussion of CMT deportation grounds for noncitizen admitted for more than five years). However, the felony CMT must not fall within another ground of removal, such as a crime of violence with a sentence of imprisonment of one year or more, which constitutes an aggravated felony conviction.

## **6.5 Cases Involving Firearms**

Offenses in which the use of a firearm (as defined under federal law) is an essential element will render your lawfully-admitted client deportable based on the firearm ground of deportability. Certain firearm offenses may also be considered aggravated felonies and carry additional adverse immigration consequences.

There is no firearm ground of inadmissibility. If, however, the firearm-related offense constitutes a crime involving moral turpitude, which is one of the crimes of inadmissibility, the offense would render the person inadmissible. For example, an offense involving the sale of a firearm is probably a crime involving moral turpitude.

If your client is charged with a firearm offense, the following options may eliminate the immigration consequences or at least the added consequences of an aggravated felony firearm conviction.

### **A. Weapons Offenses That Do Not Specifically Involve a Firearm**

If a noncitizen is convicted of an offense containing a general weapon element, and the elements of the offense do not establish that the weapon is a firearm, the offense does not qualify as a firearm offense for immigration purposes.

### **B. Firearm Offenses That Do Not Come within the Federal Definition of Firearm**

The federal definition of firearm includes explosive-powered firearms and destructive devices (as defined in 18 U.S.C. § 921(a)(4)). The federal definition does not cover air-powered weapons like BB or pellet guns. There is also a federal exception for antique firearms. *See* 18 U.S.C. § 921(a)(3).

There is not a single definition of firearm under the North Carolina criminal law statutes. Some of the firearm definitions may be broader than the federal law, while others seem to match. For example, with regard to carrying a concealed pistol or gun under G.S. 14-269(a1), neither the statute nor the pattern jury instructions define “pistol” or “gun.” Case law suggests that a gun or pistol must be a “firearm,” *see, e.g., State v. Best*, 214 N.C. App. 39, 45 (2011), which other North Carolina statutes have defined as a weapon that

“expels a projectile by action of an explosive.” See G.S. 14-415.1(a) (possession of firearm by felon); see also *In re N.T.*, 214 N.C. App. 136 (2011) (so defining gun for assault by pointing gun). Because there is no stated exception under G.S. 14-269(a1) for an antique firearm as under federal law (and under G.S. 14-415.1), there is an argument that this state offense is broader than the federal firearm ground of removal. See *Moncrieffe v. Holder*, 569 U.S. 184, 133 S. Ct. 1678, 1693 (2013); see *supra* § 3.3A, Categorical Approach and Variations.

For assistance in determining whether a firearm-related offense may come within the firearm ground of removal, see Appendix A, Selected Immigration Consequences of North Carolina Offenses, or contact an immigration attorney.

### **C. Non-Aggravated Felony**

A firearm offense can be considered an aggravated felony on two different grounds. First, certain offenses involving sale or delivery of firearms may be deemed a firearm trafficking offense. Second, specific firearm offenses, such as possession of a machine gun and possession of a firearm by a felon, are considered aggravated felonies because similar federal offenses have been designated as aggravated felonies in the immigration statute.

A non-aggravated felony firearm conviction will still have adverse immigration consequences as a firearm-related offense, but it will not have the more severe consequences associated with an aggravated felony conviction.

For assistance in determining whether a firearm-related offense may be considered an aggravated felony, see Appendix A, Selected Immigration Consequences of North Carolina Offenses, or contact an immigration attorney.

### **D. Accessory after the Fact**

The offense of accessory after the fact to a firearm offense (under G.S. 14-7) is probably not a firearm offense and thus probably does not trigger the immigration consequences associated with a firearm offense. Cf. *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997) (holding that federal accessory after the fact offense under 18 U.S.C. § 3 insufficiently relates to a controlled substance offense because it is not an inchoate crime, but a crime separate and apart from the underlying crime). An accessory after the fact conviction is considered an “obstruction of justice offense,” however, and is considered an aggravated felony offense if accompanied by a one-year term of imprisonment (active or suspended) or more. An accessory after the fact offense is generally punishable two classes lower than the principal offense under structured sentencing.

This rule does not apply to the offenses of attempt, conspiracy, and accessory before the fact to a firearm offense, which probably *are* firearm offenses.



## 6.6 Cases Involving Domestic Violence

Domestic violence offenses may make your lawfully admitted client deportable based on the domestic violence ground of deportability. The elements of the offense must establish that the offense is a “crime of violence” as defined in 18 U.S.C. § 16. *See supra* § 3.4B, Specific Types of Aggravated Felonies. The offense also must be against a person in a domestic relationship with the defendant. *See supra* § 3.4F, Conviction of a Crime of Domestic Violence, Stalking, Child Abuse, Child Neglect, or Child Abandonment, or a Violation of a Protective Order. Actual or potential length of sentence of imprisonment is irrelevant for the domestic violence ground of deportability.

There is no domestic violence ground of inadmissibility. If, however, the domestic violence offense constitutes a crime involving moral turpitude, which is one of the grounds of inadmissibility, the offense would render the person inadmissible.

If your client is charged with a domestic violence offense, the following options may mitigate the adverse immigration consequences.

### A. Offense That Is Not a Crime of Violence

Some of the offenses charged, their lesser included offenses, or related offenses may not be considered a “crime of violence.” For example, a conviction of domestic criminal trespass is generally not considered a “crime of violence” and therefore is not a crime of domestic violence for immigration purposes. However, the same sort of conduct may result in adverse immigration consequences if the defendant is convicted of violating a protective order based on that conduct. *See supra* § 3.4F, Conviction of a Crime of Domestic Violence, Stalking, Child Abuse, Child Neglect, or Child Abandonment, or a Violation of a Protective Order.

Under Fourth Circuit law, assault on a female does not satisfy the “crime of violence” definition. The Board of Immigration Appeals in an unpublished case has also found that assault on a female is not a crime of domestic violence for immigration purposes. *See infra* Appendix B, Relevant Immigration Decisions; *see also supra* § 3.4F, Conviction of a Crime of Domestic Violence, Stalking, Child Abuse, Child Neglect, or Child Abandonment, or a Violation of a Protective Order.

For assistance in determining whether an offense is considered a crime of domestic violence, see Appendix A, Selected Immigration Consequences of North Carolina Offenses, or contact an immigration attorney.

### B. Offense That Is Not Against a Person

A crime of domestic violence must be against a *person*, not property. Thus, a conviction of an offense involving the destruction of property should not be considered a crime of domestic violence (although if the court finds a violation of certain portions of a protective order in the process, the conduct would be a ground of deportability, as

discussed *supra* in § 3.4F, Conviction of a Crime of Domestic Violence, Stalking, Child Abuse, Child Neglect, or Child Abandonment, or a Violation of a Protective Order.

### **C. Offense That Is Not Against a Protected Person**

A crime of domestic violence must be against a protected person. Thus, a conviction of an offense involving a neighbor or a former spouse's current partner should not be considered a crime of domestic violence.

## **6.7. Cases Involving Child Abuse**

Offenses of child abuse and neglect may make your lawfully admitted client deportable. The elements of the offense must establish that the offense is against a "minor" or a "child," defined as anyone under age 18. Therefore, convictions for offenses that do not contain as an element "minor" or "child" should not come within this ground of removal. *See supra* § 3.4F, Conviction of a Crime of Domestic Violence, Stalking, Child Abuse, Child Neglect, or Child Abandonment, or a Violation of a Protective Order.